

**Kliger v Drucker**

2011 NY Slip Op 33649(U)

October 5, 2011

Supreme Court, Nassau County

Docket Number: 003304-11

Judge: Timothy S. Driscoll

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

**Present:**

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

-----x  
**SAM KLIGER, individually and derivatively**  
**on behalf of KWI Merchant Services, Inc.,**

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

**Plaintiff,**

**-against-**

**Index No: 003304-11**  
**Motion Seq. Nos. 2, 3, 4, 5, 6, 7**  
**Submission Date: 8/19/11**

**DAVID DRUCKER and CAPITAL**  
**PAYMENTS, LLC,**

**Defendants.**

-----x

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

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation in Support and Exhibit.....X**
  
- Notice of Motion, Memorandum of Law in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Plaintiff's Memorandum of Law in Opposition.....X**
- Plaintiff's Supplemental Memorandum of Law (mot. seqs. 3 and 6).....X**
  
- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
  
- Notice of Motion, Affirmation, Supporting Affidavit and Exhibits.....X**
- Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation.....X**

**Notice of Motion, Affidavit in Support,  
Affirmation in Support and Exhibits.....X  
Supplemental Affirmation in Opposition and Exhibits.....X  
Reply Affirmation in Further Support.....X  
Supplemental Memorandum of Law in Support.....X**

**Notice of Motion, Affidavit in Support and Exhibits.....X  
Memorandum of Law in Support.....X  
Memorandum of Law in Opposition.....X  
Reply Affirmation in Further Support.....X**

This matter is before the Court for decision on 1) the motion filed by Defendant Capital Payments, LLC (“Capital”) on March 22, 2011 (motion sequence # 2), 2) the motion filed by Defendant David Drucker (“Drucker”) on April 13, 2011 (motion sequence # 3), 3) the motion filed by Capital on May 6, 2011 (motion sequence # 4), 4) the motion filed by Plaintiff Sam Kliger, individually and derivatively on behalf of KWI Merchant Services, Inc. (“Kliger” or “Plaintiff”) on June 27, 2011 (motion sequence # 5), 5) the motion filed by Drucker on June 28, 2011 (motion sequence # 6), and 6) the motion filed by Drucker on July 18, 2011, all of which were submitted on August 19, 2011 following oral argument before the Court.

The Court denies, as moot, motion sequence #s 2 and 3, in light of the subsequent filing of the Amended Complaint.

The Court 1) grants motion sequence # 4 to the extent that the Court dismisses the Fourth, Fifth and Seventh Causes of Action as to Defendant Capital; 2) denies motion sequence # 5; 3) grants motion sequence # 6 to the extent that the Court dismisses the Second, Fourth and Fifth Causes of Action as to Defendant Drucker; and 4) grants motion sequence # 7 to the extent that the Court directs that Drucker is entitled to advancement of attorney’s fees, costs and expenses he has incurred, or will incur, in the defense of this action, and further directs that this matter shall be set down for a hearing to determine a) the sums already expended by Drucker in the defense of this action, and b) the sums that should be advanced to him in the future, subject to repayment should Plaintiff ultimately prevail on his claims against Drucker as asserted in the Amended Complaint.

## BACKGROUND

### A. Relief Sought

In light of the Court's determination that motion sequence numbers 2 and 3 are dismissed as moot, the Court will not outline the relief sought therein.

Capital moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Fourth, Fifth and Seventh Causes of Action in the First Amended Verified Complaint ("Amended Complaint").

Plaintiff moves for an Order 1) scheduling a hearing on Plaintiff's application, pursuant to Business Corporation Law ("BCL") §§ 706 and 716, removing Drucker as an officer and director of KWI Merchant Services, Inc. ("KWI"); 2) requiring Drucker to restore the pre-existing password permitting access to the computer and database of KWI; 3) restraining and enjoining Drucker from posting any self-serving entries in his favor to the ledger of KWI without consent of the Board of Directors; and 4) directing Drucker to return the corporate checkbook and prohibiting the issuance of checks unless signed by both Drucker and Kliger, jointly.

Drucker moves for an Order, pursuant to CPLR §§ 3211(a)(1) and/or (a)(7), dismissing the First, Second, Third, Fifth and Sixth Causes of Action in the Amended Complaint.

Drucker moves for an Order, pursuant to BCL §§ 722, 723 and 724, compelling KWI to reimburse Drucker for his attorney's fees and expenses paid in defending this action to date, and to make monthly advances to Drucker for his fees and expenses in defending this action going forward.

### B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated March 29, 2011 ("Prior Decision") in which the Court denied Plaintiff's application for injunctive relief. The Court incorporates the Prior Decision herein by reference.

As outlined in the Prior Decision, the Original Complaint alleged as follows:

Kliger and Drucker are the sole officers, directors and shareholders of KWI. KWI is a domestic corporation and Capital is a limited liability company ("LLC").

KWI was incorporated in 2007, with Kliger serving as Secretary and Treasurer and Drucker serving as President and Chief Executive Officer. Kliger and Drucker executed a

Shareholders Agreement (“Agreement”) dated February 1, 2007. Pursuant to a Consulting Agreement dated February 1, 2007, KWI engaged e-Financial Services Corp., by Drucker, to serve as a full-time consultant to KWI. This engagement, and the performance of Drucker’s duties, were subject to the direction, approval and control of KWI’s Board of Directors.

In or about October of 2010, Drucker, without the knowledge or consent of Kliger, began discussions with Capital to sell either Drucker’s ownership in KWI, or all or substantially all of KWI’s assets, including but not limited to certain contracts for services (“Sale”), with an anticipated closing date of February 1, 2011. In furtherance of the Sale, without Kliger’s knowledge or consent, Drucker, in his personal capacity, executed a Confidentiality and Trade Secret Agreement (“Confidentiality Agreement”) with Capital dated October 11, 2010. Pursuant to the Confidentiality Agreement, Drucker agreed to provide to Capital certain confidential KWI trade secrets or proprietary business information, including, but not limited to, customer lists and requirements (“Confidential Information”). Drucker did provide the Confidential Information to Capital in violation of the Agreement. Capital has refused to return that Information to KWI despite its written demand.

By letter to Drucker dated January 11, 2011, Capital outlined the terms of the proposed Sale (“Proposal”), and Drucker countersigned the Proposal on January 12, 2011. By letter dated January 13, 2011, Drucker provided Kliger with a “Notice of Right of First Refusal,” along with the Proposal, and advised Kliger that if he did not elect to purchase Drucker’s shares within a specified time frame, Drucker would sell his shares to Capital.

By letter dated January 18, 2011, Kliger advised Drucker that 1) the Proposal violated the Agreement because it constituted a sale of all or substantially all of KWI’s assets that required approval of the Board and shareholders; 2) the disclosure of Confidential Information was inappropriate; and 3) the Proposal violated the Agreement. Kliger further demanded that Drucker secure the return of the Confidential Information and reject the Proposal.

Counsel for Kliger sent a letter dated February 2, 2011 to Capital advising it of Drucker’s breaches of the Agreement and demanding the return of the Confidential Information to KWI. Counsel for Capital responded by letter dated February 15, 2011 in which it acknowledged the receipt of the Confidential Information from Drucker. Upon information and belief, Drucker is continuing to negotiate the Sale.

Kliger has not made demand on KWI to commence the instant action on the grounds that such a demand would be futile given that Drucker is the only other shareholder, officer and director of KWI, and in light of Drucker's failure to respond to Kliger's demands for the return of the Confidential Information.

On March 3, 2011, the Court (DeStefano, J.) issued a temporary restraining order ("TRO") which directed that, pending the hearing and determination of this Order to Show Cause, Drucker was temporarily restrained from 1) selling all or substantially all of the assets of KWI; 2) selling his shares in KWI; and 3) transmitting, disclosing or disseminating KWI's confidential and proprietary business information to any third party. This Court later modified the TRO on March 14, 2011 to direct Capital to provide to Plaintiff's counsel any documents or information received from KWI or Drucker on or before March 18, 2011.

Following the issuance of the Prior Decision, Plaintiff filed the Amended Complaint. The Amended Complaint (Ex. F to Gionis Aff. in Supp.), dated April 22, 2011, repeats the allegations in the Original Complaint, and further alleges as follows:

This Court ordered Capital to return the Confidential Information and Capital has alleged [that] it has deleted the Confidential Information from its computers, although Capital has failed to offer any evidence that all of the Confidential Information has been deleted from its computers.

Amended Complaint at ¶ 22

The Original Complaint contained five (5) causes of action: 1) against Drucker for breach of his fiduciary duty to KWI, 2) against Drucker for preliminary and permanent injunctive relief restraining him from disseminating or disclosing the Confidential Information to any third party, 3) against Drucker for unauthorized disclosure of the Confidential Information to Capital and possibly others, 4) against Capital for preliminary and permanent injunctive relief restraining Capital from disseminating, disclosing or using the Confidential Information and directing Capital to return the Confidential Information to Plaintiff, and 5) against Capital and Drucker for breach of the Confidentiality Agreement, of which Plaintiff was a third-party beneficiary.

The Amended Complaint contains seven (7) causes of action:

First Cause of Action - against Drucker for breach of his fiduciary duty to KWI,

Second Cause of Action - against Drucker for preliminary and permanent injunctive

relief restraining him from disseminating or disclosing the Confidential Information to any third party,

Third Cause of Action - against Drucker for unauthorized disclosure of the Confidential Information to Capital and possibly others,

Fourth Cause of Action - against Capital for preliminary and permanent injunctive relief restraining Capital from disseminating, disclosing or transmitting the Confidential Information to any third party or reviewing or using the Confidential Information, and directing Capital to delete all evidence of the Confidential Information from its computer,

Fifth Cause of Action - against Capital and Drucker for breach of the Confidentiality Agreement, of which Plaintiff was a third-party beneficiary, for which Plaintiff seeks to recover its costs, expenses and attorney's fees,

Sixth Cause of Action - against Drucker, for an Order, pursuant to BCL §§ 706 and 716, removing Drucker as an officer and director of KWI, in light of his having allegedly provided confidential business information and trade secrets to a purported prospective purchaser of his shares in KWI and/or all or substantially all of KWI's assets, and

Seventh Cause of Action - against Capital, for a mandatory injunction requiring Capital to provide access to an independent information technology ("IT") firm to be used by KWI in reviewing Capital's database to determine whether KWI's Confidential Information is still contained therein, and to determine whether copies of the KWI information were duplicated or downloaded prior to the return of the Confidential Information delivered by Capital's counsel to Plaintiff's counsel on March 15, 2011.

Section 3(b) of the Shareholder's Agreement (Ex. A to Drucker Memo. of Law in Supp.) provides, in pertinent part, that "no Shareholder shall, without the prior written consent of the Corporation, for any reason, either directly or indirectly [underlining in original], divulge to any third party or, use for its own benefit or to the Corporation's detriment in any way, any confidential or proprietary information or trade secrets of the Corporation..."

Paragraphs 4 and 5 of the Confidentiality Agreement (Ex. D to Drucker Aff. in Supp.) provide as follows:

Paragraph 4

Receiving Party shall at all times and forever safeguard and protect all of the



Confidential Information of Disclosing Party to prevent its being exposed to, or taken by, unauthorized persons, and when entrusted to Receiving Party will exercise its commercially reasonable efforts to assure its safekeeping (which efforts shall be no less than the Receiving Party employs in the protection of its own Confidential Information). Notwithstanding any provision of this Agreement to the contrary, in the event that Receiving Party is requested or required in a judicial, administrative or governmental proceeding or is otherwise required by law to disclose any Confidential Information, Receiving Party may disclose any such requested Confidential Information provided that Receiving Party will immediately provide Disclosing Party with written notice of same and all related proceedings so that Disclosing Party may seek an appropriate protective order.

#### Paragraph 5

Upon request of a Disclosing Party, Receiving Party will deliver to Disclosing Party, within three (3) days of receiving such request, all Confidential Information which is in the possession or control of the Receiving Party. Notwithstanding the return of the Confidential Information, a Receiving Party shall continue to be bound by its obligations hereunder for a period of three (3) years after the date of this Agreement.

Article 6 of the Certificate of Incorporation of KWI (Ex. B to Drucker Aff. in Supp.) provides, in pertinent part, as follows:

The corporation shall indemnify to the full extent permitted by the laws of the State of New York as from time to time in effect, each person who is or was a director or officers of the corporation in the event that he is or was a party or is threatened to be made a party to, or otherwise requires representation by counsel in connection with, any pending, threatened or completed civil, criminal, administrative or arbitative action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to such action, suit or proceeding, by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, or by reason of any action alleged to have been taken or omitted in such capacity. The right to indemnification conferred by this Article shall also include the right of such persons to be paid in advance by the corporation for their expenses to the fullest extent permitted by laws of the State of New York as from time to time in effect. The right to indemnification conferred on the directors and officers of the corporation by this Article shall be a contract right in favor of such directors and officers, and shall extend to all actions and omissions taken by the directors and officers of the corporation after the effective date of this Article.



### C. The Parties' Positions

Capital incorporates its arguments in connection with the motion leading to the Prior Decision, which the Court outlined in the Prior Decision, and further argues, *inter alia*, that 1) the Seventh Cause of Action is not viable, both because it “revisits” the question of injunctive relief which the Court has already denied (Gionis Aff. in Supp. at ¶ 7) and because the Confidentiality Agreement does not provide Plaintiffs with the remedy they seek, specifically damages alleging resulting from the fact that they haven’t been provided with the opportunity to inspect Capital’s computer databases “to determine whether the information which they admit has been returned to them (under this Court’s direction) has been permanently deleted” (*id.*); and 2) Capital, which received the Confidential Information lawfully and complied with the Court’s directives regarding the return of the Confidential Information, “has no business in this lawsuit” (*id.* at ¶ 13).

Plaintiff submits, *inter alia*, that 1) the Court should, “upon renewal” (Lynn Aff. in Supp. at ¶ 15) grant the preliminary injunction previously requested in light of statements made by opposing counsel at a conference before the Court that suggest that Drucker believes he is free to disclose information that is clearly confidential; and 2) in light of information regarding Drucker’s misfeasance, including Kliger’s discovery that the password to the computer data system containing the KWI ledgers had been changed and he was barred from access to the company ledgers, the Amended Complaint properly pleads a cause of action for removal of Drucker as an officer and director pursuant to the BCL.

Drucker submits, *inter alia*, that 1) while conceding that he owed a fiduciary duty to KWI and to shareholders not to improperly disclose proprietary confidential information, Plaintiff’s allegations of Drucker’s breach of fiduciary duty are not viable, given that Kliger has failed to plead that Drucker engaged in wrongful conduct or acted in bad faith, or that Plaintiff suffered damages; 2) the cause of action for a permanent injunction must be dismissed on the grounds that a) given that Drucker has already provided KWI’s Confidential Information to Capital, injunctive relief would be “moot and fruitless” (Drucker Supp. Memo. of Law at p. 13); b) the Shareholders Agreement implicitly permitted Drucker, in the context of exercising his explicit right to sell his shares, to disclose proprietary information to prospective purchasers to assist them in determining an appropriate offer; and c) Kliger has an adequate remedy at law in

the form of money damages; and 3) there is no legal basis for the Fifth Cause of Action for legal fees in light of the fact that Plaintiff has not established that Defendants breached the Confidentiality Agreement, and in light of the return of the confidential documents pursuant to the Court's directive.

Drucker also submits that, pursuant to BCL §§ 722 and 723, he is entitled to an Order directing KWI to reimburse him for attorney's fees and expenses, given Drucker's compliance with the undertaking obligation by his promise to repay to KWI all advances on such fees and expenses in the event it is determined that he is not entitled to indemnification pursuant to BCL § 722. Alternatively, the Court should grant such relief pursuant to BCL § 724.

### RULING OF THE COURT

#### A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Injunctive Relief

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson*

*v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006). A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. See *White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999).

Mandatory injunctive relief should not be granted *pendente lite* without a showing of extraordinary circumstances where the status quo would be disturbed and the plaintiff would be granted the ultimate relief in the action. *Village of Westhampton Beach v. Cayea*, 38 A.D.3d 760, 762 (2d Dept. 2007).

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction. It is to be invoked only to give protection for the future, and prevent repeated violations of the plaintiff's property rights. *Merkos L'Inyonei v. Sharf*, 59 A.D.3d 403 (2d Dept. 2009).

### C. Fiduciary Obligations

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

Directors and officers of a corporation, in the performance of their duties, stand in a fiduciary relationship to their corporation. As such, they owe the corporation their undivided loyalty and may not, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation. *Morales v Galeazzi*, 72 A.D.3d 765, 766 (2d

Dept. 2010), quoting *Yu Han Young v. Chiu*, 49 A.D.3d 535 (2d Dept. 2008) (citations and internal quotation marks omitted). A fiduciary owes a duty of undivided loyalty to those whose interests he is to protect. He must avoid not only blatant self-dealing but also situations in which his personal self-interest may conflict with the interest of those to whom the duty is owed. *Birnbaum v Birnbaum*, 73 N.Y.2d 461, 466 (1989), *reconsid. den.*, 74 N.Y.2d 843 (1989). The relationship between shareholders in a close corporation is akin to that between partners and imposes a high degree of fidelity and good faith. *Brunetti v Musallam*, 11 A.D.3d 280, 281 (1<sup>st</sup> Dept. 2004), quoting *Fender v. Prescott*, 101 A.D.2d 418, 422 (1<sup>st</sup> Dept. 1984), *aff'd*, 74 N.Y.2d 1077, 1079 (1985).

#### D. Contract Construction

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*

#### E. Corporate Indemnification of Officers and Directors

The BCL establishes a statutory framework for a corporation's indemnification of officers and directors, both voluntarily and by court order. *Wasitowski v. Pali Holdings, Inc.*, 2010 U.S. Dist. LEXIS 37802, \* 6 (S.D.N.Y. 2010). With respect to voluntary indemnification, BCL § 722 permits but does not require a corporation's bylaws to provide for director and officer indemnification. *Id.* at \* 6-7, quoting *Sequa Corp. v. Gelmin*, 828 F. Supp. 203, 205 (S.D.N.Y. 1993). BCL § 723 establishes the procedures by which shareholders or boards of directors may elect to provide indemnification. *Id.* at \* 7, citing BCL § 723(b). Although the text of BCL § 722(a) is phrased permissively, BCL § 723 (a) provides that a person who has been successful in the defense of an action of the type described in BCL § 722 *shall* be entitled to indemnification as authorized in that section. *Id.* Thus, if a corporation provides for indemnification to its directors and officers consistent with BCL § 722, BCL § 723 binds the corporation to its promise to indemnify. *Id.*

BCL § 724 establishes the procedures for court-ordered indemnification. *Wasitowski*, 2010 U.S. Dist. LEXIS 37802 at \* 7-8. When a corporation declines to afford indemnification

pursuant to BCL § 722, the officer may apply to the court, which may direct that such payments be made if the Court finds that the Defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law. *Id.* at \* 8, citing *Brittania 54 Hotel Corp. v. Freid*, 251 A.D.2d 49 (1<sup>st</sup> Dept. 1998), quoting BCL § 724(c).

F. Removal of Directors Pursuant to BCL Section 706

BCL § 706 provides as follows:

(a) Any or all of the directors may be removed for cause by vote of the shareholders. The certificate of incorporation or the specific provisions of a by-law adopted by the shareholders may provide for such removal by action of the board, except in the case of any director elected by cumulative voting, or by the holders of the shares of any class or series, or holders of bonds, voting as a class, when so entitled by the provisions of the certificate of incorporation.

(b) If the certificate of incorporation or the by-laws so provide, any or all of the directors may be removed without cause by vote of the shareholders.

(c) The removal of directors, with or without cause, as provided in paragraphs (a) and (b) is subject to the following:

(1) In the case of a corporation having cumulative voting, no director may be removed when the votes cast against his removal would be sufficient to elect him if voted cumulatively at an election at which the same total number of votes were cast and the entire board, or the entire class of directors of which he is a member, were then being elected; and

(2) When by the provisions of the certificate of incorporation the holders of the shares of any class or series, or holders of bonds, voting as a class, are entitled to elect one or more directors, any director so elected may be removed only by the applicable vote of the holders of the shares of that class or series, or the holders of such bonds, voting as a class.

(d) An action to procure a judgment removing a director for cause may be brought by the attorney-general or by the holders of ten percent of the outstanding shares, whether or not entitled to vote. The court may bar from re-election any director so removed for a period fixed by the court.

### G. Application of these Principles to the Instant Action

The documentary evidence, including KWI's Certificate of Incorporation and the Shareholders and Confidentiality Agreements, does not resolve all factual issues raised by the parties as a matter of law or conclusively dispose of all of Plaintiff's claims. The Amended Complaint adequately states causes of action against Defendant Drucker for breach of fiduciary duty (first), breach of the Shareholders Agreement (third) and removal of a corporate officer (sixth).

The first and third causes of action of the Amended Complaint are based on the allegation that Drucker improperly, *i.e.*, without Plaintiff's consent, attempted to sell his interest in, or, substantially all of the assets of, KWI to a competitor and, in so doing, disclosed KWI's confidential information to the potential purchaser, Defendant Capital. Accepting the truth of the allegations that Drucker, as an officer/director of KWI, improperly disclosed confidential/proprietary business information to Capital, without Plaintiff's consent, in an attempt to sell his interest in KWI, the Court concludes that the first and third causes of action sufficiently plead causes of action for breach of fiduciary duty and breach of the Shareholder's Agreement. The Court cannot state, as a matter of law, that 1) the sale of all, or substantially all, of the assets of KWI does not require approval by the corporation's Board of Directors and Shareholders; 2) the disclosure of confidential information by Drucker was appropriate; and/or that 3) the proposed sale was in conformity with the Shareholder's Agreement.

The Court dismisses the causes of action seeking injunctive relief based in part on the determination in the Prior Decision, which the Court reaffirms here, that Plaintiff's injury, if any, appears to be compensable by money damages. Moreover, as the proprietary business information provided to Capital has been returned to KWI pursuant to the Court's directive, the Court concludes that Plaintiff has not established a basis for an award of permanent injunctive relief. Accordingly, the Court dismisses the Second and Fourth causes of action for permanent injunctive relief as to Drucker and Capital.

The Court also dismisses the Fifth Cause of Action against Capital and Drucker, in which Plaintiff seeks to recover the reasonable costs, expenses and attorneys' fees incurred in bringing this action to enforce the Confidentiality Agreement. Plaintiff has failed to allege how Capital or



Drucker breached the terms of the Confidentiality Agreement, or that defendant Capital disclosed any confidential information pertaining to KWI's business in breach of the Confidentiality Agreement. In addition, Capital has returned the documents disclosed under the Confidentiality Agreement. Thus, there is no basis to sustain a claim for recovery of reasonable costs, expenses and attorneys' fees allegedly arising from a breach of the Confidentiality Agreement and the Court dismisses the Fifth Cause of Action.

Viewed in the light most favorable to Plaintiff, the allegations against Drucker sufficiently plead a cause of action for removal for cause under the statute. Accordingly, the Court denies Drucker's motion to dismiss the Sixth Cause of Action.

The Court dismisses the Seventh Cause of Action which seeks a mandatory injunction as to Capital. No breach of the Confidentiality Agreement is alleged, nor is any anticipatory breach alleged. Moreover, the Confidentiality Agreement does not provide for KWI's inspection of Capital's database. In light of the foregoing, there is no basis to sustain the Seventh Cause of Action and the Court dismisses the Seventh Cause of Action.

The Court denies those branches of Plaintiff's motion requesting an immediate hearing on the issue of the removal of Drucker as an officer/director of KWI, and other ancillary injunctive relief including 1) requiring Drucker to restore a pre-existing password permitting access to KWI's computer/database; and 2) directing Drucker to return the corporate checkbook. The record is devoid of extraordinary circumstances, and Plaintiff has not provided authority, warranting the issuance of a directive that would effectively provide Plaintiff now with the relief to which it may ultimately be entitled.

The Court also denies Plaintiff's request, informally set forth in the affirmation of Plaintiff's counsel, to renew the prior motion for injunctive relief.

With respect to Drucker's motion (motion sequence no. 7) to compel KWI to reimburse/advance him for attorneys' fees paid in defending this action to date, the Court does not concur with Plaintiff's assertion that the Court held in the Prior Decision that Drucker acted in his personal capacity in disseminating KWI's confidential/proprietary business information to a competitor as a means to solicit an offer for his shares in KWI. Rather, the Court wrote in the Prior Decision that the Original Complaint alleged that Drucker executed a Confidentiality



Agreement with Capital "in his personal capacity" (Prior Dec. at p. 2). There is no question that the conduct of which Plaintiff complains occurred in the context of Drucker's position as an officer/director of KWI.

In light of the legal principles and relevant provision of the KWI Certificate of Incorporation outlined *supra*, and the Court's determination that this litigation comes within the purview of the applicable provision in the Certificate of Incorporation, the Court concludes that Drucker is entitled to advancement of attorneys' fees, costs and expenses that he has incurred or will incur in the defense of this action. Accordingly, the Court grants Drucker's motion for reimbursement/advancement of attorneys' fees and the costs and expenses of litigation, and the court directs that KWI advance Drucker his reasonable expenses and attorneys' fees incurred in defense of this action. The Court will schedule a hearing to determine the amount already expended by Drucker in the defense of this action, and the amount to be advanced to him in the future, subject to repayment should Plaintiff ultimately prevail on his claims against Drucker as set forth in the Amended complaint.

All matters not decided herein are hereby denied.

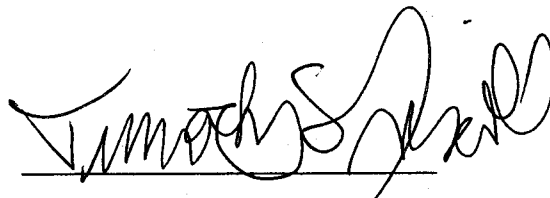
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on November 16, 2011 at 9:30 a.m., at which time the Court will also schedule the hearing on the advancement of Defendant Drucker's counsel fees and related expenses, as directed herein.

ENTER

DATED: Mineola, NY

October 5, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

OCT 13 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**