IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SOLSTICE DISTRIBUTION, INC.	)	**CASE NO. CV 11 758790**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
KEVIN DEBERNARDI, *et al.*	)	**JOURNAL ENTRY**
	)	
Defendants.	)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

Plaintiff Solstice Distributors, Inc.[1] filed its verified complaint on June 30, 2011. Solstice asserted that it and defendant Kevin B. DeBernardi were the two members of defendant Equinox Espresso, LLC. The complaint includes causes of action for breach of an oral operating agreement, breach of fiduciary duty, breach of a partner's duty to provide access to information, and conversion. A separate cause of action for breach of a commercial lease was brought against the corporate defendant Equinox Espresso, LLC, only. Solstice also seeks an accounting and a judicial dissolution and winding up of the limited liability company.[2]

Defendant DeBernardi then filed a counterclaim against Solstice that alleged unjust enrichment, fraudulent misrepresentation, breach of contract, and conversion. DeBernardi also filed a third party complaint against Joseph Deinhart, the sole shareholder of Solstice

[1] The named plaintiff is Solstice Distribution, Inc. However, trial evidence actually Solstice Distributors, Inc. Therefore, the plaintiff will be referred to here as Solstice Distributors, Inc.

[2] The complaint alleges that Equinox is a limited liability company with two members. However, the plaintiff brings some of its claims under Ohio Revised Code Chapter 1776, the Ohio Uniform Partnership Act. (Counts 3 and 4 of the complaint are captioned as being brought pursuant to Revised Code Sections 1744.44 and 1744.43. Because there are no such sections of the Ohio Revised Code, it appears the plaintiff is actually referring to 1776.44 and 1776.43.)

Distributors, Inc. The third party complaint includes the same causes of action as the counterclaim.

A bench trial began November 7. After all of the evidence was presented, the plaintiff's claim for breach of an oral lease against DeBernardi[3] and the three conversion claims by the plaintiff against DeBernardi,[4] by DeBernardi against the plaintiff,[5] and by DeBernardi against Deinhart[6] were dismissed on motion. The trial concluded on November 10 and this entry follows.

STATEMENT OF THE FACTS

Three witnesses testified at the trial: Kevin DeBernardi, Joseph Deinhart and Richard W. Sheehan, a member, with Solstice Distributors, Inc., of a separate company called Solstice Coffee Roasters, LLC.[7] Plaintiff's exhibits 1 through 4, 6 through 8, 10, 12, 13, 15 through 17, 19 through 23, 30, 31, and 86, and defendants' exhibits A through J, M through P, AA and CC were admitted into evidence.

Joe Deinhart and Kevin DeBernardi became friends when they both worked at the Ground Round restaurant in 1987. By 2008, Deinhart was the owner of Solstice Distributors, Inc., a company that provides coffee brewing equipment and supplies to restaurants and other institutions. Solstice also services its customers' coffee machines. At the same time, DeBernardi was an unemployed electrical engineer with persistent health problems who was working part-time at Potpourri, a fondue restaurant.

While Solstice focused primarily on selling coffee and servicing coffee machines, Deinhart observed that some coffee customers also used espresso machines that needed

[3] Count II of the complaint.
[4] Count V of the complaint.
[5] Count IV of the counterclaim.
[6] Count IV of the third-party complaint.
[7] All references in

servicing. He decided then that a company able to service espresso machines would be complementary to Solstice. Around November, 2008, he approached DeBernardi with a proposal to begin such a business. DeBernardi agreed and Equinox Espresso, LLC was formed.

Despite DeBernardi being an electrical engineer with some experience servicing plastic blending machines, in order to be qualified to service espresso machines he was required to take training offered by the machines' manufacturers. He began that training in the early part of 2009.

By then, the parties still had not formalized their business arrangement with a written operating agreement or other written contract. As Deinhart testified, the agreement was "loosey goosey" at that point. Ultimately, no written operating agreement was ever made.

However, Equinox Espresso, LLC, was incorporated by Deinhart, with assistance from a hired attorney, by filing articles of organization for a domestic limited liability company with the Ohio Secretary of State on June 4, 2009. The new limited liability company's mailing address was 2432 Lakeside Avenue, Cleveland. That location was already rented by Solstice for its coffee business, so Solstice sub-let a portion of the premises to Equinox, but without a written lease.

Equinox's primary business was servicing espresso machines. Money was earned from fees charged for DeBernardi's labor and a mark-up on any new parts that Equinox was required to buy and then install in its customers machines. Although Deinhart testified that Equinox was not in the business of selling espresso machines because he did not want the risk of unsold inventory, the business did sell some espresso machines. In particular, Equinox agreed to sell machines manufactured by Nespresso.

Until Equinox was self-sustaining, the members agreed that Solstice would provide capital to purchase parts and for other expenses. Besides supplying the working capital, Solstice's role, through Deinhart, was to use its contacts in the hospitality industry to procure leads and customers. DeBernardi's roles, besides doing the repair work, were to develop leads provided by Solstice into actual customers and to find customers on his own.

During the first year of business, until about June, 2010, DeBernardi did not take any monetary distributions from the company as salary. Most of the money the company generated as revenue during that first year went to cover expenses. In the meantime, the parties never came to an agreement on how distributions would be made when there was money to distribute.

DeBernardi estimated that the new company's total revenue in 2009 was between $9,000.00 and $13,000.00. During 2009 no distributions were made to either partner. Additionally, Equinox did not pay rent for its space in Solstice's warehouse.

In the meantime, Equinox's expenses that were not covered by payments from customers for repair work done by DeBernardi were paid by Solstice. Indeed, DeBernardi acknowledged that Solstice "put up the initial $5,500.00 to get Equinox going."[8] Although Deinhart testified that Solstice covered many other Equinox expenses through additional capital contributions, those payments were not proved by a preponderance of the evidence, mostly because documents that can reasonably be inferred to exist that would support the testimony were not produced as evidence. Therefore, based upon the evidence, the court finds that Solstice's distributions to Equinox, which it is entitled to recover as a capital contribution, amount to $5,500.00.

Solstice also made capital contributions in the form of equipment: two espresso machines valued at $2,400.00 and $975.00, for a total contribution of $3,375.00 in equipment.

[8] -mail to Shannon Deinhart.

Additionally, Deinhart testified that Solstice paid a legal fee of $775.00 to incorporate Equinox and supported that testimony with exhibit 8, a bill from attorney Ralph A. Berry, Jr. Adding those figures to the first $5,500 results in capital contributions by Solstice of $9,650 before the value of rent.

The other capital contribution claimed by Solstice which was ongoing is rent. Equinox was first provided space in Solstice's Lakeside Avenue warehouse and then additional office and showroom space in Solstice's new location on St. Clair Avenue. During its existence, from approximately August 2009 through April 2011, Equinox did not pay any rent to Solstice. DeBernardi testified the primary reason that Equinox did not pay rent was that it wasn't receiving any value. He noted that the Lakeside premises were unhygienic and impractical and that the St. Clair office was mostly superfluous because the real work of the company was done at its customers' premises. Deinhart disagreed, testifying that the move from Lakeside to St. Clair was made, in part, on the insistence of DeBernardi, who wanted a sales showroom for Equinox.

Solstice claims that the monetary value of the unpaid rent is equal to $7,360.00 calculated at about $460.00 per month.[9]

It is hard to tell whether Equinox received value equivalent to $460.00 per month for its use of the premises, given the lack of detailed evidence about the square footage of the premises and the proportionate use of the property among Solstice Distributors, Solstice Roasters and Equinox. However, the proposition offered by DeBernardi that there was no value at all to Equinox for its use of Solstice's property is untenable. Additionally, DeBernardi did not proffer evidence about the real value of the space other than zero. Therefore, the only conclusion the court can reach on the evidence is that Equinox did receive, from Solstice as a

[9] The rental calculation apparently begins in January, 2010, and ends in May, 2011.

sub-lessor, value equal to $460.00 per month over the 16 months it occupied Solstice's warehouses. That value should be considered a capital contribution by Solstice to Equinox, bringing Solstice's total contributions to $17,010.

As 2010 began, the business was becoming more stable. DeBernardi was making three to five service calls per week, most of them outside of the Cleveland area. The revenues were generally enough to cover the expenses, limiting the need for additional capital contributions by Solstice. Nevertheless, for the first half of the year, DeBernardi did not take distributions other than to cover expenses.

In the meantime, around March, 2010, Solstice took distributions totaling $4,005.70[10] to pay a bill to Nespresso and to allow Solstice to pay down a credit card that had reached its maximum because it was used to cover earlier Equinox expenses.

Then, on June 11, 2010, DeBernardi began making distributions to himself. In the check register he noted the distributions as being for "weekly wage" or "guaranteed payment."[11] Ultimately, non-expense distributions by DeBernardi to himself totaled $23,900.00.

Although Deinhart testified that from the beginning DeBernardi was never especially communicative, by the spring of 2011 the partners were barely talking and mistrust was great. DeBernardi began working exclusively from his home in Mentor and had Equinox's phone number redirected to his house. Then Deinhart closed Equinox's bank account and opened a new account to which only he had access. DeBernardi and Deinhart could not agree to settle their differences and stay in business, so, in May, 2011, DeBernardi unilaterally filed a

[10] Check No. 1033 for $700.00 and Check No. 1039 for $3,305.70. There is no date on No. 1033 and No. 1039 is dated March 18, 2010.

[11] One payment, Check No. 1067 in the amount of $400.00, was listed as "reimbursement of loan." The payments characterized as "weekly wage" were made through August 13, 2010, and those characterized as "guaranteed

certificate of dissolution of Equinox Espresso, LLC, with the Ohio Secretary of State.[12] He also incorporated a new entity, Opus Espresso, LLC. DeBernardi is the sole member of Opus and he concedes that about 80% of the new company's accounts were Equinox customers. He contends that he had no choice but to start a new company after Deinhart locked him out of Equinox in early May. DeBernardi testified that when he started the new company, he left behind whatever equipment was in Solstice's warehouse but that he did keep an inventory of spare parts for use in his new venture. Equinox also owed accounts payable when the dissolution was filed.

Deinhart testified that assets of Equinox still in Solstice's possession include espresso machines, grinders, and a "gaggle" of old parts. Since DeBernardi left Equinox, Solstice has remained in control of the Equinox bank account.

LAW AND ANALYSIS

The heart of this lawsuit are the members' competing claims for breach of contract and the claim for judicial dissolution. None of these claims can be resolved without first deciding what the terms of the operating agreement were. DeBernardi claims that the members agreed that he was entitled to 60% of the company's revenues after the cost of parts, but before the payment of any other expenses. Deinhart denied that claim in his testimony and Solstice argued that the members never did agree to the priority and percentage of a distribution of the company's revenues so that the return of capital and an allocation of the company's profits and losses must be made under the default provisions of Chapter 1705 of the Revised Code.[13] In

[12] At trial the parties stipulated that it was not reasonably practicable to carry on the business of the company in conformity with its operating agreement, for the purpose of judicial dissolution under R.C. §1705.47, beginning May 10, 2011.

[13] Those provisions are found primarily at R.C. §§1705.09, 1705.10, 1705.11 and 1705.28.

this case, that would mean that the two members are entitled to a *pro rata* share, i.e. 50% each, of distributions after payments to creditors and the return of capital contributions.

Chapter 1705 governs the formation, operation and dissolution of limited liability companies in Ohio. Section 1705.01(J) acknowledges the legality and enforceability of oral operating agreements by defining "operating agreement" as "all of the valid written or oral agreements of the members." An oral operating agreement is a contract and DeBernardi, as the proponent of a breach of contract claim, has the burden of proving the elements of that claim by a preponderance of the evidence. The elements of his breach of contract counterclaim are the existence of a contract, performance by DeBernardi, breach by Solstice, and damage to DeBernardi. *State v. Gatson*, 8th Dist. No. 94668, 2011-Ohio-460, 2011 WL 345944, ¶12.

The evidence does not support DeBernardi's claim for breach of contract. Specifically, DeBernardi did not show by a preponderance of the evidence that the members agreed that DeBernardi was entitled to 60% of Equinox's revenues after the purchase of parts but before all other expenses. There is no question that DeBernardi contributed greatly to any success the company had by doing the majority, if not all, of the day-to-day work. Yet Solstice not only contributed all of the company's initial capital in the form of money and office/warehouse space, but it laid the foundation for success by tapping Deinhart's knowledge of the industry and its participants. So, while it is difficult to conclude with assurance that each member contributed exactly proportionately, it is easy to see that DeBernardi's risk did not so greatly to the point that Solstice would have agreed to give DeBernardi 60% of gross revenues, less only the cost of parts.

Because DeBernardi cannot show the terms of the contract by a preponderance of the evidence, he cannot show the elements of breach and damages, and the court finds in favor of

Solstice on DeBernardi's counterclaim for breach of contract.[14] For the same reasons, and because there was no evidence that Deinhart, individually, was a party to the operating agreement, the court finds in favor of Deinhart on the third-party complaint for breach of contract.[15] At the same time, Solstice admits it cannot prove the terms of the members' operating agreement, so the court finds in DeBernardi's favor on Solstice's breach of contract claim.[16]

The next claim to consider is Solstice's complaint against Equinox for breach of a lease. Like the operating agreement between the members, there was no written lease between Solstice and the limited liability company. Moreover, the paucity of evidence about the terms of any oral lease requires the court to find in Equinox's favor on this claim.[17] However, the court will consider the value of office/warehouse space as a capital contribution by Solstice in connection with the claim for judicial dissolution.

DeBernardi's remaining claims are for unjust enrichment and fraudulent misrepresentation. These claims are asserted against Solstice and Deinhart and are founded on the same allegations. For the unjust enrichment claim, DeBernardi seeks compensation for the benefit conferred upon Solstice and Deinhart by his efforts in building a showroom at Solstice's St. Clair Avenue warehouse. By the fraudulent misrepresentation causes of action, DeBernardi claims that Deinhart, for himself and on behalf of Solstice, fraudulently misrepresented that DeBernardi would "receive compensation for conducting the day to day operations of Equinox Espresso, LLC," and that he relied on that promise by doing the work.[18]

[14] Count III of the counterclaim.
[15] Count III of the third-party complaint.
[16] Count I of the complaint.
[17] Count II of the complaint.
[18] Paragraph 6 of the counterclaim and paragraph 6 of the third-party complaint.

Unjust enrichment occurs where one party confers a benefit on another, with the other's knowledge, under circumstances where it would be unjust for the party getting the benefit to retain it without payment. *Advantage Renovations, Inc. v. Maui Sands Resort Co., LLC*, 6th Dist. No. E-11-040, 2012-Ohio-1866, 2012 WL 1493826, ¶33. Ohio law does not require that the party getting the benefit act improperly in some fashion before an unjust enrichment claim can be upheld; instead, unjust enrichment can result from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain without paying compensation. *Id*.

Putting aside the question of whether DeBernardi's labor in constructing a showroom was, like his other work, expended to further the interests of the limited liability company of which he was a member, he did not prove by a preponderance of the evidence that the showroom constitutes a benefit to either Solstice or Deinhart. Deinhart testified that the showroom was DeBernardi's pet project; a project that, according to Deinhart, was hardly

Solstice paid for most of the materials to build the showroom. Indeed, Deinhart seemed to think that DeBernardi made the showroom mostly because he liked doing that kind of work, not because he thought it would be especially helpful to the prospects of Equinox's success.

conclusion that it constituted a benefit to Deinhart or Solstice since there was no testimony about her alternatives. In the absence of that evidence, the court is left to conclude that it was a minimal benefit at most since she could just as easily have used some other location. The court

therefore finds in favor of Solstice and Deinhart on the counterclaim and third-party complaint for unjust enrichment.[19]

The elements of fraudulent misrepresentation are: a material representation; made falsely, with knowledge of its falsity, or with such utter disregard as to whether it is true or false that knowledge may be inferred; with the intent of misleading another into relying upon it; justifiable reliance by the plaintiff; and damages proximately caused by the reliance. *Burr v. Stark County Board of Comm'rs*, 23 Ohio St.3d 69 (1986), syllabus 2. Given the court's finding that DeBernardi failed to prove a promise by Solstice to give him 60% of gross revenue, after the cost of parts, it is enough to say about this cause of action that DeBernardi failed to put on any evidence that Deinhart, on his own behalf or for Solstice, made any representation, that was false at the time, about when or how much DeBernardi would get paid. Moreover, because this was a new business venture that might not have ever thrived, DeBernardi could never have justifiably relied on any such promise. Accordingly, the court finds in favor of Solstice and Deinhart on DeBernardi's claims for fraudulent misrepresentation.[20]

The court now turns to Solstice's claim that DeBernardi breached his fiduciary duties under R.C. §§1776.44 and 1776.43.[21] By their terms, these statutes create duties that apply only to partners in a partnership formed under R.C. §1776.22, and that section excludes from the definition of partnership any association for-profit that was formed under another section of the Revised Code. In this case, Solstice and DeBernardi formed a limited liability company under Chapter 1705, so the provisions of Chapter 1776 do not apply. Despite that, partnerships and LLCs have enough similarities that the court will consider these causes of action as being

[19] Count I of the counterclaim and Count I of the third-party complaint.
[20] Count II of the counterclaim and Count II of the third-party complaint.
[21] Count III of the complaint, which refers to the non-existent R.C. §1744.44.

made pursuant to R.C. §1705.23 and the common law, which provides that, in general terms, members of a limited liability company owe one another the duties of utmost trust and loyalty. *McConnell v. Hunt Sports Ent.*, 132 Ohio App.3d 657, 689 (10th Dist. 1999). The gist of Solstice's claims is that DeBernardi breached his fiduciary duties to Solstice by giving himself guaranteed payments, moving the office and company records to Mentor, and taking the company's phone number and directing it to his new business.

As for the common law claim, the absence of a written agreement setting forth exactly what the members agreed to concerning the distribution of the company's income compels the court to conclude that DeBernardi did not breach a fiduciary duty merely by taking the payments. Without evidence of an agreed priority and timing of distributions, the court finds that DeBernardi can reasonably have taken the distributions as an advance, if not as a salary. With respect to moving the office and appropriating the phone number, the court notes that the members agree that they were at an impasse as of May 10, 2011 and the business could not be carried on after that date, so that any damages caused by moving the office and taking the phone number would have to be shown to have been incurred before then. No such damages were proven by Solstice, and the court therefore finds in favor of DeBernardi on those claims for breach of partnership duties, with the exception of the claim for return of excess distributions.[22]

Solstice's claim for the return of excess distributions is made under R.C. §1705.23. That statute provides, in pertinent part:

> A member who knowingly receives any distribution or payment made contrary to the articles of organization or the operating agreement of a limited liability company is liable to the company for the amount received by him that is in excess of the amount that could have been paid or distributed without a violation of the articles or the operating agreement.

[22] Counts III and IV of the complaint.

In this case, as noted above, the members were entitled to a 50/50 distribution after expenses and return of capital. Additionally, they never agreed that distributions could be taken at the discretion of one member without consulting the other. Because all of DeBernardi's distributions were contrary to the members' implied agreement he is liable to the company for the return of the entire $23,900 in unauthorized distributions.

Solstice's penultimate claim in the complaint is for an accounting. As a practical matter, the accounting was accomplished through discovery and trial since all of each partner's records and recollections were laid bare. Therefore, this claim is moot and the court will not order relief in favor of one party or the other.[23]

That leaves the plaintiff's request for a judicial dissolution. In the case of a limited liability company, judicial dissolution is governed by R.C. §1705.47. The version of that statute in effect as of May, 2011 provides as follows:

> On application by or for any member of a limited liability company, the court of common pleas may decree the dissolution of that company if it is not reasonably practicable to carry on the business of the company in conformity with its articles of organization and operating agreement.

The decree of dissolution here is easily done because the members have stipulated that as of May 10, 2011 it was not reasonably practicable to carry on the business. Based upon that stipulation – and based upon the court's independent evaluation of the evidence, which supports the stipulation – the court hereby decrees that Equinox Espresso, LLC is judicially dissolved.

After a dissolution is decreed under §1704.47, then §1704.44 allows the court to wind up the affairs of the company, with or without the appointment of a liquidating trustee. Here, the parties, recognizing that the expense of a liquidating trustee is not warranted given the

[23] Count VI of the complaint.

relatively small amount of money at issue, have asked the court to wind up the affairs. In support of that request, the parties entered into evidence all of the available information about the company's assets and liabilities. That evidence includes the post-trial filing by Solstice and Deinhart, on December 1, 2011, of a "notice of Equinox Espresso equipment remaining in the parties' possession."

The first step in winding up a business is marshaling the company's assets. The available evidence of Equinox Espresso, LLC's current assets, excepting the $23,900 that DeBernardi owes back to the company, is the following:

$506.81	Checking account balance as of 08/12/2011[24]
$3,300.00	Post-trial sale of Cimbali M29 espresso brewer[25]
$450.00	Nuevo Simonelli grinder model MCF[26]
$1,200.00	Asta Super brewer SN A990701[27]
$899.00	Nespresso Gemini CS 100 machine[28]
$899.00	Nespresso CS100 machine[29]
$175.00	Nespresso CS20 frother[30]
$550.00	Cimbali grinder[31]
$4,000.00	Spare parts[32]
$1,722.89	Accounts receivable[33]
$13,702.70	Total current assets

Upon identifying the assets, R.C. §1705.46(A) requires that they be distributed first to creditors. Evidence at trial showed that Equinox still has accounts payable totaling $3,148.46.[34] Ordinarily, a liquidating trustee would satisfy those debts from the assets of the dissolved company. However, since the court is the *de facto* liquidator here, the court delegates

[24] Defendant's exhibit J.
[25] Notice of Equinox Espresso equipment remaining in parties' possession.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Defendant's exhibits N, O and P.
[34]

that responsibility and orders Solstice, which is still in control of the checking account, to pay those bills and provide proof of payment to the court and DeBernardi. If Solstice is able to settle any of those bills for less than the current balance, the difference is ordered to remain in the Equinox account until a further order of distribution.

Besides the accounts payable, Equinox Espresso, LLC may have outstanding tax liabilities to federal, state or local governments. Unfortunately, there was no evidence at trial to allow the court to conclude how much, if anything, is owed in this regard. Nevertheless, the payment of taxes has priority over the return of capital contributions and distributions to members. Because the court, as the liquidator, is not equipped to calculate any tax liability, and because all participants are trying to limit the expense of dissolution and liquidation, Solstice and DeBernardi are ordered to confer and agree how to undertake the calculation of any taxes owed. If the services of an accountant, attorney, tax preparer or other professional are needed to make that calculation then the members are ordered to share that expense equally.

Subtracting the accounts payable from the $13,702.70 in assets leaves $10,554.24[35] for distribution according to the priority set forth in R.C. §1705.46. The next in line for payment under that statute are members for "satisfaction of liabilities for distributions."[36] That section is not applicable here because there is no evidence that the operating agreement called for guaranteed distributions to members. Priority then goes to members "for the return of their contributions."[37] Based on the evidence detailed at pages 5 and 6 of this entry, Solstice has made unreimbursed contributions of $13,004.30. Therefore, Solstice is entitled to all of the remaining identified assets totaling $10,554.24, less any taxes owed. Each party is ordered to

[35] Assuming no taxes are owed. If taxes are owed then all subsequent figures have to be adjusted accordingly.
[36] R.C. 1705.46(A)(2).
[37] R.C. 1705.46(A)(3)(a).

liquidate the assets in their possession (with Solstice to collect the accounts receivable[38]) and preserve the proceeds for eventual payment to Solstice, after any taxes owed, as a return of its contributions. The parties must report to the court the details of all sales and the proceeds should go into the Equinox account.

If there were no other assets, the winding up would be done after the collection, sale and distribution of the remaining assets as ordered above, and Solstice would be unable to recover the remainder of its contributions. However, Equinox has an intangible asset: the right to return of the $23,900 in non-expense distributions taken by DeBernardi. That right, as decided above, comes from R.C. §1705.23, which requires the distributions to be returned to the company. However, in this case, the company is dissolved, and any assets left after the payment of creditors and the return of capital contributions will go half to Solstice and half to DeBernardi. Initially, then, the first $2,450.06 of that $23,900 is owed to Solstice for return of the balance of its contributions. Hence, as the first component of relief for DeBernardi's violation of R.C. §1705.23, DeBernardi is ordered to pay Solstice $2,450.06. As the second component of relief under that claim, DeBernardi is ordered to pay to Solstice $10,724.97 as Solstice's half share of the remaining $21,449.94 of DeBernardi's unauthorized distributions.

CONCLUSION

Based on all of the foregoing, the court orders as follows: that Solstice pay Equinox's accounts payable of $3,148.46 using Equinox's current cash assets; that the parties cooperate to agree to the steps necessary to figure out whether Equinox has any unpaid tax liability, and then undertake that process, with Solstice and DeBernardi equally sharing the cost; that Solstice collect and preserve, until a further order of the court, all of Equinox's accounts receivable, and

[38] At its option, Solstice may forgive its own account receivable of $348.58 and take a credit in that amount on return of contributions.

assets in its possession, preserve the proceeds until a further order of the court, and report the amount of those proceeds to the court; that DeBernardi liquidate Equinox's tangible assets in his possession, preserve the proceeds in Equinox's account until a further order of the court, and report the results to the court; and that DeBernardi pay Solstice the total amount of $2,450.06, representing a return of capital contributions.

However, because the remaining amount owed from DeBernardi to Solstice may be more or less than $10,724.97, depending on the amounts received for the assets to be liquidated and any tax liability, no judgment against DeBernardi for the return of the balance of the excess distributions will be entered until the liquidation is complete and the amount of any taxes owed has been calculated and paid from the proceeds of the liquidation. After that, a judgment will be entered against DeBernardi in an appropriately adjusted amount.

Within 75 days of the date of this entry the parties are ordered to accomplish the satisfaction of the accounts payable, the collection and preservation of the accounts receivable, the determination of any tax liability, and the asset liquidation and preservation of proceeds. Further orders will be made thereafter as appropriate.

IT IS SO ORDERED:

_____ Date: _____

SERVICE

A copy of this journal entry was sent by email, this _____ day of May, 2012, to the following:

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