

STATE OF NORTH CAROLINA
CABARRUS COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 4085

JONATHAN GRUBER,

Plaintiff,

v.

A. BRIAN WRIGHT; ANGIE
CARMICHAEL; CARMICHAEL
CONSULTING GROUP, LLC; and
PIONEER PAY, LLC,

Defendants.

**ORDER ON DEFENDANT A. BRIAN
WRIGHT'S MOTION FOR
PRELIMINARY INJUNCTION**

A. BRIAN WRIGHT,

Counterclaim
Plaintiff,

v.

JONATHAN GRUBER; PIONEER,
LLC; and IN CLOVER I, LLC,

Counterclaim
Defendants.

1. **THIS MATTER** is before the Court on Defendant A. Brian Wright's ("Wright") Motion for Preliminary Injunction (the "PI Motion") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure ("Rule(s)") in the above-captioned case. (ECF No. 12.) Having considered the PI Motion, the briefs, exhibits, and affidavits in support of and in opposition to the PI Motion, the arguments of counsel at the hearing on the PI Motion, and other relevant documents of record, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW and hereby **GRANTS** the PI Motion as set forth below.

I.

PROCEDURAL HISTORY

2. Plaintiff Jonathan Gruber (“Gruber”) initiated this action on 23 November 2021, asserting a claim against Wright for breach of contract arising out of their disagreements concerning the management and operation of Pioneer, LLC (“Pioneer”), an LLC in which they are each 50% owners and member-managers. (Compl., ECF No. 3.) Wright in turn has asserted counterclaims against Gruber for breach of contract and declaratory judgment arising out of these same disputes.¹

3. Wright filed the PI Motion on 29 December 2021, followed by a motion for a temporary restraining order (“TRO Motion”) on 5 January 2022, (Mot. Temporary Restraining Order, ECF No. 16). Judge Adam M. Conrad of this Court denied Wright’s TRO Motion on 10 January 2022, concluding that the relief sought by Wright could not be granted without the inclusion of Pioneer and In Clover I, Inc. (“In Clover”), a North Carolina corporation wholly-owned by Pioneer, as parties to the action. (Order on Mot. Temporary Restraining Order, ECF No. 21.) Wright later filed a motion to add Pioneer and In Clover as nominal counterclaim defendants on 14 January 2022,² which Judge Conrad granted on 18 January 2022.³

¹ (See Def.’s Ans. to Compl., Affirmative Defenses, and Countercl., ECF No. 7; Def.’s Ans. to Compl., Affirmative Defenses, and First Am. Countercl., ECF No. 23.)

² (See Counterclaimant’s Motion to Add Parties as Nominal Counterclaim Defendants Pursuant to Rule 13(h), ECF No. 24.)

³ (See Order on Mot. Add Parties, ECF No. 30.)

4. On 24 January 2022, Gruber filed a Motion for Leave to File First Amended Complaint and Add Parties. (ECF No. 34.) Wright consented to Gruber's motion, and the Court granted the motion on 27 January 2022.⁴ The case was reassigned to the undersigned that same day. (Reassignment Order, ECF No. 38.)

5. Gruber filed the First Amended Complaint on 28 January 2022. Gruber's new complaint added Angie Carmichael, Carmichael Consulting Group, LLC, and Pioneer Pay, LLC as additional Defendants and also sought to add a claim for declaratory judgment arising from the same allegations and to clarify his existing breach of contract claim. (Plaintiff's First Am. Compl., ECF No. 40.)

6. The Court held a hearing on the PI Motion on 8 February 2022 (the "Hearing"), at which all represented parties were represented by counsel.

7. The PI Motion is now ripe for resolution.

II.

FINDINGS OF FACT

8. The Court makes the following findings of fact, which are made solely to decide the PI Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at a trial on the merits.").

⁴ (See Order on Mot. Leave File First Am. Compl. and Add Parties, ECF No. 39.)

9. Gruber and Wright co-own multiple related businesses, including Pionear⁵ and In Clover.⁶ Pionear is a recruiting agency located in Charlotte, North Carolina,⁷ and In Clover was initially created as a holding and investment company but now operates as a staffing company.⁸

10. Gruber and Wright are the sole members and managing partners of Pionear⁹ and entered into Pionear's Operating Agreement (the "Operating Agreement") on 13 March 2003.¹⁰

11. Section 8.1(a) of the Operating Agreement relates to net cash flow distributions to Gruber and Wright and states:

The net cash flow of [Pionear] shall be distributed to the Members¹¹ at such times and in such amounts as determined by the Members; provided, however, that the Company shall, if possible, distribute amounts to the Members annually (pro rata in accordance with their respective Profit-Sharing Percentages) at least sufficient for the Members to pay their federal and state income taxes on their shares of Company income. All cash flow distributions shall be in proportion to the Member's Profit-Sharing Percentages unless all Members otherwise consent.

⁵ (See Aff. A. Brian Wright ¶¶ 3, 7 [hereinafter "Wright Aff."], ECF No. 12.2; First Aff. Jonathan Gruber ¶ 2 [hereinafter "Gruber Aff."], ECF No. 20.)

⁶ (See Second Aff. A. Brian Wright ¶¶ 6, 9 [hereinafter "Second Wright Aff."], ECF No. 18; Second Aff. Jonathan Gruber ¶¶ 4, 8 [hereinafter "Second Gruber Aff."], ECF No. 28.)

⁷ (Wright Aff. ¶ 5.)

⁸ (Second Gruber Aff. ¶ 4.)

⁹ (Wright Aff. ¶¶ 6, 8; see Gruber Aff. ¶ 2.)

¹⁰ (Wright Aff. ¶ 4; see Operating Agreement of Pionear [hereinafter "Operating Agreement"], ECF No. 12.3.)

¹¹ All references to "Member(s)" in the Operating Agreement apply to Gruber and Wright as the only members and managers of Pionear.

(Operating Agreement 8–9.)

12. Section 9.5 of the Operating Agreement concerns the payment of compensation to Gruber and Wright and states, in relevant part: “No Member shall receive a salary or otherwise be compensated for his personal services to [Pioneer] unless such compensation is approved by all of the Members.” (Operating Agreement 10.)

13. After working successfully with one another for over twenty years, the business relationship between Gruber and Wright began to deteriorate in the fall of 2021.¹² As relations frayed, the parties began taking actions—including taking distributions and/or salary payments, making payments to third parties, limiting access to each other’s accounts, paying expenses related to affiliated and non-affiliated companies, and cancelling credit cards and reducing credit card limits—that the other party contends violate the Operating Agreement.¹³

14. Gruber made payments from the Pioneer account to Gruber’s personal account as follows: (i) \$20,660.00 on 5 October 2021; (ii) \$10,000.00 on 1 November 2021; (iii) \$10,000.00 on 3 December 2021; (iv) \$10,000.00 on 7 December 2021; and (v) \$10,000.00 on 9 December 2021.¹⁴ (Wright Aff. ¶ 25 (c)–(d), (l), (p), (r).)

¹² (See Wright Aff. ¶ 16; Gruber Aff. ¶ 3.)

¹³ (See Wright Aff. ¶ 25; Second Wright Aff. ¶¶ 15–16; Second Gruber Aff. ¶ 15.)

¹⁴ The parties dispute whether these and other payments to Gruber’s personal accounts constitute “net cash flow distributions” under Section 8.1(a) or “salary” or other compensation under Section 9.5. The Court need not resolve that dispute to resolve the PI Motion.

15. On 3 January 2022, Gruber caused Pionear to transfer \$1,230,000.00 of its funds to an In Clover account and thereafter, acting for Pionear, caused In Clover to transfer \$500,000.00 of those funds, plus an additional \$10,000.00, to Gruber's personal account. (*See* Wright Aff. ¶ 25(x); Second Wright Aff. ¶¶ 11, 15–16.)

16. Gruber has asserted that, unless he is enjoined, he will continue to make net cash flow distributions to himself without Wright's approval of their timing and amount.¹⁵

17. Wright contends that Gruber's payments to his personal accounts, all made without Wright's approval or consent as to timing and amount, constitute breaches of Sections 8.1(a) and 9.5 of the Operating Agreement.¹⁶ As a result, Wright seeks to enjoin Gruber from: (i) making any net cash flow distributions to himself without Wright's consent as to timing and amount and (ii) paying himself a salary or otherwise compensating himself without Wright's consent.¹⁷

¹⁵ (*See* Pl. Jonathan Gruber's Br. Opp'n Def. A Brian Wright's Mot. Preliminary Injunction 8–9 [hereinafter "Gruber's Opp'n"], ECF No. 29.)

¹⁶ (*See* Def./Countercl. Pl.'s Mem. Supp. Mot. Preliminary Injunction 6 [hereinafter "Wright's Br."], ECF No. 12.1.)

¹⁷ In his Motion and at the Hearing, Wright argued that Gruber had also breached Sections 9.1, 9.2(d), and 9.3(c) of the Operating Agreement, entitling Wright to enjoin Gruber from (i) with certain limited, identified exceptions, causing anything to be done on behalf of Pionear under Section 9.2 without Wright's consent and (ii) holding in trust funds transferred by Pionear on or after 2 October 2021 to any account owned or controlled by Gruber. By email to the Court and Gruber's counsel dated 15 February 2022, Wright's counsel advised that Wright had withdrawn these requests for injunctive relief.

III.

CONCLUSIONS OF LAW

18. BASED UPON the foregoing FINDINGS OF FACT, the COURT makes the following CONCLUSIONS OF LAW:

19. “The purpose of a preliminary injunction is ordinarily to preserve the status quo[.]” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400 (1983) (quoting *State v. School*, 299 N.C. 351, 357–58 (1980)). When seeking a preliminary injunction, the moving party must show (i) a “likelihood of success on the merits” and (ii) that the moving party is “likely to sustain irreparable loss unless the injunction is issued, or[.]” that an injunction “is necessary for the protection of [the moving party’s] rights during the course of litigation.” *Id.* at 401 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)); *see also* N.C. R. Civ. P. 65; N.C.G.S. § 1-485. The issuance of a preliminary injunction “is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities[.]” *id.* at 400 (quoting *State v. School*, 299 N.C. at 357–58), but it cannot be issued “unless the movant carries the burden of persuasion as to each of these prerequisites[.]” *Air Cleaning Equip., Inc. v. Clemens*, 2016 NCBC LEXIS 199, at *17 (N.C. Super. Ct. April 29, 2016).

20. To prove irreparable loss or injury,

it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law.

A.E.P. Indus., Inc., 308 N.C. at 407 (quoting *Barrier v. Troutman*, 231 N.C. 47, 50 (1949)).

21. Wright and Gruber acknowledge that the Operating Agreement is a binding and valid contract. *See, e.g., N.C. State Bar v. Merrell*, 243 N.C. App. 356, 370 (2015) (“An operating agreement is a contract[.]”). To sustain a claim for breach of contract under North Carolina law, a plaintiff must prove “the ‘(1) existence of a valid contract and (2) breach of the terms of that contract.’” *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 39, at *10 (N.C. Super. Ct. June 19, 2019) (quoting *Poor v. Hill*, 138 N.C. App. 19, 26 (2000)).

22. As noted above, Wright seeks to enjoin Gruber from making distributions and salary or other compensation payments to himself in amounts and at times for which Wright has not provided the required consent. Wright argues that Gruber has repeatedly breached the express requirements of Sections 8.1(a) and 9.5 by not obtaining Wright’s consent for these distributions and payments and that preliminary injunctive relief is necessary to protect Wright from Gruber’s ongoing disregard of Wright’s voting rights under the Operating Agreement. (Wright’s Br. 6.)

23. Gruber makes a textual argument in response. Section 8.1(a)’s requirement that “the net cash flow of the Company shall be distributed to the Members at such times and in such amounts *as determined by the Members*” (emphasis added) differs from Section 9.5’s requirement that “[n]o Member shall receive a salary or otherwise be compensated for his personal services to the Company unless such compensation is *approved by all of the Members*” (emphasis added). Based on that difference,

Gruber argues that Section 8.1(a) should be read to permit one Member, not require both, to provide the required determination or approval.¹⁸

24. Applying ordinary rules of contract interpretation,¹⁹ the Court concludes that the relevant provisions of Section 8.1(a) and 9.5 are unambiguous, that Gruber's suggested reading of those provisions cannot be supported by the contract's plain language, and that the only reasonable interpretation of these two sections is that the payments described by each cannot be made without the agreement of both parties as to the payment of salary or other compensation and the timing and amount of net cash flow distributions from Pionear.

25. Because the record evidence demonstrates that Gruber made numerous transfers to his personal account from Pionear and In Clover accounts, either as net cash flow distributions or as salary or other compensation, from October 2021 to January 2022 totaling at least \$570,660.00 without, in the case of net cash flow distributions, Wright's agreement as to timing and amount, and, as to salary or other compensation, Wright's approval, the Court concludes that Wright has established a likelihood of success on his claim that Gruber has breached Sections 8.1(a) and 9.5 of the Operating Agreement.

26. The evidence in the record is also clear that, unless enjoined, Gruber will continue to breach these provisions and cause Wright irreparable harm by

¹⁸ (See Gruber's Opp'n 9.)

¹⁹ See, e.g., *759 Ventures, LLC v. GCP Apt. Investors, LLC*, 2018 NCBC LEXIS 82, at *12 (N.C. Super. Ct. Aug. 13, 2018) ("Because the Operating Agreement is a contract, ordinary rules of contract interpretation apply.").

prohibiting Wright from exercising his contractual rights under the Operating Agreement to participate in management decisions through his consent or veto of distributions and salary or other compensation. *See, e.g., Emrich Enters., LLC v. Hornwood, Inc.*, 2020 NCBC LEXIS 45, at *27 (N.C. Super. Ct. Apr. 8, 2020) (“When a member of an LLC seeks to enforce its own rights under the LLC’s operating agreement, not the rights of the LLC, in an effort to remedy its own injury, that member has standing to bring its direct breach of contract claim.”); *Bennett v. Bennett*, 2019 NCBC LEXIS 19, at *15 (N.C. Super. Ct. Mar. 15, 2019) (“[T]he right to vote on company matters is a right possessed by the individual member, and the infringement of that right is an individual injury properly the subject of a direct claim.”); *759 Ventures*, 2018 NCBC LEXIS 82, at *10 (recognizing the right to vote on management decisions as a direct claim). The Court concludes that Gruber’s continued breach of Sections 8.1(a) and 9.5 are injuries to which Gruber “should not be required to submit or [Wright] permitted to inflict, and [are] of such continuous and frequent recurrence that no reasonable redress can be had in a court of law,” *A.E.P. Indus., Inc.*, 308 N.C. at 407.

27. The Court further concludes that a preliminary injunction enjoining Gruber’s further breach is necessary to protect Wright’s voting rights during this litigation and that this potential harm to Wright from Gruber’s continued breach outweighs the harm to Gruber from an injunction precluding his further breach of these provisions.

28. Accordingly, the Court concludes, in the exercise of its discretion, that Gruber should be restrained and enjoined from transferring distributions and salary or other compensation into his personal accounts from either Pionear or In Clover's²⁰ accounts, without Wright's consent or approval, in accordance with Sections 8.1(a) and 9.5 of the Operating Agreement.

29. The Court next considers an appropriate bond. "The trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant no material damage, and where the applicant for equitable relief has considerable assets and is able to respond in damages if the [enjoined party] does suffer damages by reason of a wrongful injunction." *Red Valve, Inc. v. Titan Valve, Inc.*, 2018 NCBC 31A, at *42 (N.C. Super. Ct. April 17, 2018) (quoting *Stevens v. Henry*, 121 N.C. App. 150, 154 (1995)) (cleaned up).

30. Having carefully considered the evidence of record and the briefs and arguments of counsel, the Court, pursuant to Rule 65(c), and as a condition of this

²⁰ The parties agreed at the Hearing that should the Court conclude that Gruber should be enjoined from making distributions and compensation payments without Wright's consent under sections 8.1(a) and 9.5 of the Pionear Operating Agreement, Gruber should be enjoined from making such withdrawals from both Pionear's and In Clover's accounts. The Court is aware, however, that In Clover has a separate Operating Agreement, which contains an arbitration provision, and that Gruber has filed a motion seeking to partially stay proceedings and compel arbitration of Wright's claim for monetary and injunctive relief based on Gruber's alleged wrongful transfer of \$500,000.00 from an In Clover account to his personal account. (Mot. Partially Stay Proceedings and Compel Arbitration [hereinafter "Mot. Partially Stay and Arbitrate"], ECF No. 26.) The Court has scheduled a hearing on Gruber's motion for 8 March 2022, (Notice of Hearing and BCR 9.3 Case Management Conference [hereinafter "Notice of Hearing"], ECF No. 43), and reserves the right to reconsider this Order's extension to In Clover's accounts should the Court's resolution of Gruber's motion make that reconsideration appropriate.

Order, concludes, in the exercise of its discretion, that a bond of \$20,000.00 is a proper security, without prejudice to either party's right to request that the amount of the bond be increased or decreased for good cause shown.

31. **WHEREFORE**, based upon the foregoing **FINDINGS** of **FACT** and **CONCLUSIONS** of **LAW**, the Court **GRANTS** the PI Motion, and it is hereby **ORDERED**, in the exercise of the Court's discretion, that pending final resolution of this civil action, and unless and until otherwise ordered by this Court:

- a. Gruber is hereby **RESTRAINED** and **ENJOINED**, during the pendency of this action, from making future distributions of net cash flow to himself from accounts owned or controlled by Pionear or In Clover without Wright's consent as to the timing and amounts of such distributions.
- b. Gruber is hereby **RESTRAINED** and **ENJOINED**, during the pendency of this action, from receiving salary or other compensation for services provided to Pionear or In Clover without Wright's approval.²¹
- c. Pursuant to the provisions of Rule 65(c), and as a condition of this Order, Wright shall post security in the amount of \$20,000.00 in the form of cash, check, surety bond, or other undertaking satisfactory to the Cabarrus County Clerk of Superior Court; and

²¹ The Court's order is without prejudice to any rights Gruber may have to be paid salary or other compensation from Pionear or In Clover under federal and state wage and hour laws.

- d. The terms and conditions of this Order shall be in force and take effect immediately upon Wright's posting of security as provided herein.

SO ORDERED, this the 17th day of February, 2022.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge