

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VENABLE LLP
Thomas E. Wallerstein (SBN 232086)
twallerstein@venable.com
Amit Rana (SBN 291912)
arana@venable.com
Antonia I. Stabile (SBN 329559)
aistabile@venable.com
101 California Street, Suite 3800
San Francisco, CA 94111
Telephone: 415.653.3750
Facsimile: 415.653.3755

Attorneys for Defendants
Julian Michalowski, Malante Hayworth,
Joshua Ginsberg, Steven Loeb
and Jason Loeb

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

LMAJ, LLC, a Delaware limited liability
company,

Plaintiff,

v.

JULIAN MICHALOWSKI, an individual;
MALANTE HAYWORTH, an individual;
JOSHUA GINSBERG, an individual; and
STEVEN LOEB, an individual; and
JASON
LOEB, an individual; and, DOES 1,
through
100,

Defendants.

Case No. 30-2021-01221102-CU-MC-CJC
Assigned to: Hon. Linda Marks, Dept. C-25

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S EX PARTE APPLICATION
FOR TEMPORARY RESTRAINING
ORDER**

Date: September 20, 2021
Time: 1:30 p.m.
Dept.: C-25

Action Filed: September 15, 2021
Trial Date: None

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
I. FACTUAL BACKGROUND.....	1
II. ARGUMENT.....	3
A. This Court Lacks Jurisdiction.....	3
B. Plaintiff Cannot Obtain Injunction Because It Has Not Established Imminent Or Irreparable Harm.....	4
1. The Bridge Loan Preserves The Status Quo Whereas The TRO Would Cause Irreparable Harm.....	4
2. The Sale Is Not Imminent.....	5
3. Any Harm Is Speculative And Plaintiff Offers No Evidence.....	5
4. Any Harm Is Not Irreparable.....	5
C. Plaintiff Has No Likelihood Of Success On The Merits.....	6
1. Defendants Have Not Breached Any Fiduciary Duties.....	6
2. Plaintiff Will Not Be Harmed By The Loan.....	7
III. CONCLUSION.....	7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Julian Michalowski, Malante Hayworth, Joshua Ginsberg, Steven Loeb, and
3 Jason Loeb (collectively, “Defendants”) oppose the application for a temporary restraining order
4 made by Plaintiff LMAJ, LLC (“Plaintiff” or “LMAJ”), and its beneficial owners Adam Bierman
5 and Andrew Modlin.

6 **I. FACTUAL BACKGROUND**

7 Many of plaintiff’s facts are dead wrong; others are simply misleading. Defendants do
8 not attempt to point out all of them on this expedited briefing.¹

9 Plaintiff LMAJ and Defendants are members of Coastal Holding Company, LLC
10 (“Coastal” or the “Company”). Michalowski Decl. ¶¶ 2-3. Plaintiff LMAJ’s members are (1)
11 Andrew Modlin; (2) Adam N. Bierman and Laura N. Bierman, as Co-Trustees of The Bierman
12 Trust; and (3) Adam N. Bierman and Laura N. Bierman, as Co-Trustees of The Bierman 2018
13 Irrevocable Trust. *Id.* ¶ 3. Adam Bierman is the designee of LMAJ and serves as a member of
14 the Board of Managers of Coastal. *Id.* There are no majority equity holders in Coastal. *Id.* ¶ 4.
15 Every member including each Defendant is a minority owner. *Id.*

16 On or about November 1, 2018, Kimberly Jones, an owner of Coastal, made a loan to
17 Jamaba Properties, LLC in the amount of \$4,000,000 (“Jones Loan”). *Id.* ¶ 5. The Jones Loan
18 was not personally guaranteed by anyone else. *Id.*

19 **Plaintiff And Defendants Agree To Sell The Company**

20 In or around April 2021, Mr. Bierman, at the behest of Coastal, worked with a third-party
21 consultant, MarVista Partners (“MVP”) to shop Coastal to potential buyers. *Id.* ¶ 8. At least
22 three offers were obtained. *Id.* The best offer was for \$55 million. *Id.* Coastal entered into a
23 term sheet with the prospective buyer, but the buyer cancelled the transaction after a period of
24 due diligence. *Id.*

25 During a Coastal Board of Managers meeting on May 3, 2021, Plaintiff through Mr.
26 Bierman vehemently expressed his opinion that Coastal was days away from failing to remain an

27 _____
28 ¹ For example, Plaintiff declines to mention that it actually agreed to fund the Company \$5 million but defaulted on that obligation, requiring the Company to raise additional funds on much less favorable terms than LMAJ had committed to. Declaration of Julian Michalowski (“Michalowski Decl.”) ¶¶ 6-7.

1 ongoing concern. *Id.* ¶ 9. He indicated it was necessary to go back to all the potential buyers
2 from the first round and be willing to reduce Coastal’s asking price. *Id.* The Board agreed, and
3 Mr. Bierman worked with MVP to secure new offers. *Id.*

4 **Plaintiff Finds, Negotiates And Recommends The Current Offer**

5 A new offer was secured by Mr. Bierman and MVP from a buyer to purchase Coastal for
6 even more, not less; specifically, for \$56.2 million (the “Current Offer”). *Id.* ¶ 10. Only Mr.
7 Bierman and MVP negotiated the terms of the Current Offer on behalf of Coastal, not any of the
8 Defendants. *Id.*

9 During a Coastal board meeting on June 22, 2021, Plaintiff presented the term sheet
10 affiliated with the Current Offer to the Board and called it a “great offer.” *Id.* ¶ 11. Mr.
11 Bierman, as a manager of Coastal, made the motion to accept the Current Offer and move
12 forward with the transaction; his motion passed unanimously. *Id.* Andrew Modlin, Plaintiff
13 LMAJ’s co-owner, indicated that two other parties were involved in working towards purchase
14 offers of Coastal, but the Current Offer was the best option available. *Id.*

15 On the strength of Plaintiff’s recommendation, Coastal accepted the terms of the Current
16 Offer and began working with the buyer towards drafting the appropriate documents to
17 effectuate the transaction. *Id.* ¶ 12.

18 **Plaintiff Determines To Interfere With And Nullify The Current Offer**

19 The term sheet for the Current Offer contained an exclusivity clause, in which Clause
20 was not to “encourage, initiate or take part in any discussion” with a third party about selling
21 Coastal, while working with the buyer. *Id.* ¶ 13. Despite the exclusivity clause, Mr. Bierman
22 reported that he had obtained a “backup offer” for the purchase of Coastal. *Id.* ¶ 14.

23 After learning further details, each of the Defendants determined that Mr. Bierman’s
24 proposal was far inferior to the Current Offer and not in the Company’s interest. *Id.* ¶ 15.
25 Defendants rejected Mr. Bierman’s suggestion and reminded him that Coastal was under an
26 exclusivity restriction. *Id.* ¶ 16.

27 Ever since Defendants (and, therefore, Coastal) rejected Mr. Bierman’s “backup offer,”
28 Plaintiff has engaged in any practice and maneuver he can think of to prevent the Current Offer

1 from reaching a successful conclusion. *Id.* ¶ 17. This includes speaking negatively about the
2 Current Offer, and presenting false accusations to Coastal partners and stakeholders. *Id.*

3 **The Company Negotiates An Emergency Bridge Loan To Stay In Business Pending Sale**

4 Based on Plaintiff’s repeated statements about the dire financial condition of Coastal,
5 Defendant Michalowski sought a \$1 million short term loan from the buyer, as a way to bridge
6 the financial obligations of Coastal until the signing of the transaction documents. *Id.* ¶ 22. The
7 buyer was willing to extend the offer on largely favorable terms to Coastal, including a 1%
8 annual interest rate on a non-securitized loan. *Id.* Such a low interest rate generally is not
9 available anywhere, and especially in the cannabis space. *Id.*

10 The bridge loan will be used to pay existing debt, most of which accrues at a higher rate
11 of interest. *Id.* ¶ 25. \$640,000 of the \$1 million is intended to pay overdue tax liabilities to the
12 IRS. *Id.* None of the \$1 million bridge loan is intended to personally benefit any Defendant over
13 the interest of the Company. *Id.*

14 The proposed terms of the bridge loan were disclosed to the Board and a board resolution
15 was circulated to approve entry into this bridge loan on September 14, 2021. *Id.* ¶ 23. Four of
16 the five board members voted in favor; Mr. Bierman abstained. *Id.* With majority and
17 unanimous approval (Mr. Bierman abstaining), the Board approval met the requisite majority
18 vote requirements set forth in the Coastal Operating Agreement. *Id.*

19 **II. ARGUMENT**

20 A TRO or preliminary injunction “is an extraordinary power, and is to be exercised
21 always with great caution” *City of Tiburon v. Nw. Pac. R. Co.*, 4 Cal.App.3d 160, 179
22 (1970) (quoting Joyce on Injunctions § 109). “The power, therefore, should rarely, if ever, be
23 exercised in a doubtful case.” *Id.* “The right must be clear, the injury impending and threatened,
24 so as to be averted only by the protective preventive process of injunction.” *Id.* (internal
25 quotation marks removed). Plaintiff does not come close to meeting this standard.

26 **A. This Court Lacks Jurisdiction**

27 On September 19, 2021, Defendants filed a notice of removal in and to the United States
28 District Court for the Central District of California based on diversity of citizenship. *See*

1 Declaration of Thomas E. Wallerstein, at ¶ 2. On September 20, 2021, Defendants filed a notice
2 to this Court and to Plaintiff of the removal. *Id.* The filing of Defendants’ notice “shall effect
3 the removal and the State court shall proceed no further unless and until the case is remanded.”
4 28 U.S.C. § 1446(d). Respectfully, this Court lacks jurisdiction to enter any relief in this action.

5 **B. Plaintiff Cannot Obtain Injunction Because It Has Not Established Imminent**
6 **Or Irreparable Harm**

7 To obtain a TRO, or preliminary injunction, Plaintiff carries the heavy burden of
8 establishing with admissible evidence that it will suffer irreparable injury if an injunction is not
9 issued. *See Costa Mesa City Employees’ Assn. v. City of Costa Mesa*, 209 Cal.App.4th 298, 306
10 (2012). This requirement is fundamental to the Court exercising “the rather extraordinary
11 power” to issue a TRO or preliminary injunction. *Tahoe Keys Property Owners’ Ass’n. v. State*
12 *Water Resources Control Board*, 23 Cal.App.4th 1459, 1471 (1994).

13 A temporary restraining order is intended only to preserve the status quo pending the
14 noticed hearing of an application for preliminary injunction. *Costa Mesa City Employees*, 209
15 Cal.App.4th at 305. Here, the TRO would radically disrupt the status quo whereas denying the
16 TRO would preserve it. And although Plaintiff would suffer no irreparable harm if the
17 injunction is denied, Defendants would suffer grievous irreparable harm if the TRO was granted.

18 **1. The Bridge Loan Preserves The Status Quo Whereas The TRO Would**
19 **Cause Irreparable Harm**

20 The bridge loan will be used to repay existing debt, so it has no negative impact on the
21 Company. Michalowski Decl. ¶ 25. Defendants have submitted evidence that the loan “will be
22 used to pay existing debt, most of which accrues at a higher rate of interest. \$640,000 of the \$1
23 million is intended to pay overdue tax liabilities to the IRS. None of the \$1 million bridge loan is
24 intended to personally benefit any Defendant over the interest of the Company.” *Id.* In fact, the
25 bridge loan just swaps creditors on \$1 million of debt, but at a much more favorable interest rate.
26 *Id.* ¶¶ 22; 24. Plaintiff submits no evidence, because there is none, that the loan would alter the
27 status quo in any negative way.

28 Conversely, the Company will be irreparably harmed if the bridge loan is enjoined.

1 Failure to obtain the bridge loan could mean the failure of the Company. *Id.* ¶ 26. The Company
2 urgently needs the bridge loan to pay large debts which are maturing or overdue; the inability to
3 pay these debts with the bridge loan would be devastating to the Company. *Id.* Without the
4 bridge loan, the Company will likely be unable to continue to get products from its vendors
5 needed to keep the business running. *Id.* In fact, Plaintiff itself has repeatedly expressed
6 concern that Coastal will not survive without an immediate capital infusion. *Id.* ¶¶ 21, 9.

7 Enjoining the sale would be similarly devastating. *Id.* ¶ 28. Should the sale documents
8 not be signed, even though closing is likely many months away, it is likely that Defendants might
9 never be able to sell the company to anyone else. *Id.*

10 **2. The Sale Is Not Imminent**

11 The bridge loan in no way “locks up” the contemplated sale. *Id.* ¶ 27. To the contrary,
12 the bridge loan note expressly provides that neither the Company nor the prospective buyer is
13 required to sign the deal documents. *Id.*

14 While the Current Offer is expected to be ready for signing in or about September 2021,
15 the actual closing of the transaction is contingent on regulatory approval. *Id.* ¶ 29. Closing
16 therefore likely will not occur for at least six months, and possibly up to twelve months, due to
17 the complex nature of transferring multiple regulated licenses associated with the business. *Id.*

18 **3. Any Harm Is Speculative And Plaintiff Offers No Evidence**

19 Plaintiff offers no evidence of any better deal such that the proposed sale would damage
20 Plaintiff. Plaintiff offers no evidence of any harm, much less irreparable harm. “To qualify for
21 preliminary injunctive relief plaintiffs must show irreparable injury, either existing or threatened.
22 To satisfy this requirement it is incumbent upon the plaintiff to present evidence.” *Loder v. City*
23 *of Glendale*, 216 Cal.App.3d 777, 782-83 (1989) (internal quotation marks and citation omitted).

24 **4. Any Harm Is Not Irreparable**

25 Plaintiff offers no evidence that any better deal exists for the Company; even if it did,
26 then the value of that better deal minus the value of the Defendants’ intended deal would
27 precisely quantify Plaintiff’s alleged damages. Injunctions are inappropriate where the plaintiff
28 has adequate remedies at law in the form of monetary redress. *See Triple A Machine Shop, Inc.*

1 *v. State of Cal.*, 213 Cal.App.3d 131, 138 (1989).

2 **C. Plaintiff Has No Likelihood Of Success On The Merits**

3 A TRO or preliminary injunction must not issue unless it is “reasonably probable that the
4 moving party will prevail on the merits.” *Costa Mesa City Employees*, 209 Cal.App.4th at 309.

5 **1. Defendants Have Not Breached Any Fiduciary Duties**

6 Plaintiff’s claim that Defendants breached any duties is frivolous. It was Plaintiff, not
7 Defendants, who recommended, found, and negotiated the Current Offer. Michalowski Decl. ¶¶
8 7-10. Plaintiff recommended the Board accept what it called a “great offer,” and Plaintiff
9 expressly acknowledged that there was no better alternative. *Id.* ¶ 11. It was only on the
10 strength of Plaintiff’s recommendation that Coastal accepted the Current Offer and began
11 working with the buyer towards drafting documents to effectuate the transaction. *Id.* ¶ 12.

12 The majority shareholder duties cited by Plaintiff are inapplicable because there is no
13 majority shareholder; all Defendants are minority shareholders, too. *Id.* ¶ 4. That Defendants
14 together may own a majority of shares does not make them majority shareholders.

15 In any event, Defendants’ and Coastal’s agents have spent countless hours negotiating the
16 best deal possible for Coastal, including making the details of the Current Offer as favorable to
17 Coastal as possible. *Id.* ¶ 18. All five defendants believe that the Current Offer remains the best
18 reasonably available alternative for the Company. *Id.* ¶¶ 18-19. The only evidence to the
19 contrary is the objection of a single disgruntled member who is trying to blow up the deal.

20 California like all jurisdictions adopts a business judgment rule which provides “a
21 judicial policy of deference to the business judgment of corporate directors in the exercise of
22 their broad discretion in making corporate decisions.” *Gaillard v. Natomas Co.*, 208 Cal.App.3d
23 1250, 1263 (1989) (internal quotation marks and citations omitted).

24 The business judgment rule “immunizes directors for their corporate decisions that are
25 made in ‘good faith ... to further the purposes of the [LLC], are consistent with the [LLC’s]
26 governing documents, and comply with public policy.” *Coley v. Eskaton* (2020) 51 Cal.App.5th
27 943, 953 (internal quotation marks and citations omitted). It also “insulates from court
28 intervention those management decisions that meet the rule’s requirements.” *Id.* (internal

1 quotation marks and citations omitted).

2 Here, the Board – including Plaintiff – voted unanimously to pursue the Current Offer.
3 That remains the Company’s best alternative and Plaintiff’s ipse dixit is insufficient to establish
4 any breach of duty. Even if there is another potential sale available, it is a legitimate business
5 judgment to take the proverbial bird in the hand versus Plaintiff’s speculation about two in the
6 bush, especially in this context where the Company could fail should it change course now.

7 Further, Plaintiff was kept well informed of everything. Plaintiff’s brief and declaration,
8 though largely false, evidences the transparency that Plaintiff was provided. For example, Mr.
9 Bierman attended board meetings in which updates to the Board on the transaction have occurred
10 on August 10, 16, 25, 27 and September 3, 9, and 15. Michalowski Decl. ¶ 20.

11 **2. Plaintiff Will Not Be Harmed By The Loan**

12 Plaintiff seeks to enjoin Defendants from having the Company agree to the bridge loan
13 based entirely on Plaintiff’s speculation as to how the loan will be used. Plaintiff submits no
14 evidence, because there is none, that the loan would harm it in any way. The evidence as to how
15 the loan will be used is uncontested; it will be used to repay existing debt, but at a more
16 favorable interest rate, so it has no negative impact on the Company. *Id.* ¶¶ 22, 25.

17 **III. CONCLUSION**

18 Respectfully, this Court lacks jurisdiction. To the extent this Court exercises jurisdiction,
19 Plaintiff’s application should be denied.

20 Respectfully submitted,

21
22 Dated: September 20, 2021

VENABLE LLP

23
24 By: 
Thomas E. Wallerstein