

<b>Catalogne v Class Action Recovery, LLC</b>
2023 NY Slip Op 35031(U)
August 25, 2023
Supreme Court, Westchester County
Docket Number: Index No. 61209/2022
Judge: Hal B. Greenwald
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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EDGAR CATALOGNE,

Plaintiff,

Index No.: 61209/2022

*-against-*

DECISION AND ORDER  
(Motion Sequences 1 & 2)

CLASS ACTION RECOVERY, LLC d/b/a  
CLASS ACTION REFUND and  
RICHARD G. DELGATTO,

Defendants.

-----X

Greenwald, J.S.C.

THE COMPLAINT & ANSWER

Plaintiff Edgar Catalogne commenced this action for breach of a “verbal agreement” by the filing of a Summons and Complaint on June 1, 2022, The complaint asserted three (3) causes of action for breach of contract, unjust enrichment and promissory estoppel. Paragraph 7 of the complaint alleges the type of work that the defendants are engaged in.

***7. Class Action specializes in the recovery of monies for its clients that are owed to their businesses as a result of being a claimant to a class action settlement, with a focus on settlements of antitrust class actions, financial antitrust class actions, and securities class actions.***

It is claimed that Class Action works on a contingency basis and would receive a percentage amount that each of its clients receives as a result of a class action settlement. Further it is alleged Catalogne and defendant Richard G. Delgatto previously worked for a predecessor company, Class Action Refund from 2003 to 2104, and Catalogne joined Class Action when it was formed in 2016.

Catalogne proposes that he had a good working relationship with Delgatto at Class Action Refund through 2014. Between 2014 and 2016, purportedly, Delgatto advised Catalogne not to start his own company but to assist him in forming defendant Class Action. There is the basic claim that Delgatto asked Catalogne to be his partner, despite it being listed that Delgatto was the 100% owner of Class Action. The allegations continue in paragraphs 16 and 17, that Delgatto designated Catalogne as Chief Operating Officer and to “run Class Action because Mr. Delgatto was semi-retired and spent about nine months of the year in Florida...”. Further it is alleged: “Mr. Delgatto told Mr. Catalogne, “You run the show.” However, the allegations that Catalogne ‘ran’ Class Action have no bearing on the subject matter of this lawsuit, the verbal agreement. Most importantly, it is asserted that Delgatto verbally agreed to business terms with Mr. Catalogne. But Catalogne says he wanted something in writing and was told by Delgatto to

wait until, "...we get things going...". The financial basis for this claim is that according to Catalogne at paragraph 21."

***21. As such, Mr. Catalogne and Mr. Delgatto verbally agreed that Mr. Catalogne (a) would be entitled to a 30% equity interest in the Company; (b) would receive significant percentages of the contingency fees paid by Class Action's clients to the Company; and (c) would, in addition to these fees, be entitled to a 25% commission fee1 on all client agreements which Mr. Catalogne secured for Class Action as a result of his efforts.***

Over the next 10 paragraphs or so in the complaint Catalogne details his work efforts, discussions with Delgatto and his projected revenues for Class Action. He claims he was terminated from Class Action by Mr. Delgatto on October 21, 2019. The complaint sets forth three causes of action for breach of contract, unjust enrichment and promissory estoppel and seeks \$1.5M in damages.

Defendants interposed its Answer on July 8, 2022, denying the relevant allegations in the complaint claiming seven affirmative defenses including statute of frauds.

#### THE CURRENT MOTIONS

Plaintiff filed a proposed Order to Show Cause (OSC#1) on January 27, 2023, that was signed January 31, 2023. The OSC#1 sought a preliminary injunction and temporary restraining order enjoining any distributions of profits at Class Action. At a court conference on February 22, 2023, the Court denied portions of OSC#1 seeking a temporary restraining order, preliminary injunction and the appointment of a temporary receiver. The Court adjourned the remaining portion of OSC#1 as to plaintiff seeking to amend its complaint pursuant to CPLR 3025. The instant Decision and Order determines the remaining issues sought by plaintiff in Motion Sequence #1.

On March 2, 2023, Defendant moved by Notice of Motion for Summary Judgment (Motion Sequence #2) pursuant to CPLR 3212 and 3211 (a)(5) and (7) for dismissal of the action. Court conferences have been held to attempt to resolve the open motions to no avail. The instant Decision and Order also resolves Motion Sequence #2

Besides seeking to essentially shut down defendant Class Action by maintaining its demand for injunctive relief plaintiff, OSC#1 also sought leave of the Court to amend its complaint. The relief sought includes enjoining Class Action from making any distributions; appointing a receiver directing an accounting of Class Action affairs for 22 named class action lawsuits, a Preliminary Injunction and Temporary Restraining Order prohibiting any distributions to Delgatto or other members of Class Action. (the Company). The first 20 paragraphs in Catalogne' supporting Affidavit are a rehash of the Complaint. The next set of paragraphs consist of self-serving statements about the plaintiff's abilities and his unilateral claim that Delgatto verbally agreed to make him a partner, a member or a joint venturer in Class Action. Plaintiff's counsel' affirmation parrots his client's claim for relief and attaches a proposed Amended Complaint.

The proposed Amended Complaint contains the following causes of action for breach of contract, unjust enrichment and quantum meruit, promissory estoppel, declaratory judgment pursuant to CPLR 3001; breach of fiduciary duty and the imposition of a constructive trust, an accounting, and the appointment of a temporary receiver. However, to reiterate, at a court conference held in open court on February 22, 2023, the Court denied the plaintiff its demand for a preliminary injunction, temporary restraining order and the appointment of a temporary receiver.

In support of the OSC#1, besides supporting affidavit and affirmation, plaintiff also submitted a lengthy (31 pages) document entitled Memorandum of Law (MOL). However, the first 10 pages of the MOL again rehash what has been stated in the complaint and Catalogue's supporting affidavit.

Point I of the MOL concerned the application for leave of the court to amend the complaint pursuant to CPLR 3025. The argument is made that such leave is often freely given unless, "...the proposed amendment is palpably insufficient or patently devoid of merit."

Point II seeks both a preliminary injunction and temporary restraining order enjoining the defendants from receiving any profits making any distributions or transferring any assets. Plaintiff seeks monetary damages of at least \$1.5M.

#### PLAINTIFF SEEKS INJUNCTIVE RELIEF

The test under CPLR 6301 for injunctive relief is where the non-moving party threatens to harm some "thing" or "res" that plaintiff has a claim for and that if there is any such harm, that could render the ultimate result as ineffectual. (see Practice Commentaries C:6301:1) An additional reason for granting injunctive relief is where the non-moving party is threatening "injurious conduct" that would injure the movant during the litigation. An example is the misuse of trade secrets. This is an equitable remedy and is often used in replevin actions or quiet title actions, where the specific personalty or real property could be spirited away and thus defeat the moving party's action. As stated in plaintiff's MOL the movant must demonstrate three things: 1. A likelihood of success on the merits of the action; 2. The danger of irreparable injury in the absence of preliminary injunctive relief; and 3 a balance of the equities in favor of the moving party. *Nobu Next Door, LLC v Fine Arts Housing, Inc.* 4 N.Y.3d 839 (2005) To reach any decision on a preliminary injunction requires this Court to evaluate plaintiff's separate causes of action to determine if there is any likelihood of success on the merits, whether there is irreparable harm to the plaintiff without a preliminary injunction and whether the balance of the equities favors the plaintiff or the defendants on these initial causes of action.

#### PLAINTIFF CLAIMS LIKELIHOOD OF SUCCESS AS FOLLOWS:

##### A. BREACH OF CONTRACT

Although there is no written contract, possibly there were discussions between the parties that plaintiff believed was an oral agreement. However, at the time of the "agreement" plaintiff was an employee of defendant and was paid remuneration for his efforts. Whether plaintiff deferred the making of a written agreement or not, there simply was no such document.

Defendant would have this court dismiss this action on that issue alone under the Statute of Frauds. Plaintiff cited several cases in support of its claim of breach of contract:

1. *Second Source Funding, LLC v Yellowstone Capital, LLC* 144 A.D.445 (1<sup>st</sup> Dept, 2016). A former employee brought suit against former employers for breach of an employment contract. Not relevant
2. *U.S. Bank National Association v Lieberman* 98 A.D.3d 422 (1<sup>st</sup> Dept, 2012) Was a mortgage foreclosure action wherein a mortgage reformation became a contract issue. Not relevant

Plaintiff's next point is that just because the 'agreement' was not memorialized in writing doesn't make it "any less binding" citing the following cases;

1. *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 298, 765 N.Y.S.2d 575 (1<sup>ST</sup> Dept 2003) This was a multifaceted case involving multiple businesses and sophisticated businesspeople and whether a joint venture was created. There were allegations by plaintiff that they contributed an equity interest in one entity and the defendants contributed cash and as a result they formed a joint venture to acquire a third entity. This case is useful to refute plaintiff's claim of a joint venture but is not useful in attempting to support plaintiff's claim of a contract, or of a breach and damages.
2. *T. Moriarty & Son v Case Constr.* 287 A.D.2d 390 (1<sup>ST</sup> Dept, 2001) This case stated: ***The record discloses that the parties were in accord as to the essential elements of the construction subcontract between them, there having been a meeting of the minds as to price, scope of work and time of performance.*** No such meeting of the minds can be found herein. Not useful
3. *Elizabeth St. v 217 Elizabeth St. Corp.* 276 A.D.2d 295 (1sr Dept, 2000) The court found that it must consider the following to help in puzzling whether there was a contract when there is no writing:  
***(1) whether there ha[d] been an express reservation of the right not to be bound in the absence of a writing; (2) whether there ha[d] been partial performance of the contract; (3) whether all of the terms of the alleged contract ha[d] been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing*** According to defendant, there was no agreement, verbal or otherwise, and certainly all of the terms suggested by plaintiff were not agreed to by defendants. There are no allegations of any performance other than it is represented that plaintiff was a salaried employee of defendant at the time of the alleged "agreement". Lastly, a contract such as the one suggested by plaintiff would be best served being in writing.

It is unlikely that plaintiff will prevail on its claim of a breach of contract.

## B. CLAIM FOR UNJUST ENRICHMENT OR QUANTUM MERUIT

Plaintiff makes a half-hearted claim for unjust enrichment and quantum meruit, without any discussion or denial that at the time of the so-called “agreement” he was an employee of Class Action and was being paid for his work. This Court finds that neither unjust enrichment, nor quantum meruit are applicable to the situation presented, and accordingly it is unlikely that plaintiff will prevail on any such claims.

## C. CLAIM FOR PROMISSORY ESTOPPEL

Plaintiff in his MOL sets forth the elements of a promissory estoppel claim and cites several cases. It is alleged that the elements “...of a promissory estoppel claim are: (i) a sufficiently clear and unambiguous promise; (ii) reasonable reliance on the promise; and (iii) injury caused by the reliance. First, it does not appear that there has been a ‘clear and unambiguous promise’ made by Delgatto to Catalogne for the “agreement” as posed by plaintiff. It flows that any such “reliance” would also fail, and any “injury” would not be causally related to any alleged promise made by Delgatto. The following cases are cited:

1. *Matlin Patterson ATA Holdings LLC v Federal Express Corp.*, 87 A.D.3d 836, (1st Dept 2011), lv denied 21 N.Y.3d 853 (2013); FEDEX had a business relationship with nonparty ATA Airlines and plaintiff Matlin Patterson ATA Holdings LLC (MP Holdings) invested and loaned ATA substantial funds at various times, but FEDEX terminated its business relationship at one time with ATA. Plaintiff alleged some sort of a third-party promissory estoppel, but much of what was alleged was significantly different from the case at bar and much more complicated. Thus, it has no value to this argument.
2. *Agress v Clarkstown Cent. School Dist.*, 69 A.D.3d 769, (2d Dept 2010) Former school employee relied on misinformation provided by school district that her health benefits would continue after she resigned and turned age 55. The Second Department affirmed the lower court’s decision to deny summary judgment on the issue of promissory estoppel. It was found there were issues of fact as to what the previous representation was and whether it was reasonable for plaintiff to rely on such representations about continued health care. Also, not a persuasive case.
3. *Fleet Bank v Pine Knoll Corp.*, 290 A.D.2d 792 (3<sup>rd</sup> Dept 2002) In a mortgage foreclosure involving a 30 year loan on various resort properties a counterclaim was raised for promissory estoppel. Despite there being an oral agreement to fund various properties, it was found there was an issue of fact that would preclude summary judgment based on defendant’s reliance and expenditures based partly on oral representations. For promissory estoppel to be properly brought the injured party must also, “...demonstrate that it would be unconscionable to invoke the statute of frauds to bar such a claim.” In the instant matter Castalogne incurred no expenditures and invoking the statute of frauds can be viewed as entirely appropriate herein.

4. *Melwani v. Jain*, 281 A.D.2d 276 (1st Dept. 2001) Oral agreement to pay royalties to plaintiff during his lifetime held to be violative of statute of frauds. Case dismissed.
5. *WE Transa v Suffolk Transp. Serv.*, 192 A.D.2d 601 (2d Dept. 1993), lv denied 82 N.Y.2d 656 (1993) Oral contract to perform services over time which cannot be performed within one year held to violate statute of frauds. Cause of action of promissory estoppel dismissed and affirmed.

It is unlikely that plaintiff will prevail on its claim of promissory estoppel.

#### D. PLAINTIFF SEEKS DECLARATORY JUDGMENT THAT HE IS AN EQUITY MEMBER OF THE COMPANY

It appears that there is an issue between plaintiff and defendants but the question is whether it is a justiciable controversy? As stated in CPLR 3001:

#### **3001.Declaratory Judgment**

***The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds***

Plaintiff continues to assert its self-serving claims as if they have already been judicially determined by stating such things as; “Here Plaintiff is a member of the Company” (page 19 MOL); “Delgatto repeatedly verbally confirmed...” (page 19 MOL); “Delgatto completely withheld any payment to Catalogne...” (page 20 MOL); “ As the Company did not have an operating agreement setting forth a mechanism for the expulsion of members, Delgatto had no authority under to expel Catalogne from the Company.” (page 21 MOL) Plaintiff’s steadfast assertions and positioning, at this juncture in the litigation, are just that, assertions based upon an oral agreement that has no written basis and is being disputed by the defendants.

1. *Megibow v Condominium Bd. of Kips Bay Towers Condominium*, 38 A.D.3d 265, 266, (1st Dept. 2007); The issue concerned a condo owner having a dog in its unit. There was no justiciable issue however, since the owner had permission to “harbor the dog”. Not sure of the relevance
2. *Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 A.D.3d 253 (1st Dept. 2006). States: ***“A declaratory judgment action thus “requires an actual controversy between genuine disputants with a stake in the outcome,” and may not be used as “a vehicle for an advisory opinion”*** The issue concerned an issue of fact precluding summary judgment as to whether a claim would reach a level of liability for excess insurance coverage. Not helpful
3. *Chanos v MADAC, LLC*, 74 A.D.3d 1007 (2d Dept 2010) Declaratory action was proper in deciding an easement issue. Understandable but not persuasive.

4. *DeVeau v Braisted*, 5 A.D.2d, 603 (2d Dept. 1958), aff'd 5 N.Y.2d 236 (1959), aff'd 363 US 144 (1960) Plaintiff was convicted of a felony and his sentence was suspended. Plaintiff was a secretary -treasurer of Local 1346 of the International Longshoremen's Association. (ILA) Section 8 of the Waterfront Commission Act prohibits one from collecting dues for such an organization as ILA if one has been convicted of a felony. Plaintiff says Section 8 conflicts with the National Labor Relations Act and is void. The court found this to be a proper case for declaratory judgment. Defendant's application for dismissal was granted finding Section 8 is valid and that plaintiff's conviction was within the meaning of that section. Affirmed. Interesting and very long decision but not prevailing.
5. *Goodman v Reisch*, 220 A.D.2d 383 (2d Dept. 1995) plaintiff obtained a money judgment against defendant Reisch in a Federal Court matter. Plaintiff brought this state court action to declare Reisch the true owner of certain properties where he had "secreted these assets from his creditors by placing title thereof in the names of family or corporate nominees...". It was held that a declaratory judgment therein would have some practical effect in uncovering assets. This case made sense for itself but was not persuasive.

In the instant matter, without a valid contract, there would not be a justiciable controversy to be determined by a declaratory action. However, to continue with plaintiff's argument. Plaintiff proposes that Delgatto's actions in firing Catalogne were violative of Limited Liability Law and cite several cases:

1. *Man Choi Chiu v Chiu*, 71 A.D.3d 646 (2d Dept. 2010) lawsuit to remove member of LLC was dismissed since LLC did not have operating agreement "...setting forth mechanism for expulsion of members". In this case, unlike the case at hand, there did not appear to be any issue that the parties to the action were indeed members of the subject LLC. Such is not the case herein where Catalogne was an employee.
2. *Manitaras v Beusman*, 56 AD3d 735 (2d Dept 2008) Without getting to the issue of the sale of the LLC's sole asset, *Manitaras* does not contain any issue about the validity of the subject LLC or who its members are. Interesting local history but not persuasive.

It is unlikely that plaintiff will prevail on its claim for a Declaratory Judgment.

#### E. PLAINTIFF SEAKS CLAIM FOR BREACH OF FIDUCIARY DUTY AND IMPOSITION OF A CONSTRUCTIVE TRUST

Similar to the previous argument, plaintiff bases his argument on a faulty supposition, that he is a member of the Company LLC. That is the crux of plaintiff's argument for a declaratory judgment and is not established. The following cases are offered, but again they

contain parties who are already deemed members in the subject LLCs, unlike the situation herein.

1. *Pokoik v Pokoik*, 115 A.D.3d 428 (1st Dept. 2014) concerned a dispute between a managing member of the LLC who was found to owe a duty to a non-managing member of the same LLC. Not useful.
2. *Salm v Feldstein*, 20 AD3d 469 (2<sup>nd</sup> Dept, 2005) The plaintiff and defendant were members of the same LLC, each with an equal financial interest in the company. Defendant as managing member bought out plaintiff's interest for \$3,750 and two days later sold the subject automobile dealership for \$16M. Lower court granted defendant's motion and dismissed. Appellate Division reverses and found for a breach of fiduciary duty between two members. Instructive but not conclusive.
3. *Tzolis v Wolff*, 39 A.D.3d 138 (1st Dept 2007), aff'd 10 N.Y.3d 100 (2008) Plaintiff as 25% owners of the company did not have right to bring derivative suit to prevent defendants from selling the company's sole asset without their consent. Appellate Division reversed and Court of Appeals affirmed that derivative suits on behalf of the LLC are permitted. Not persuasive.

An alternative theory by plaintiff is that plaintiff and Delgatto entered a partnership or joint venture where Delgatto still would owe plaintiff a fiduciary duty. The following cases were presented by plaintiff in support of this theory;

1. *U.S. Bank N.A. v. Kahn Prop. Owner, LLC*, 206 A.D.3d 851(2d Dept. 2022) Mortgage foreclosure with multiple parties, third party actions concerning proposed developers of condominiums and golf courses. Not relevant
2. *Plumitallo v Hudson Atl. Land Co., LLC* 74 A.D.3d 1038 (2d Dept. 2010) The statute of frauds does not apply to an oral joint venture agreement to deal in real property. Not relevant
3. *Parr v Ronkonkoma Realty Venture I, LLC* 65 AD3d 1199 (2d Dept. 2009) There were actual written agreements providing for certain real property to be redeemed from a lender and conveyed to entities that provided certain funds for redemption. Not relevant

As an outgrowth of the above theory plaintiff sought a constructive trust be imposed on defendant company to prevent unjust enrichment. Plaintiff states at page 23 of the MOL:

***A constructive trust will be imposed on a finding of “(1) confidential or fiduciary relation; (2) a promise, express or implied; (3) transfer made in reliance on that promise; and (4) unjust enrichment.”***

Several cases are cited in support of this theory:

1. *Bankers Sec. Life Ins. Soc'y v. Shakerdge* 49 N.Y.2d 939, 940 (1980) The brother of the deceased was the beneficiary of the proceeds of two insurance policies purchased

12 years before his death. The widow, who had been married to decedent for 13 months sought to have a constructive trust imposed upon these proceeds. The trial court agreed with her. The appellate court reversed, and the Court of Appeals affirmed stating: "...the constructive trust doctrine serves as a 'fraud rectifying' remedy rather than an 'intent enforcing' one, the circumstances offered by the widow were insufficient to establish the promissory element essential to the proof of such a [constructive] trust." This case is more supportive of the defendant's position than plaintiffs and there is no fraud alleged and "intent" is not agreed upon.

2. *Ruiz v. Meloney* 26 A.D.3d 485 (2d Dept 2006) Plaintiff was successful in imposing a constructive trust on real property. She demonstrated that she had "contributed time, money and energy into finding home [*sic*], purchasing and then maintaining it...". This too is more useful to defendants' argument that plaintiff contributed nothing other than his efforts at work as an employee of defendant Class Action.
3. *Marini v. Lombardo*, 79 A.D.3d 932 (2d Dept. 2010) This was an ejectment action between a mother-in-law and son-in-law, so the fiduciary relationship aspect of a constructive trust was conceded by the court. Defendant cited this case for the following quote: "***However, "these elements serve only as a guideline [;] a constructive trust may still be imposed even if all of the elements are not established."***" Note both the trial court and appellate court dismissed defendant's counterclaim to impose a constructive trust. Totally useless.

It is unlikely plaintiff will prevail on its claim for a breach of fiduciary duty and imposition of a constructive trust.

#### F. PLAINTIFF SEEKS AN ACCOUNTING

Somehow, plaintiff continues its legal crusade by now claiming it would be likely to prevail on his claim for an accounting. Once again, a fiduciary relationship is at the core of this application, and no such relationship exists herein. Delgatto has no fiduciary duties to "flout". (page 24 MOL) However several cases are cited by plaintiff:

1. *Adam v Cutner & Rathkopf*, 238 AD2d 234 (1st Dept 1997 this is a lawsuit brought by "limited partners in defunct limited real estate partnership", against a law firm for alleged breach of duties as escrow agents which was dismissed. However appellate court reinstated the claim for an accounting and if accounting showed irregularities there could be repleading. This case, under its facts made sense but was not similar to the case at hand.
2. *Mariani v. Summers* 3 Misc.2d 534, (Sup. Ct. N.Y. County 1944), aff'd, 269 A.D. 840 (1st Dept 1945). The trial court agreed with plaintiffs that there was a "joint adventure" between the parties, that defendants did not keep up with the bargain and that there was no partnership. Unlike the instant action, there was testimony that there

was an agreement between three individuals to work on a “fifty-fifty basis. The judgment was unanimously affirmed by the First Department.

There simply is no joint venture between Catalogne and Delgatto, so there is no fiduciary duty, no imposition of a constructive trust and no accounting.

It is unlikely plaintiff will prevail on its claim for an accounting.

#### G. PLAINTIFF SEEKS THE APPOINTMENT OF A RECEIVER

This type of relief was denied by the Court on the record on February 22, 2023. However, the Court has reviewed plaintiff’s argument and wishes to bring more certainty to foreclosing this claim.

Plaintiff cites CPLR 6401(a) as its basis for seeking the appointment of a receiver. However from the start this position is faulty. The statute begins: “upon motion of a person having an *apparent interest* in property which is the subject of an action in supreme or county court...”. (Emphasis added). Plaintiff does not have an ‘apparent interest’ in Class Action. Further the following cases are cited by plaintiff:

1. *Vardaris Tech, Inc. v Paleros, Inc.*, 49 A.D.3d 631 (2d Dept 2000) Here the Second Department reversed the lower court’s appointment of a receiver finding that: **“the unsupported allegations and accusations set forth by the plaintiff fell far short of the required “clear evidentiary showing that property of the corporation was in danger of being ‘removed from the state, or lost, materially injured or destroyed’ ”** (*Lee v 183 Port Richmond Ave. Realty*, 303 AD2d at 380, quoting CPLR 6401 [a]; see *Iannone v Iannone*, 31 AD3d 713, 715 [2006]; *Matter of Kristensen v Charleston Sq.*, 273 AD2d 312 [2000]; cf. *Friedman v Ragin*, 228 AD2d 642 [1996]). Same could be said in the matter before the court.
2. *Matter of Kristensen v Charleston Sq.*, 273 A.D.2d 312 (2d Dept 2000). Same idea as above. The moving party did not establish by a “...clear evidentiary showing of the necessity of conserving the property and protecting that party’s interests...” The appellate court reversed and denied the appointment of a receiver.

It is unlikely plaintiff will prevail on its claim for the appointment of a temporary receiver.

#### PLAINTIFF SEEKS A PRELIMINARY INJUNCTION

- III. Plaintiff seeks a preliminary injunction: “enjoining defendants CLASS ACTION RECOVERY, LLC d/b/a/ CLASS ACTION REFUND (the “Company”), RICHARD G. DELGATTO (“Delgatto”, and together with the Company, “Defendants”), and any of the Company’s other managers or officers from making any distributions of profits or

distributions to Delgatto or any other members of the Company during the pendency of this action; Both a preliminary injunction and temporary restraining order were denied by the Court on the record on February 22, 2023. However, once again, the Court wishes to close out this type of injunctive relief.

### ***CPLR 6301 Commentary***

#### ***C6301:2 Preliminary Injunction: Additional Requirements and factors Bearing on Court's Discretion***

***The party seeking a preliminary injunction must do more than show that the underlying action falls within one of the categories specified in CPLR 6301. Under longstanding judicial precedent, the movant in most cases must, in addition, demonstrate three things: (1) a likelihood of success on the merits of the action; (2) the danger of irreparable injury in the absence of preliminary injunctive relief; and (3) a balance of equities in favor of the moving party. See, e.g., Nobu Next Door, LLC v. Fine Arts Housing, Inc., 2005, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 49, 833 N.E.2d 191, 192. In applying these requirements, the court must “weigh a variety of factors,” and the matter is committed to the court's sound discretion. Doe v. Axelrod, 1988, 73 N.Y.2d 748, 750, 536 N.Y.S.2d 44, 45, 532 N.E.2d 1272, 1272.***

On February 22, 2023, the Court denied plaintiff's demands for a temporary restraining order, preliminary injunction and the appointment of a temporary receiver. However, as explained above the Court found it necessary to deal with each and every aspect of plaintiff's claim in reaching the within written Decision and Order on OSC#1 (Motion Sequence #1) and Notice of Motion (Motion Sequence #2)

### **PLAINTIFF CLAIMS IRREPARABLE HARM**

Plaintiff now moves on to its clam of irreparable injury, premised upon the purported oral agreement providing plaintiff with certain financial rights. Multiple cases are cited by plaintiff:

1. *Lesron Junior v Feinberg*, 13 A.D.2d 90 (1st Dept. 1961) Action seeking preliminary injunction to enjoin construction of adjoining building that would block plaintiff's building had been dismissed by the trial judge and reinstated by the appellate division. However, plaintiff's summary judgment denied, but injunctive relief may be proper if defendant's structure, "...in fact violates the law". Not useful
2. *Robjudi Corp. v Quality Controlled Prods.*, 111 AD2d 156 (2d Dept. 1985) Concerned the possibility of "...the uncontrolled sale and disposition of the [subject] chattels would threaten to render ineffectual any judgment..." so injunctive relief is proper". Not relevant.
3. *Board of Mgrs. of 235 E. 22nd St. Condominium v Lavy Corp.*, 233 AD2d 158 (1st Dept 1996) Injunctive relief to prevent the sale or transfer of a condominium was proper. Not relevant.

4. *Pando v Fernandez*, 124 AD2d 495 (1st Dept 1986) Injunctive relief proper to prevent defendant from disposing "...in any manner the sixth and all subsequent lottery payment.". Not relevant
5. *In Wisdom Import Sales Co., LLC v. Labatt Brewing Co. Ltd.*, 339 F.3d 101, 114 (2d Cir. 2003) Breach of joint venture demonstrated likelihood of success on the merits and irreparable harm as required in Federal court. Not relevant.
6. *Int'l Equity Investments, Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 563 (S.D.N.Y. 2006) "Limited partners in investment fund .... Brought action to compel general partner of fund manager...to register change of general partner." Much too complicated a case and not on point at all.
7. *Global Switching, Inc. v. Kasper*, No. CV-06-0412 (CPS), 2006 WL 385315, at \*3 (E.D.N.Y. Feb. 17, 2006) Issues concerning the sale of long-distance telephone service in the Dominican Republic and an investment agreement. Not useful,
8. *Suchodolski Assocs. v. Cardell Fin. Corp.*, 2003 U.S. Dist. LEXIS 24933, 2003 WL 22909149, at \*4 (S.D.N.Y. 2003) Shareholders sought TRO pending the resolution of their claim in arbitration against "...purported controlling shareholder for alleged breach of fiduciary duty." Parties were all shareholders. Not persuasive. Very short decision.
9. *Zonghetti v. Jeromack* 150 AD2d 561(2d Dept 1989) Plaintiffs sued former bookkeeper for wrongful conversion of over \$740,000. Injunctive relief proper to prevent defendant from disposing of any assets. Not relevant.
10. *Street v. Vitti*, 685 F. Supp. 379, 384 (S.D.N.Y. 1988) Minority shareholders sued majority shareholder to prevent election of a new director to the board and other relief. Not relevant.

It is unlikely plaintiff will prevail on its claim that it will suffer irreparable harm if no injunctive relief is granted.

#### IV: BALANCE OF THE EQUITIES FAVORS PLAINTIFF

After the Court has spent significant time reviewing all the points alleged by plaintiff, it is hard to imagine that plaintiff could seriously allege that the balancing of the equities favors the plaintiff. Again cases are cited and reviewed by the Court.

1. *Winter Bros. Recycling Corp. v. Jet Sanitation Serv. Corp.*, 23 Misc. 3d 1115[A], 2009 NY Slip Op. 50753[U] (Sup. Ct. Nassau County Mar. 13, 2009) This case very succinctly and correctly discusses the reasoning behind the granting (or denying) of a preliminary injunction. This case was between competing solid waste removal companies and the issue seemed to be whether one party was taking customers away from the other and if that resulted in irreparable harm. Ultimately no injunctive relief was granted. Useful for its discussion but not supportive of the case before the Court.

2. *Fischer v. Deitsch*, 168 A.D.2d 599 (2d Dept. 1990). Declaratory judgment action of parties respective rights to a corporation based upon parties' dispute as to who owns the corporation. Complicated fact pattern concerning real property, who bought who's shares in what corporation and whether certain investments were returned. Not useful.

It is unlikely that plaintiff will prevail on its claim that the balancing of the equities favors the plaintiff.

#### V. PLAINTIFF CLAIMS UNDERTAKING SHOULD BE MINIMAL

Why? If the business plaintiff claims he is a part of is a multimillion-dollar enterprise, why would an undertaking in the sum of \$2,500 be sufficient. Further, plaintiff is seeking a minimum of \$1.5M in damages. Plaintiff cited one case for an unknown purpose::

1. *In re Total MRI Mgmt., LLC* 11 Misc. 3d 1062(A) (Sup. Ct. Nassau Cnty. Feb. 24, 2006) Totally confusing and overcomplicated case involving motions for contempt, a stipulation of settlement and its vacatur, allegations of contumacious behavior. Not sure of any relevance other than a bond of \$2500 was ordered.

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#### DEFENDANT'S OPPOSITION TO THE ORDER TO SHOW CAUSE

#### I PLAINTIFF'S ACTION IS NOT VIABLE AS A MATTER OF LAW

On February 10, 2023, defendants collectively interposed their opposition to the instant Order to Show Cause consisting of an Attorney Affirmation and Memorandum of Law. Defendants' unequivocal position is that not only must the OSC#1 be denied but the action itself should be dismissed by reason that since there was no agreement in writing this violated General Obligations law 5-701(a)(10) and there is no basis for the underlying lawsuit. GOL 5-01(a)(10) states:

***§ 5-701. Agreements required to be in writing.***

***Currentness***

***a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:***

***10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation***

***and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman. (Emphasis added by defendants)***

It is proffered that no matter what plaintiff states, there simply is no agreement. Further, plaintiff's allegations about any agreement made by Delgatto cannot be substantiated without a writing. Besides that, it is an undisputed fact that plaintiff will not be contributing any form of consideration in exchange for preposterous per centages of the defendant business. There are also no allegations that there is any *quid pro quo* for plaintiff to become a "partner" or member or joint venturer with Delgatto. Defendants consistently state, and its is corroborated by plaintiff and multiple affidavits from other individuals who claim to know plaintiff, that plaintiff was an employee and nothing more and he was terminated. He may have been a "general manager" or someone who lead meetings and did trainings, but that does not demonstrate that there was any agreement between the parties as is claimed by plaintiff. Done. End of story. Defendants cite several cases:

1. *Clivner v Ackerman* 51 Misc 2d 856 (Sup. Ct. Special Term, New York County, 1966) Although the subject was an oral "finder's fee" agreement for a minority stock interest, rather than a majority stock interest, the Court granted the motion and dismissed the action as the oral agreement was unenforceable. The First Department unanimously affirmed. Persuasive but the case herein was not a "finder's fee" matter.
2. *Karlin v Avis* 457 F.2d 57 (United States Court of Appeals, Second Circuit, 1972) Again an oral agreement for a "finders' fee" of the sale of defendant's stock was dismissed by the lower court and affirmed herein. Relevant but finder's fee is redundant.
3. *Hiller v Franklin Mint* 485 F.2d 48 (United States Court of Appeals, Third Circuit, 1973) This was a "finder's fee" issue, but the business relationship can be differentiated. The Court was of an opinion that this agreement was not a business sale, but an employment contract and it would not be barred by the SOF under New York law. But there was a choice of law issue here as well. Did Pennsylvania or New York law apply? It seems both states were consistent in their holdings and summary judgment was reversed. Too unwieldy a case. Not useful.
4. *Gutkowski v Steinbrenner* 680 F.Supp 2d 602 (United States District Court, S.D. New York, 2010) Alleged oral agreement to create a television network owned and operated by the baseball team. Motion to dismiss granted. This was a multi-year "negotiation" according to the plaintiff, and it appeared to be substantiated that the parties met over a period of time that encompassed several years. There was even some compensation paid by defendant to plaintiff for some services rendered over

time. However, there was no written agreement, only alleged “promises” made by defendant to plaintiff, not unlike the situation complained of herein. Coincidentally there was also argument by plaintiff to amend his complaint. by plaintiff. The Southern District dealt with a motion to dismiss under Federal Rule 12[b][6] which is similar to New York State CPLR 3211 . The Court stated in granting the motion:

***On the other hand, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ” Id. (quoting Twombly, 550 U.S. at 555, 127 S.Ct. 1955). Applying this standard, if Plaintiff “ha[s] not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed.” Twombly, 550 U.S. at 570, 127 S.Ct. 1955.***

The result in this matter was that the complaint was dismissed with prejudice. This matter was informative and useful.

5. *Dorfman v. Reffkin*, 144 A.D. 3d 10 (First Dept, 2016) 2020 NY Slip Op 32469(U), ^ 4 (Sup. Ct, NY County 2020) An alleged former partner (different from the case at bar) sued founder for allegedly stealing proprietary information. The implied contract claim was dismissed, but unjust enrichment and quantum meruit survived because the services rendered were more than just actions in negotiating a business opportunity. In the case before the court, there was absolutely no writing, and any services allegedly rendered by plaintiff were as an employee of defendant. Useful
6. *Goldfarb v. Schaeffer*, 2014 NY Slip Op 32589(U), ^ 4 (Sup. Ct., NY County; Index No.: 650173/2014) Appears to be a ‘finder’s fee’ type of situation. Again, there is no writing, and the action is premised upon plaintiff’s claim for compensation for “negotiating a business opportunity”. Complaint dismissed and affirmed. Useful.
7. *Andrews v. Cerberus Partners*, 271 A.D.2d 348 (1st Dep’t 2000); Alleged oral agreement to enter into a joint venture, for plaintiff to obtain 15% equity interest in defendant; for plaintiff to obtain five year employment contract, plus claims for unjust enrichment, breach of contract and tortious interference all dismissed and Affirmed. There was no evidence of a business relationship between the parties. [In the instant action plaintiff was employed by defendant at one time]. Useful.
8. *Petkanas v. Petkanas*, 2014 NY Slip Op 33137(U), 1 2 (Sup. Ct., New York County) Here plaintiff cousin of defendant loaned defendant’s company \$150,000, provided other funds and office space for oral promises of a 17% share. Due to the applicability of GOL 5-701 certain causes of action were dismissed and others remained. Breach of contract claim and quantum meruit services in negotiating a business opportunity were dismissed. Conversion, tied to breach of a contract was also dismissed, but unjust enrichment remained as a viable cause of action. Certainly more interesting than other cases, but there was a financial contribution made by plaintiff both as a loan and funding. There was no such contribution by Catalogne.

9. *ELJM Consulting, LLC v. Santoni S.PA*, 2018 NY Slip Op 31736(U), ^ 10-11 (Sup. Ct, NY County 2018) Defendant brought motion pursuant to CPLR 3211 (a)(7) to dismiss nine causes of action All oral based claims dismissed, only written consulting agreement remained. There were contingencies that precluded defendant from receiving compensation. Not particularly useful.
10. *Behrman v. Red Flower, Inc.*, 2018 NY Slip Op 51545(U), ^ 4-5, 61 Misc. 3d 1217(A), 110 N.Y.S.2d 899 (Sup. Ct, NY County 2018) Base upon an oral agreement, Plaintiff provided public relations services to defendant at a discounted rate with an expectation of receiving a larger equity position in defendant company. The Court dismissed the complaint including causes of action for breach of fiduciary duty, quantum meruit, unjust enrichment, an accounting, and the imposition of a constructive trust. Instructive due to the analysis provided by the court in the decision.
11. *Alkholi v. Macklowe*, 2017 U.S. Dist. LEXIS 211700, at \*20-21 (S.D.N.Y. Dec. 22, 2017) aff'm 858 Fed. Appx 388 (United States Court of Appeals, 2021) District Court dismissed plaintiffs' claims. The parties had discussed an agreement for plaintiff to raise capital for a joint venture, but the joint venture did not happen, but the project went forward with another investor. Despite the joint venture not coming into being, plaintiffs were paid \$750K and \$5M for lost opportunity. The lower court had dismissed plaintiff's claims based on New York Statute of Frauds and the United States Court of Appeals affirmed.
- 12 *Snyder v. Bronfman*, 13 N.Y.3d 504 (2009) The trial court denied defendant's motion to dismiss plaintiff's causes of action for unjust enrichment and quantum meruit. The First Department reversed, and the Court of Appeals affirmed that reversal and dismissed. This was an oral joint venture agreement between the parties that violated the statute of frauds. The Court of Appeals found that: ***Thus the question is whether the compensation plaintiff seeks is "for services rendered . . . in negotiating the purchase . . . of a [redacted] business opportunity, business . . . or an interest therein"—with "negotiating" defined to include both "procuring an introduction" and "assisting in the negotiation or consummation of the transaction. The answer to this question is yes.***

## II PLAINTIFF'S REQUEST FOR TEMPORARY RELIEF MUST BE DENIED

The three-prong test for granting a preliminary injunction is again quoted as follows:

***“(1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of equities favors [the movant's] position.”***

Defendants cite multiple cases in support of its position that the court deny this relief:

1. *Barone v. Frie*, 99 A.D.2d 129 (2d Dep't 1984) failure to establish likelihood of success on the merits results in denial of preliminary injunction.
2. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990) no irreparable injury results in denying injunctive relief.
3. *W.T. Grant Co. v. Srosi*. 52 N.Y.2d 496 (1981) erroneous tax assessments.
4. *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dep't 2002) petitioners demonstrated reasonable likelihood of success and irreparable harm and Second Department reversed the trial court and granted preliminary injunction to maintain the status quo.

Further, the within Decision and Order goes into great lengths to refute each and every proposed cause of action asserted by plaintiff in his application to amend his complaint. The Court went into great detail as well in reviewing each aspect of the three prong test that is necessary to be sustained by the movant for any sort of injunctive relief to be granted.

The next issue in dealing with a request for injunctive relief is that there must be a basis in “undisputed facts” for the court to recognize a movant’s clear right to seek injunctive relief. There are no such “undisputed facts” in the instant matter, as is obvious by the pleadings and motion practice on both sides Accordingly, there is no need for this Court to review the cases cited by defendant at page 16 of its Memorandum of Law in Opposition to Motion Sequence #1. Defendants’ position has been and is that plaintiff has not made *prima facie* showing it is entitled to the injunctive relief sought.

### POINT III PLAINTIFF MUST GIVE AN UNDERTAKING

Pursuant to CPLR 6312(b) the party seeking a preliminary injunction must give an undertaking. Said statute states:

#### **Rule 6312. Motion papers; undertaking; issues of fact.**

##### Currentness

***(b) Undertaking. Except as provided in section 2512 and in actions brought under section two hundred sixty-five-a of the real property law, prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including:***

3. ***if the injunction is to stay proceedings upon a judgment for a sum of money on any ground other than that the judgment was obtained by actual fraud, the full amount of the judgment as well as all damages and costs which may be awarded to the defendant in the action in which the injunction was granted.***

In the instant matter, plaintiff claims defendant company is a multi-million dollar producing entity and seeks, essentially, to shut down the company while he conducts an accounting and other activities that would substantially interfere with a going business. Plaintiff's claim that a bond in the sum of \$2500 would be sufficient would be laughable, if it weren't for the seriousness of the claims being brought. As stated in *Olympic Ice Cream Co., Inc. v Sussman*, 151 AD3d 872 (2d Dep't 2017), "***The fixing of the amount of an undertaking is a matter within the sound discretion of the Supreme Court, and its determination will not be disturbed absent an improvident exercise of that discretion***" (*Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 896 [2006]; see *S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 AD3d 642, 643 [2008]).

Accordingly, in the event a preliminary injunction is granted herein an undertaking in the minimum amount of TWO MILLION (\$2,000,000) DOLLARS is required to be posted by plaintiff.

#### PLAINTIFF SEEKS TO AMEND ITS COMPLAINT

It is understood that pursuant to CPLR 3025[b], "[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.". Plaintiff cites the following:

1. *RBP of 400 W42 St., Inc. v 400 W. 42nd St. Realty Assoc.*, 27 A.D.3d 250 (1st Dept 2006) Lower court and First Department both denied leave to amend.
2. *Pellegrino v New York City Tr. Auth.*, 177 A.D.2d 554 (2d Dept 1991). Third party defendants denied leave to amend, on the eve of trial, almost three years into the lawsuit. Not relevant.
3. *G.K. Alan Assoc., Inc. v Lazzari*, 44 A.D.3d 95 (2d Dept. 2007) Very lengthy, complicated case dealing with agency and other matters where leave to amend granted.
4. *Trataros Constr., Inc. v New York City Hous. Auth.*, 34 A.D.3d 451 (2d Dept. 2006) A amended complaint that added a 13<sup>th</sup> cause of action was properly granted as it had a basis in fact.
5. *Sample v Levada*, 8 A.D.3d 465 (2d Dept 2004) Plaintiff changed her theory of recovery in a medical malpractice claim, but that "new" theory was justified. Granting leave to amend complaint was proper. Not persuasive.
6. *Sleepy's Inc. v Orzechowski*, 7 A.D.3d 511(2d Dept. 2004). Appellate court reversed lower court and granted unopposed motion for leave to amend as discretionary.
7. *Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15, (2d Dept. 2008). Leave to amend treated as "Leave to Replead to Cure Technical Deficiencies" granted. Not relevant.

Defendant opposes the plaintiff's motion for leave to amend. The additional proposed causes of action have been reviewed above in the with Decision and Order and will not be rehashed herein. However, defendant has asserted reasons why the motion for leave to amend should be

denied and has cited several cases. Additionally, while leave to amend pleadings, “shall be freely given (CPLR 3025[b], it may be denied where the proposed amendment is palpably insufficient as a matter of law or totally devoid of merit.” *Frometa v Mar-Can Transportation Co., Inc.* 72 Misc 3d 316{Sup Ct 2021} . It is likely herein that the application to amend will be denied by virtue that what is proposed as amended causes of action are “palpably insufficient as a matter of law or totally devoid of merit”. The following cases were cited.

1. *EECP Ctrs. of Am., Inc. v. Vasomedical, Inc.*, 265 A.D.2d 372, (2d Dept 1999) This is very short decision dealing with a motion to dismiss pursuant to CPLR 3211 (a)(7) for failure to state a cause of action. Not particularly useful.
2. *Dorce v. Gluck*, 140 AD3d 1111 (2d Dept, 2016) Counterclaims by defendant failed to state a cause of action to recover damages for prima facie tort and were properly dismissed. Further leave to amend complaint was properly denied. However not useful as no explanation about what was “palpably insufficient”.
3. *Berardino v. Ochlan*, 770 N.Y.S.2d 75 (2d Dep't 2003) Irrevocable life insurance trust action concerning fraud and negligent misrepresentation. Amended complaint did not allege certain conduct and was dismissed. Minimally useful.

#### PLAINTIFF OPPOSES MOTION #2 TO DISMISS

Plaintiff opposes defendants’ motion #2 to dismiss pursuant to CPLR 3212 and 3211 (a)(5) and (a)(7) and offers multiple affidavits in support of his position. They will be reviewed herein;

1. Jorge Salva Affirmation is made by the attorney for plaintiff. He is without any personal knowledge of this matter, unless he will be offering himself as a witness. It may be a summary of “...various affidavits being submitted in Plaintiff’s opposition.”, but this is not probative.
2. Affidavit of the Plaintiff, Edgar Catalogne, sworn to on March 21, 2023, restates what has been stated in the Complaint and other documents.
3. Affidavit of Edgar Catalogne, sworn to on January 23, 2023, earlier version of the March 21, 2023, affidavit and complaint.
4. Affidavit of Mariana Rodrigue, sworn to on March 20, 2023, hearsay affidavit from an individual with 20 years’ experience in finance. Repeated what she “has learned from Catalogne”, claims to have overheard what was said in Delgatto’ s office. Former employee of Class Action.
5. Affidavit of Armando Tejada, sworn to on March 20, 2023. Partner of plaintiff in Triangulum, also overheard a conversation with Delgatto. He prepared a website for Class Action, worked for Class Action, prepared a software program for Class Action and alleged he had a verbal agreement with Delgatto. He left Class Action in 2020.

6. Affidavit of Justin Cammarata, sworn to on March 17, 2023. He was a personal trainer for Delgatto's girlfriend and worked at Class Action and attested to Catalogne working at Class Action.
7. Affidavit of Roger Browne, sworn to on March 20, 2023. He was hired by Catalogne and worked for Class Action. Allegedly observed that Delgatto came into the offices "about one or two days a month".
8. Affidavit of Ritesh Mitrá, sworn to on March 21, 2023. Develops custom software and programming and was partner with Catalogne in Triangulum. Developed a software program for Class Action
9. Affidavit of Anthony Piacquadio, sworn to on March 21, 2023. Former business partner within Class Action Refund from 2004 through 2015. Attested to certain work performed by Catalogne between 2006 to 2014.
10. Affidavit of Joseph Lodi, sworn to on March 21, 2023. A partner with Piacquadio and Delgatto in Class Action Refund, LLC. Attested to Catalogne working for certain Companies from about 2006 through on or about November 2014. Confirmed Catalogne's compensation as set forth in Piacquadio Affidavit above.

## CONCLUSION

As a consequence of all the foregoing, this Court is of the opinion that the Statute of Frauds GOL 5-701 bars plaintiff from claiming there is any agreement between plaintiff and defendant as asserted in this action. This results in denying the requested relief and dismissing the action without prejudice. Plaintiffs set forth seven (7) affirmative defenses the first of which is most important, namely that the Complaint "...fails to state a claim upon which relief may be granted. This allows defendant to seek dismissal of plaintiff's claims under CPLR 3211 (a)((5) or (a)(7) which is different standard than a summary judgment motion under CPLR 3212. The other affirmative defenses were:

2. Laches, unconscionability, estoppel and unclean hands
3. Failure to mitigate damages.
4. Plaintiff's claim is barred by Statute of Frauds
5. Plaintiff's claim is barred by the New York general Obligations Law
6. Plaintiff was at all times relevant herein an employee of the Defendant.
7. Plaintiff does not have standing to bring this action.

By reason of all the foregoing it is

ORDERED that Plaintiff's motion by Order to Show Cause (Motion Sequence #1) seeking an Order granting plaintiff a preliminary injunction pursuant to New York CPLR 6301 and 6311 and/or temporary Restraining Order, for the duration of this litigation against Defendants: (i) enjoining Defendants from making any distributions of profits or other distributions to Defendant RICHARD G. DELGATTO or any other members of Defendant Class

Action Recovery d/b/a Class Action R~fund (the "Company") during the pendency of this action is **DENIED**; and it is further,

ORDERED that Plaintiff's motion by Order to Show Cause (Motion Sequence #1) seeking an Order granting plaintiff the appointment of a Temporary Receiver under CPLR 6401 (a) to take a hold of and preserve the Company's assets. and profits, while assuring payment of the Company's debts and expenses, collection of revenues, and accounting for the Company's income is **DENIED**; and it is further.

ORDERED that Plaintiff's motion by Order to Show Cause (Motion Sequence #1) seeking an Order directing Defendants to provide to Catalogne an accounting of the Company's economic, legal, and business affairs, including financial statements, expenses, and records concerning payouts in the following class action suits (together referred to herein as "Class Action Suits") is **DENIED as to the within paragraph and following specified matters.**

- Christine Asia Co. Ltd. et al. v. Jack Yun Ma, et al
- In Re: Automotive Parts Antitrust Litigation
- In Re: Automotive Parts Antitrust Litigation (In re: Bearings Cases)
- In Re: BHP Billiton Limited Securities Litigation
- In Re: Capacitors Antitrust Litigation
- In Re: Syngenta AG MIR162 Corn Litigation
- In Re: Illinois v. Hitachi Ltd., et al.
- In Re: Sullivan, et al. v. Barclays pic, et al.
- In Re: Laydon v. Mizuho Bank, Ltd., et al
- In Re: Foreign Exchange Benchmark Rates Antitrust Litigation
- In Re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation
- In Re: Alaska Electrical Pension Fund v. Bank of America, N.A.
- In Re: Diisocyanates Antitrust Litigation
- In Re: LIBOR-Based Financial Instruments Antitrust Litigation
- In Re: Liquid Aluminum Sulfate Antitrust Litigation
- In Re: Liquid Aluminum Sulfate Antitrust Litigation
- In Re: Lithium Ion Batteries Antitrust Litigation - All Indirect Purchaser Actions
- In Re: Optical Disk Drive Antitrust Litigation

- In Re: Steven Knurr v. Orbital ATK, Inc., et al.
- In Re: Resistors Antitrust Litigation
- In Re: SanDisk LLC Securities Litigation
- In Re: Transpacific Passenger Air Transportation Antitrust Litigation

And it is further.,

ORDERED that Plaintiff's motion by Order to Show Cause (Motion Sequence #1) seeking leave of the Court to file an amended complaint under CPLR 3025 is **DENIED**; and it is further,

ORDERED that Defendants' motion by Notice of Motion (Motion Sequence #2) seeking an order granting defendants summary judgment against plaintiff pursuant to CPLR 3212 for an order dismissing this action without prejudice is **GRANTED**; and it is further.

ORDERED that Defendants' motion by Notice of Motion (Motion Sequence #2) seeking an order pursuant to CPLR 3211 (a)(5) and/or (a)(7) dismissing this action without prejudice is **GRANTED**.

Any relief not specifically granted herein is denied.

The forgoing constitutes the decision and order of this Court.

Dated: August 25, 2023  
White Plains, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that where the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

TO: Plaintiff and Defendants via *NYSCEF*