DISTRICT OF MINNESOTA

NUBAI GLOBAL INVESTMENT LIMITED, Plaintiff, v. THOMAS CLARKE, Defendant.	Case No. 18-CV-2228 (PJS/DTS) MEMORANDUM

David E. Potter and Jaipat Singh Jain, LAZARE POTTER GIACOVAS & MOYLE LLP; Douglas L. Elsass, Benjamin C. Johnson, and Sarah B. Riskin, NILAN JOHNSON LEWIS PA, for plaintiff.

Gilbert R. Saydah Jr. and Alan R. Arkin, CKR LAW LLP; David Bradley Olsen, Stuart T. Williams, and Benjamin J. Hamborg, HENSON & EFRON, P.A., for defendant.

Plaintiff Nubai Global Investment Limited ("Nubai") is the sole member of Chippewa Capital Partners, LLC ("Chippewa"). Chippewa, in turn, is the sole member of Mesabi Metallics Company LLC ("Mesabi"), which is engaged in developing a massive iron-ore mining project in northern Minnesota.

Defendant Thomas Clarke was the CEO and a member of the boards of directors of both Chippewa and Mesabi. Clarke was also the owner of a small minority interest in Chippewa. After various disputes arose between the parties, Clarke sold his minority stake in Chippewa to Nubai as part of an attempt to settle their differences.

That attempt was unavailing, however. After continued recriminations between the parties, Clarke announced that he was removing the Nubai-aligned members of the Chippewa and Mesabi boards. The next day, Nubai removed Clarke from his positions at Chippewa and Mesabi. Contending that Nubai's action was illegitimate, Clarke continued to hold himself out as the companies' CEO and as the only remaining member of the companies' respective boards, and Clarke continued to give direction to the employees of the companies. In response, Nubai filed this action seeking declaratory and other relief against Clarke, and simultaneously filed a motion seeking a preliminary injunction. The Court conducted a hearing on the motion on August 10, 2018, and, immediately after the hearing, entered an order granting the motion. This memorandum memorializes the Court's reasoning.

I. BACKGROUND

As noted, Mesabi is engaged in developing an iron-ore mining project in northern Minnesota. Oram Decl. ¶ 5. Mesabi was formerly known as Essar Steel Minnesota LLC ("Essar"). *Id.* In July 2016, Essar filed for Chapter 11 bankruptcy protection. *Id.* In mid-2017, Clarke partnered with Nubai to acquire the reorganized bankruptcy estate using Chippewa as a financing and acquisition vehicle. Clarke Decl. ¶ 9. After various machinations, Nubai owned 95 percent of the membership units of Chippewa, with the remaining 5 percent being owned by Clarke and another

individual. Oram Decl. Ex. 1 (November 3, 2017 amended and restated member unit sale agreement).

A dispute later developed between Nubai and Clarke concerning whether Nubai had met its obligation to make its full capital contribution to Chippewa. Oram Decl. Ex. 2 at 2-3 (Exit and Settlement Agreement describing background of dispute). Clarke contended that this alleged default triggered an automatic reduction of Nubai's ownership interest in Chippewa and the automatic removal of one of the Nubai-aligned directors from Chippewa's and Mesabi's boards. Oram Decl. Ex. 2 at 3. Nubai denied these allegations and contended that it had met its capital-contribution obligation by a mixture of cash, assumption of liabilities, and asset contributions. Oram Decl. Ex. 2 at 3.

The parties eventually agreed that Nubai would buy out Clarke's minority interest in and become the sole member of Chippewa. Oram Decl. Ex. 2 at 3. The parties executed an Exit and Settlement Agreement ("Exit Agreement") to effectuate the sale of Clarke's membership units to Nubai.[1] Oram Decl. Ex. 2. Under the Exit Agreement, Clarke remained the CEO and a board member of both Chippewa and Mesabi, "subject to his right to resign from any of these positions at any time and Nubai's right as unit-holder to remove him from such positions[.]" Oram Decl. Ex. 2

[1]According to the Exit Agreement, by the time the parties settled their dispute, the minority interest in Chippewa was held by Merida Natural Resources, LLC ("Merida") (a Clarke-owned entity) and ENCECO, Inc. ("a nominal interest-holder aligned with Clarke"). Oram Decl. ¶ 6 & Ex. 1 at 1-2.

at 3. The Exit Agreement left in place Nubai's existing obligation to make specified capital contributions to Chippewa. Oram Decl. Ex. 2 at 3. Nubai also agreed to contribute to paying the expenses of ERPI, another Clarke-owned entity.[2] Oram Decl. Ex. 2 ¶ 4.4(e).

Nubai's purchase of the remaining membership units in Chippewa closed on or about May 30, 2018. Oram Decl. Ex. 2 at 4 (defining "Closing Date"). On June 1, Clarke (acting in his capacity as CEO of Chippewa) signed and delivered a membership certificate to Nubai attesting that Nubai owned all of the Chippewa units. Oram Decl. ¶ 7 & Ex. 3. Clarke also updated Chippewa's member-interest register to reflect Nubai's sole ownership of Chippewa. Oram Decl. ¶ 8 & Ex. 4. Finally, on June 3, Timothy Dixon, an attorney for Clarke and other Clarke-related entities (including the sellers of the Chippewa membership units), confirmed in writing that Nubai owned all of the membership units in Chippewa. Oram Decl. ¶ 9 & Ex. 5. Thus, the record could not be clearer that, as of June 1, 2018, Nubai alone owned Chippewa; at that point, Clarke had no ownership interest whatsoever.

[2]Clarke asserts that Nubai purchased 50 percent of ERPI in 2017, but Nubai apparently denies this. Clarke Decl. ¶ 7.

The Exit Agreement provides that Nubai has the right to amend and restate the Chippewa and Mesabi operating agreements "into a form acceptable to Nubai[.]"[3] Oram Decl. Ex. 2 § 4.4(h). A few days after becoming the sole owner of Chippewa, Nubai executed Chippewa's Third Amended and Restated Limited Liability Company Agreement ("the Chippewa operating agreement") and caused Chippewa to execute Mesabi's Amended and Restated Limited Liability Company Agreement ("the Mesabi operating agreement") (collectively, "the operating agreements"). Oram Decl. ¶ 10 & Exs. 6, 7. Under both of the operating agreements, the members holding an aggregate of more than 75.1 percent of the interest in one of the companies have the power to remove any director or officer of that company. Oram Decl. ¶¶ 12-13; *id.* Ex. 6 at 7 (defining "Special Majority Approval") & ¶ 7.3(a); *id.* Ex. 7 at 7 (defining "Special Majority Approval") & ¶ 7.3(a).

Unfortunately, the Exit Agreement did not put an end to Clarke's and Nubai's seemingly endless disputes. Just a few weeks after the execution of the Exit Agreement, Clarke sent Nubai a notice of default, claiming that Nubai had failed to comply with its obligation to pay ERPI expenses and demanding that Nubai cure the default. Clarke Decl. Ex. 3. Two days later, Mesabi wrote to Clarke, accusing one of his entities of

[3]The operating agreement of a limited liability company generally governs the company's activities, the relations among the members of the company, and the rights and duties of the company's managers and governors. Minn. Stat. § 322C.0110, subd. 1.

defaulting on its obligation to effectuate the transfer to Mesabi of the equity interest in a third entity. Clarke Decl. Ex. 4 at 4. Ten days later, Nubai wrote to Clarke and his entities, denying that Nubai was in default and reiterating the default alleged in the Mesabi letter. Clarke Decl. Ex. 4 at 1-3. A few weeks later, Clarke sent Nubai a second notice of default that also disputed the default alleged by Mesabi. Clarke Decl. Ex. 5.

Shortly after Clarke sent the second notice of default, Nubai informed him that it intended to replace him as the CEO of Chippewa and Mesabi. Oram Decl. ¶ 15. Clarke initially indicated that he would resign, but on July 22, Clarke sent out a notice in which he claimed that he had removed the "Nubai directors"—that is, all of the board members except himself—from the Chippewa and Mesabi boards.[4] Oram Decl. ¶¶ 15-16 & Ex. 8.

The next day, on July 23, Nubai and Chippewa exercised their respective authority under the Chippewa and Mesabi operating agreements to remove Clarke from all positions at Chippewa and Mesabi. Oram Decl. ¶¶ 19-20 & Exs. 9, 10. Notwithstanding this action, Clarke has continued to claim to act on behalf of

[4]As part of the Exit Agreement, one of the Clarke-aligned board members resigned from the Chippewa and Mesabi boards and was apparently not replaced, leaving four remaining members (including Clarke) on each board. *See* Oram Decl. Ex. 2 § 4.3(c); Clarke Decl. Ex. 1 ¶ 7.3(a) (then-governing Chippewa operating agreement stating that Chippewa's board has no more than five members); Clarke Decl. Ex. 2 ¶ 7.3(a) (then-governing Mesabi operating agreement stating that Mesabi's board has no more than five members).

Chippewa and Mesabi. He has represented to others—including the employees of Chippewa and Mesabi, the Governor of the State of Minnesota, the Itasca County Attorney, and the media—that he remains the CEO and sole director of Chippewa and Mesabi. Oram Decl. ¶¶ 24-26, 31 & Exs. 12, 13. After Mesabi's general counsel advised Clarke that his removal was valid and enforceable, Clarke cut off her access to Mesabi's computer and email systems and sent her a notice suspending her from her position.[5] Oram Decl. ¶ 23. Clarke has also continued to give direction to employees and has informed them that he is "working to sell the Nubai forfeited equity to a highly credible replacement investor." Oram Decl. ¶ 35 & Ex. 14. In response to these actions, Nubai filed this lawsuit on July 31. Nubai now seeks a preliminary injunction to restrain Clarke's conduct.

II. ANALYSIS

A. Standard of Review

A court must consider four factors in deciding whether to grant a preliminary injunction: (1) the movant's likelihood of success on the merits; (2) the threat of irreparable harm to the movant if the injunction is not granted; (3) the balance between that harm and the injury that granting the injunction will inflict on the other parties; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir.

[5]Clarke asserts that he has now reinstated Mesabi's general counsel and restored her access to the Mesabi computer and email systems. Clarke Decl. ¶ 35.

1981). Preliminary injunctions are extraordinary remedies, and the party seeking such relief bears the burden of establishing its entitlement to an injunction under the *Dataphase* factors. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

Clarke contends that Nubai bears a particularly heavy burden in this case because it is seeking to alter the status quo and gain relief similar to that to which it would be entitled after prevailing at trial. *See Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 486 (8th Cir. 1993). In this unusual situation, however, it would be anomalous to characterize Clarke's hostile takeover of Chippewa and Mesabi as establishing the "status quo." Even if a heightened standard applies, however, Nubai has satisfied it.

B. Likelihood of Success on the Merits

Nubai contends that it is likely to succeed on its claim for a judgment declaring that Clarke's attempt to remove the other members of Chippewa's and Mesabi's boards of directors, and his refusal to comply with his own removal from Chippewa and Mesabi, are unauthorized and invalid. The Court agrees.

Clarke bases his claim that he had the power to remove the other directors on § 7.3(d) of the companies' operating agreements. Those provisions state that "[i]f any Director fails or ceases to be qualified as a director of the Company under any applicable laws, rules or regulations . . . such Director shall immediately resign or be

removed from the Board." Oram Decl. Ex. 6 ¶ 7.3(d); *id.* Ex. 7 ¶ 7.3(d). According to Clarke, the other directors were no longer qualified to serve because, as a result of Nubai's various contractual breaches, they had a conflict of interest between their duties as directors of Chippewa and Mesabi and their allegiance to Nubai.

The Court doubts that this alleged conflict of interest even exists, much less that it would cause any director to "cease[] to be qualified . . . under any applicable laws, rules or regulations." (At oral argument, Clarke was unable to identify any such law, rule, or regulation.) But even if removal of a director was justified, the operating agreements do not grant *Clarke*—either in his capacity as CEO or in his capacity as a director—any power to remove a fellow director.[6] Instead, the operating agreements clearly vest the power to remove directors in the companies' members. Moreover, as Nubai points out, Minnesota law[7] prohibits individual board members from acting on behalf of a limited liability company and explicitly provides that "the board acts only through an act of the board[.]" Minn. Stat. § 322C.0407, subd. 4(1)(i), (ii). Clearly, then,

[6]It is worth noting that, even if Clarke had such power and had validly removed the other directors on July 22, the removal of those directors would not have prevented Nubai's and Chippewa's exercise of their membership rights to remove Clarke on July 23.

[7]Both of the operating agreements are governed by Minnesota law. Oram Decl. Ex. 6 ¶ 16.11; *id.* Ex. 7 ¶ 16.10(a).

Clarke's purported removal of the other members of the Chippewa and Mesabi boards had no legal effect.

In contrast, Nubai, as the sole member of Chippewa, unambiguously has the power to remove any Chippewa officer or director. Oram Decl. Ex. 6 at 7 (defining "Special Majority Approval") & ¶ 7.3(a). Likewise, Chippewa, as the sole member of Mesabi, unambiguously has the power to remove any Mesabi officer or director. Oram Decl. Ex. 7 at 7 (defining "Special Majority Approval") & ¶ 7.3(a). On July 23, Nubai and Chippewa exercised their rights to remove Clarke from all of his positions with Chippewa and Mesabi.

Clarke argues that, because Nubai is in breach of the Exit Agreement, it cannot enforce the terms of that agreement against Clarke. *See, e.g.*, *VFS Financing, Inc. v. Falcon Fifty LLC*, 17 F. Supp. 3d 372, 379 (S.D.N.Y. 2014) ("Under New York law, a party's performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach." (citation and quotations omitted)).[8] But Nubai's removal of Clarke was not an attempt to compel Clarke to perform his obligations under the Exit Agreement (or, for that matter, under any other contract). Instead, it was an exercise of Nubai's membership rights in Chippewa and Chippewa's membership rights in

[8]The Exit Agreement is governed by New York law. Oram Decl. Ex. 2 § 15.

Mesabi—rights granted to Nubai and Chippewa under the companies' operating agreements, not under the Exit Agreement. Clarke is not a party to the Exit Agreement or the operating agreements; obviously, then, Nubai is not forcing Clarke to perform any obligation under any of those agreements.

Clarke also argues that Nubai has anticipatorily repudiated the Exit Agreement by refusing to comply with its capital-funding obligation[9] and by repudiating the releases that it granted to Clarke and Clarke-related entities under that agreement. *See* Clarke Decl. Ex. 4 at 2. Under New York law, when a party anticipatorily repudiates a contract, the nonrepudiating party can elect to rescind the contract. *Smith v. Tenshore Realty, Ltd.*, 31 A.D.3d 741, 742 (N.Y. App. Div. 2006). Theoretically, therefore, if Clarke (or his entities) had rescinded the Exit Agreement—and if Clarke is correct that Nubai's alleged pre-settlement breaches had reduced Nubai's ownership interest in Chippewa—it is possible that the return of the parties to the pre-Exit Agreement status quo could have deprived Nubai of the ability to remove Clarke from Chippewa and Mesabi.

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[9]Nubai denies that the Exit Agreement incorporates its capital-funding obligation. Nubai seems to have a point. The Exit Agreement *recites* the existence of that obligation, *see* Oram Decl. Ex. 2 at 3, but Clarke has not pointed to any language in the Exit Agreement that affirmatively *imposes* the capital-funding obligation as part of the consideration for that agreement. Even if Nubai anticipatorily breached its capital-funding obligation, therefore, it is doubtful that the breach would give Clarke the right to rescind the Exit Agreement (even setting aside the complication that Clarke is not a party to the Exit Agreement).

But Clarke does not contend that he has in fact rescinded the Exit Agreement, much less explain how he could have rescinded a contract to which he is not a party. None of the notices that Clarke or his entities sent to Nubai and the Nubai directors purported to rescind the Exit Agreement; to the contrary, the first two notices demanded that Nubai cure its alleged breaches and meet its contractual obligations, *see* Clarke Decl. Exs. 3, 5, and the final notice announced that Clarke intended to sue Nubai and its affiliates for the alleged breaches, *see* Oram Decl. Ex. 8 at 4. In addition, even if Clarke had effectively rescinded the Exit Agreement, he does not explain how that would have given him the authority to remove the other Chippewa and Mesabi directors.

Clarke also contends that discovery might reveal evidence that he was fraudulently induced to enter into the Exit Agreement and that he may be entitled to rescind that agreement. Again, however, Clarke does not explain how he would have a right to rescind an agreement to which he was not a party. More fundamentally, Clarke has not given the Court any reason to believe that his predictions about what discovery might reveal are anything more than speculation. Under the circumstances of this case, Clarke's speculation does little to counter Nubai's strong showing of a likelihood of success.

Finally, Clarke argues that, because Nubai is in breach of the Exit Agreement and the operating agreements, Nubai has unclean hands and is therefore not entitled to equitable relief. The Court is not in a position to determine whether Clarke's accusations that Nubai has breached these contracts has any merit. Even if Nubai is in breach, however, that does not automatically bar its ability to exercise its membership rights under the operating agreements. Under both Minnesota and New York law, the doctrine of unclean hands only applies when a party is guilty of bad faith or unconscionable conduct. *See All Finish Concrete, Inc. v. Erickson*, 899 N.W.2d 557, 565-66 (Minn. Ct. App. 2017) (Minnesota law); *PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) (New York law). In this case, both sides have accused each other of various breaches of their complicated web of agreements—and, at least at this stage, the Court sees no evidence that the parties' dispute is the result of bad faith or unconscionable conduct on Nubai's part. The Court therefore concludes that Nubai has established a strong likelihood of success on its claim for a declaratory judgment.

C. Irreparable Harm, Balance of Harms, and the Public Interest

The Court also concludes that the remaining factors weigh heavily in favor of granting Nubai's motion. Clarke's rash acts have deprived Nubai of control over its business during a critical period and have thrown the status of Mesabi—and the massive mining project that Mesabi is pursuing—into chaos. *See Tau, Inc. v. Alpha*

Omicron Pi Fraternity, Inc., No. 12-3141 (JRT/JSM), 2013 WL 5340904, at *14 (D. Minn. Sept. 23, 2013) ("[L]oss of control of a corporation can constitute irreparable harm.").

Among other things, Mesabi is involved in negotiations with its noteholders and must coordinate with state and county officials regarding the mining project. Mesabi is also involved in important litigation and is responsible for critical environmental reporting. Clarke's actions have interfered with Nubai's ability to participate in and make time-sensitive decisions in these matters. Clarke has also represented to outsiders (including public officials and the news media) that he is in control of the companies. Such representations threaten Nubai's credibility and goodwill with the public, governmental officials, and the company's stakeholders. In addition (and of greatest concern to Nubai), Clarke has stated that he is trying to sell Nubai's equity to another investor—although he now volunteers that he will not do so without the Court's permission.

In contrast to the certain harm facing Nubai, Clarke has not identified any concrete harm that he personally will suffer. Clarke focuses on Nubai's alleged breaches of contract and fiduciary duties to Chippewa and Mesabi, as well as on the harm that those breaches may cause to employees of the entities and others. But these are not harms to *Clarke*; Clarke sold his stake in Chippewa and no longer has any equity interest in the companies. Although he asserts that he has provided millions of dollars'

worth of funding to the companies and has only been partially reimbursed, it is unclear whether he considers himself a creditor or is otherwise entitled to any further reimbursements or remuneration from them. Setting that aside, any connection between an injunction restraining Clarke from operating the companies and a threat of harm to Clarke himself is attenuated, as it is based on the notion that Clarke will be a better steward of the companies than Nubai will be—something that the Court cannot possibly determine on the present record. In contrast to this speculative harm, Nubai is currently suffering the direct and irreparable harm of loss of control over its business.

Finally, the public interest clearly favors issuance of an injunction. Mesabi is involved in an important mining project in which there is a strong public interest. The confusing and chaotic status quo is untenable, and that status quo was caused when Clarke abruptly asserted control over Chippewa and Mesabi based on a farfetched claim of right. Given Nubai's clear showing of a likelihood of success and the clear threat of irreparable harm, it is in the public interest to put an end to the confusion and give back control of the companies to their owner during the pendency of this case. For these reasons, the Court has granted Nubai's motion for a preliminary injunction. *See* ECF No. 57.

Dated: August 17, 2018

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge