

# EXHIBIT A

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF ERIE : VIRTUAL PROCEEDINGS : PART 22

3 IN THE MATTER OF THE APPLICATION OF  
4 MATTHEW KAVANAUGH, JAMES KAVANAUGH,  
5 and HELEN KAVANAUGH for the,  
6 DISSOLUTION of CONSUMERS BEVERAGES, INC.,  
7 PURSUANT TO BCL 1104-a,

Index #806587/2022

8 Petitioners,

9 - vs -

10 CONSUMERS BEVERAGES, INC.,  
11 CORNELIUS KAVANAUGH, a/k/a NEIL KAVANAUGH,  
12 MARY ELLEN KAVANAUGH, MARTHA KAVANAUGH  
13 and LAWRENCE M. KAVANAUGH, JR.,

14 Respondents.

25 Delaware Avenue  
Buffalo, New York  
January 18, 2023

15 B E F O R E: HONORABLE TIMOTHY J. WALKER,  
16 Acting Supreme Court Justice.

17 A P P E A R A N C E S:

18 HUGH CARLIN, ESQ.  
19 and KEVIN LELONEK, ESQ.,  
20 Appearing virtually for the Petitioners.

21 VINCENT DOYLE, ESQ.,  
22 Appearing virtually for Neil Kavanaugh.

23 STEVE COLE, ESQ.,  
24 Appearing virtually for Martha Kavanaugh.

25 DENNIS GARVEY, ESQ.,  
Appearing virtually for Mary Ellen Kavanaugh.

JAMES MILBRAND, ESQ.,  
Appearing virtually for Consumers Beverages.

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1 PAUL JOYCE, ESQ.,  
Appearing virtually for Kavcon Development LLC.

2 RICHARD VALENTINE, ESQ.,  
3 Appearing virtually for Lawrence M.  
4 Kavanaugh, Jr.

5 ANDREA SCHILLACI, ESQ.,  
Appearing virtually for William E. Mancini  
6 and Semanchin & Wetter, LLP.

7 P R E S E N T:

8 MATTHEW KAVANAUGH, Virtually.

9 LAWRENCE KAVANAUGH, Virtually.

10  
11 THE CLERK: This is the matter of Matthew  
12 Kavanaugh, et al. versus Consumers Beverages, Inc., et  
13 al., index number 806587/2022. Counselors, please state  
14 your appearances for the record.

15 MR. CARLIN: Hugh Carlin and Kevin Lelonek on  
16 behalf of the petitioners.

17 MR. DOYLE: Vincent Doyle on behalf of Neil  
18 Kavanaugh.

19 MR. MILBRAND: Good morning, Your Honor. James  
20 Milbrand on behalf of Consumers Beverages.

21 THE COURT: Mary Ellen?

22 MR. GARVEY: Dennis Garvey here for Mary Ellen.

23 THE COURT: Martha?

24 MR. GARVEY: Steve is on mute.

25 MR. COLE: Steve Cole on behalf of Martha

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1 Kavanaugh.

2 THE COURT: Lawrence?

3 MR. VALENTINE: Richard Valentine on behalf of  
4 Lawrence Kavanaugh.

5 THE COURT: We have a motion to dismiss, motion  
6 four, document 157. Mr. Doyle?

7 MR. DOYLE: Thank you. This is a motion to  
8 dismiss the petition brought for dissolution. As Your  
9 Honor knows, there is quite a plethora of lawsuits and  
10 claims that are made essentially between the Kavanaugh  
11 siblings.

12 What's at issue in this case, in a very unique way,  
13 is an iconic business in Western New York, seventy-five  
14 years old with over two hundred and seventy employees,  
15 Consumers Beverages. And I want to make sure that  
16 Consumers Beverages is at the forefront in the  
17 consideration of this motion, rather than the disputes  
18 between the siblings.

19 Dissolution is a drastic remedy, and I know you're  
20 aware of that, Your Honor. Whether it's statutory, as was  
21 brought, or equity and common law, there are requirements  
22 that the law imposes strictly before the Court may  
23 entertain essentially destroying a well-run business here  
24 in Western New York.

25 Your Honor, knowing you well I know you've read the

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1 materials; I'm not going to belabor them. I'm just going  
2 to make two points and obviously answer any questions that  
3 you have that are outside of those two points.

4 My first point is standing. Matthew and Jim do not  
5 have standing. 1104 says that only shareholders, quote,  
6 who are entitled to vote may present a petition for  
7 dissolution. The share purchase agreement of Consumers,  
8 which is the operative agreement, the one that the  
9 petitioners successfully sought to have the Fourth  
10 Department enforce, which started all of this, that  
11 agreement provides that voting shares can be owned solely  
12 by those shareholders who are employed by the corporation.

13 That agreement further provides that if a shareholder  
14 who is employed ceases to be employed, quote, for any  
15 reason whatsoever, voluntarily or involuntarily, his stock  
16 is -- shares, voting shares, his or her, are redeemed for  
17 non-voting shares.

18 The petition itself indicates, Your Honor, that  
19 Matt's employment was terminated by Consumers in March of  
20 2022. The petition itself indicates that Matt's  
21 employment -- that Jim's employment, James' employment,  
22 was terminated in May of 2022. Therefore, at the time of  
23 the petition, which was filed on June 7th, 2022, both  
24 Matthew and James' employment had been terminated and  
25 their shares, by operation of the share purchase

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1 agreement, were converted to non-voting shares, therefore,  
2 they are not proper plaintiffs or petitioners in this  
3 dissolution action under 1104-a. That's what the petition  
4 says, in addition to the exhibits attached to the petition  
5 which are the -- basically the termination letters and the  
6 other information that's before you.

7 In response, Your Honor, the petitioners say, well,  
8 they remain as officers. We don't dispute that. They do  
9 remain as officers. They were not removed as officers.  
10 But an officer is not necessarily an employee. Sometimes  
11 they are, sometimes they are not. More importantly, the  
12 share purchase agreement does not give officers voting  
13 shares, it gives employees voting shares. They are not  
14 employees, they don't have voting shares, they do not have  
15 standing, therefore, their status should be resolved by  
16 the Court.

17 The second point, Your Honor, is as to the remaining  
18 petitioner who has standing under 1104-a, Helen, her  
19 claims and the claims that the others are pursuing, either  
20 by cross petition or by common law, a dissolution  
21 petition, should be precluded because as a matter of law  
22 there are adequate remedies in other pending actions.

23 Your Honor, the law establishes, both the statute and  
24 the common law, establishes that if there are other means  
25 by which the shareholders' interests can be protected by

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1 the Court, then dissolution is inappropriate. Here we  
2 have a textbook example of when that would be the case  
3 because we have five other pending actions between these  
4 same parties seeking to vindicate the very same rights.  
5 As a matter of law that -- it cannot be the case that  
6 dissolution is the only feasible means to protect these  
7 shareholders when they are actively bringing lawsuits,  
8 brought before the petition, lawsuits to vindicate those  
9 same rights.

10 These other five actions, Your Honor, include claims  
11 for conversion, fraud, breach of fiduciary duty, violation  
12 of the Business Corporation Law, violation of the Labor  
13 Law. These other actions seek money damages against Neil,  
14 an accounting, removal of Neil as director and president.  
15 There is a shareholder derivative action, and there are  
16 individual actions by some of the petitioners seeking to  
17 vindicate all of these rights.

18 And Your Honor, not only are they pursuing these  
19 claims and these remedies in these other lawsuits, but  
20 they are actually scheduled for trial now. Your Honor  
21 ruled when we were last before you about the trial blocks.  
22 All of those claims I just mentioned, brought individually  
23 or as shareholder derivative actions, are all scheduled  
24 for trial in blocks one through three. All claims forming  
25 the basis of this dissolution petition will be adjudicated

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1 long before we get to the dissolution petition, therefore,  
 2 it cannot be necessary for the Court to consider  
 3 dissolution and it cannot be the only feasible means by  
 4 which the shareholders can be protected.

5 Your Honor, this dissolution proceeding is hanging  
 6 over the head of the company like the Sword of Damocles.  
 7 There may be a suggestion that you should put this off  
 8 until trial block four and while the other cases are  
 9 resolved, and I would urge you not to do that. It is  
 10 hanging over the head of the company. It's hanging over  
 11 the head of the employees. The information about this  
 12 dissolution proceeding was available online. Until Your  
 13 Honor sealed certain exhibits and certain pleadings they  
 14 were available, and they're still being transmitted  
 15 online. There were stories in several local media about  
 16 it. In this very tight employment market recruiting new  
 17 employees and retaining existing employees has been  
 18 difficult for the company, and will continue to be  
 19 difficult as long as it's out there that the company might  
 20 be dissolved or could be dissolved or imminently is going  
 21 to be dissolved.

22 The other answer that may be suggested or has been  
 23 suggested, Your Honor, to you is well, Neil can simply buy  
 24 the company or the company can buy the outstanding shares.  
 25 And that's unfair for a couple reasons, Your Honor. First



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1 of all, it ignores the very real legal issues we've  
2 addressed to you in this petition, that this petition  
3 should not be allowed to go forward.

4 Furthermore, under 1104-a and the remainder of the  
5 Business Corporation Law it would skew the value of the  
6 company in terms of the purchase price because it sets a  
7 very specific methodology for determining the purchase  
8 price for an election to buy that is different than the  
9 valuation that is set out in the share purchase agreement  
10 for what should be the method by which shares are  
11 purchased.

12 And Your Honor, the Court of Appeals itself in the  
13 Kemp and Beatley case, which we cited for you, said that  
14 dissolution should never be allowed as a, quote, coercive  
15 tool, end quote, to force a sale or to force some type of  
16 a value for the minority shareholders when it is  
17 inappropriate otherwise under the statute.

18 So Your Honor, for those reasons we urge you to  
19 consider the motion now to dismiss this now for the legal  
20 reasons we set out in our papers. And I would be glad to  
21 answer questions about any of the other aspects. I know  
22 there were other things mentioned in our papers but I  
23 don't want to belabor the point for you, Your Honor.

24 THE COURT: Very good. Mr. Carlin?

25 MR. CARLIN: Thank you, Your Honor. Hugh

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1 Carlin. And Your Honor, I too won't reiterate everything  
2 in our papers, but I do want to highlight a few of the  
3 matters, some of which we'll respond to some of the things  
4 Mr. Doyle raised --

5 THE COURT: Either you need to move closer to  
6 your microphone or speak louder. The court reporter and I  
7 are having a little difficulty hearing you.

8 MR. CARLIN: Let me do both, Judge. I'll move  
9 the microphone closer and I'll talk louder. Is that  
10 better?

11 THE COURT: It is.

12 MR. CARLIN: If at any time you can't hear me, I  
13 know you'll stop me. It would be a waste of everybody's  
14 time.

15 Judge, we look at this case and this dissolution  
16 proceeding obviously very different than Mr. Neil  
17 Kavanaugh and his counsel do. This, to us, is a classic  
18 case that falls right under Kemp and Beatley and the  
19 critical language in Kemp -- the Court of Appeals case in  
20 Kemp versus Beatley.

21 The petition -- and this is a motion to dismiss, and  
22 it was clarified in the reply papers it's a motion to  
23 dismiss under 3211(a)(7), failure to state a claim.  
24 Judge, we have stated a claim, more than a very viable  
25 claim for dissolution. The petition and the materials

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1 before the Court reflect that Neil Kavanaugh is basically  
2 using every weapon in his arsenal to defeat the  
3 expectations of his shareholder -- his sibling  
4 shareholders. Leading up to the Fourth Department and the  
5 petition he employed every tactic to prevent the  
6 shareholders from getting back control of Mary Ellen and  
7 Martha's interest.

8 But Judge, it's even more important -- because at  
9 that time we hadn't filed the dissolution proceeding. We  
10 believed that once we got a ruling from -- from the Fourth  
11 Department, things would move on. But following the  
12 Fourth Department's decision the acts of oppression have  
13 only increased by Mr. Kavanaugh.

14 As you know, Mr. Kavanaugh loaned -- on behalf of  
15 Consumers loaned two million dollars or so to Kavcon so  
16 that Neil could then, under the unauthorized Kavcon, write  
17 himself a check for two point some odd million dollars to  
18 pay himself.

19 THE COURT: And that particular issue is the  
20 subject of its own lawsuit currently scheduled for trial  
21 this year, correct?

22 MR. CARLIN: That's correct, Your Honor. But it  
23 doesn't mean it isn't relevant to the issues of  
24 dissolution.

25 THE COURT: No. No. It's extremely relevant

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1 for the reasons Mr. Doyle pointed out, if there's adequate  
2 relief, otherwise, you don't blow up a corporation or put  
3 in jeopardy the jobs of two hundred plus employees.

4 But let's go back because you started on substantive  
5 and I want to go right to procedural. The claim that two  
6 of the three don't have standing, let's speak to that  
7 right now.

8 MR. CARLIN: Okay. Judge, and again, this is --  
9 this also tees into the oppression, the termination of  
10 Matt and Jim. Matt -- and really we talk of termination,  
11 and of course, the petition acknowledges that these events  
12 occurred, but the petition also alleges very clearly,  
13 Judge, that there was -- those terminations were  
14 unauthorized. In other words, Neil did not have the  
15 authority to terminate Matt or Jim. And he certainly, in  
16 his affidavit, suggests that he terminated them for cause.  
17 At minimum Judge, at minimum issues of fact would exist as  
18 to whether or not Neil Kavanaugh had the authority to  
19 terminate Matt and Jim, and second, whether there was  
20 cause for such termination. We've alleged they aren't,  
21 that there isn't. We've explained the circumstances. For  
22 instance, Neil says he fired Matt because now Matt, as  
23 manager of Kavcon, was working for Kavcon. Judge, for  
24 twenty some odd years Neil Kavanaugh wore both hats,  
25 Consumers Beverages and Kavcon, nobody fired him.

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1 As to Jim, Judge, the timeframe here is -- this is  
2 terminating a forty-year employee, somebody who is a  
3 shareholder with an expectation of employment, over this  
4 ruse of a floor scrubber being picked up so he could  
5 repair it with the approval of the store manager, that  
6 will not equate with termination for cause. So right  
7 there, Judge, are issues that really go the heart of  
8 standing.

9 THE COURT: What if it was without cause,  
10 terminated without cause? Their employment is still  
11 terminated, correct, prior to the commencement of the  
12 action?

13 MR. CARLIN: Judge, we again -- two points on  
14 that. One, Neil Kavanaugh doesn't have authority to  
15 terminate them. Second, he, in his own affidavit, says it  
16 was a termination for cause so that stands his own  
17 testimony upsidedown.

18 THE COURT: But this Court has been presented  
19 with many instances where people thought one thing and the  
20 Court determined another.

21 So let's just start with this, what if the  
22 terminations of employment for both individuals were  
23 without cause? Doesn't that shareholder agreement still  
24 provide that regardless of whether for cause or not  
25 they're out the door, they're no longer in possession of

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1 voting shares, they're converted to non-voting shares and  
2 they had no standing to join in bringing the action in  
3 June? What about that?

4 MR. CARLIN: Two responses, Judge. One,  
5 ultimately Neil Kavanaugh doesn't have the authority to  
6 terminate Matt and Jim under the bylaws. Only the board  
7 of directors can remove officers.

8 THE COURT: No. No. No. Employees. They were  
9 terminated as -- don't conflate for me, please. It's  
10 difficult enough for any reasonable Court to keep all the  
11 claims in these various actions straight so conflating is  
12 not beneficial to this cause.

13 Their employment statuses were terminated, not their  
14 positions -- the officer position has nothing to do with  
15 standing, because I did read the shareholder agreement  
16 many times, including again this morning.

17 MR. CARLIN: Your Honor, the bylaws provide, and  
18 we put this in our papers, I think the Court can review it  
19 further, in the one provision it talks about officers can  
20 only be removed by the board of directors. In another  
21 section of that agreement so that we understand --

22 THE COURT: Let's back this up and try to make  
23 this simple. Was Matt an employee?

24 MR. CARLIN: Matt was an employee.

25 THE COURT: In what capacity was he employed?

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1 MR. CARLIN: Matt was employed -- he worked --  
2 he was involved in various maintenance and overseeing in  
3 connection with Consumers' locations.

4 THE COURT: And at the same time he was an  
5 officer?

6 MR. CARLIN: Yes.

7 THE COURT: He was fired as an employee?

8 MR. CARLIN: He was fired as an employee without  
9 authorization to fire him.

10 THE COURT: Wait. What authorization did Neil  
11 need to fire an employee?

12 MR. CARLIN: Your Honor, if we -- if I can refer  
13 to the bylaws.

14 THE COURT: You're going to talk about lawyers  
15 and officers. I'm not. You just acknowledged he was an  
16 employee of the company. His employment was terminated.  
17 He was a W-2 employee, was he not?

18 MR. CARLIN: Yes, he was.

19 THE COURT: He was a W-2 employee and let go.  
20 And the minute, the nanosecond he was let go, for cause or  
21 otherwise, the shareholder agreement dictated that his  
22 voting shares were exchanged for non-voting shares, he no  
23 longer had standing to commence the action.

24 MR. CARLIN: Your Honor, in this instance the  
25 officers are employees. And if you read the bylaws it's

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1 very clear. If you read section --

2 THE COURT: I did.

3 MR. CARLIN: Article -- if you understand our  
4 argument --

5 THE COURT: I do.

6 MR. CARLIN: And you're free to do with it as  
7 you want.

8 THE COURT: I'm free to look at the record in  
9 this case and determine in what capacity someone's  
10 employment status was terminated, and then draw on the  
11 shareholder agreement and determine whether or not that  
12 person continues on as a voting shareholder.

13 MR. CARLIN: Judge, in order to make those  
14 determinations, because there are factual issues, there  
15 would have to be a hearing.

16 THE COURT: What's the fact issue? Neil  
17 acknowledges I terminated the employment of both Matt and  
18 Jim. Their W-2 status, not their officer status, their  
19 employee status, it ended.

20 MR. CARLIN: Judge, we disagree.

21 THE COURT: Okay.

22 MR. CARLIN: Neil did not have authority to  
23 terminate these officer/employees and he did not have --  
24 and he doesn't have for cause. So Judge, all in that  
25 there are issues of fact.



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1 THE COURT: They're both employees at will,  
2 right?

3 MR. CARLIN: Yes, they are employees at will.

4 THE COURT: Got it.

5 MR. CARLIN: But protected by the bylaws.

6 THE COURT: As you allege.

7 So let's move on to the other petitioner, the  
8 remaining, Helen. Let's talk about the claims because she  
9 obviously has standing. She is, in fact, a voting  
10 shareholder.

11 MR. CARLIN: That's correct, Judge.

12 THE COURT: All right. So now let's talk about  
13 why she does not have adequate remedies in the other  
14 pending actions that are scheduled for trial this year.

15 MR. CARLIN: Judge, the adequate remedies --  
16 first of all, I think it puts the cart before the horse  
17 because the first thing that needs to be demonstrated, and  
18 we have demonstrated, is there are grounds under 1104-a,  
19 sub A -- or sub one. As to the alternative remedies,  
20 Judge, we read that as at a hearing on dissolution should  
21 the Judge decide -- should the Court decide that there's a  
22 basis and a grounds for dissolution that then the Court  
23 must decide is that the only viable method, or are there  
24 other remedies that can be fashioned by the Court to avoid  
25 dissolution, such as buyouts, such as sales, online sales,

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1 things of that nature.

2 Mr. Doyle refers to coercion. Judge, this is not an  
3 attempt to coerce. In fact, in Kemp Beatley it talks  
4 about the use of coercion where the petitioners come in  
5 having unclean hands, having done bad acts themselves.  
6 That's not the case here.

7 What is coercive, and as we've alleged as further  
8 oppression, is his failure to issue tax distributions.  
9 Again, for years up until the Fourth Department's decision  
10 tax distributions were being made to cover shareholders'  
11 tax liabilities. He has stopped that for all  
12 shareholders.

13 THE COURT: Did he have the right to do it?

14 MR. CARLIN: No, he doesn't have the right to do  
15 it.

16 THE COURT: Why not?

17 MR. CARLIN: Because under Kemp Beatley he owes  
18 shareholders a fiduciary duty to treat them fairly. For  
19 years, just as in the Kemp Beatley case, there were tax  
20 distributions issued for every shareholder every quarter.  
21 That has stopped. It's punitive. It's coercive.

22 THE COURT: Let's stop for a second. Let's put  
23 it in perspective. Pot, kettle, black. Once your folks  
24 took over the other entity it was no longer business as  
25 had been usual for thirty-four plus years. I've got

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1 motions on signage, turning off the electricity, charging  
2 rents, insurance issues, all those things that had been  
3 business as usual until the new sheriff arrived and new  
4 management took over at the old Kavcon place.

5 You know, it's -- this time you're arguing this is  
6 unfair and they changed the rules of engagement. Milbrand  
7 and others were arguing it several weeks ago before me on  
8 the other side of the coin. This is a mess, a legal and  
9 family mess. It is a travesty, a travesty to the  
10 employees, to the community and to the family members  
11 themselves that just can't get out of each other's way.  
12 They've had so many years of feeling under a younger or  
13 older sibling's thumb that now it comes to light in not  
14 one, not two, not three, not four, not five, but six  
15 lawsuits with three, six, nine, at least ten, maybe a  
16 dozen lawyers all the way around. This is just the  
17 latest. So there's my backdrop.

18 To hear that this is oppressive, they changed the  
19 rules, they stopped tax distributions, if they had the  
20 ability to do it and they did it, that's one thing.  
21 You're claiming Neil had no authority to stop the tax  
22 distributions, right?

23 MR. CARLIN: Doesn't have it. He doesn't have a  
24 -- Judge, it's unlawful, it's illegal, it's unprecedented.

25 THE COURT: It's criminal?

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1 MR. CARLIN: No.

2 THE COURT: You said illegal. Isn't illegal,  
3 isn't that a criminal term?

4 MR. CARLIN: I'm not suggesting it's criminal,  
5 Judge. Other things he did may be criminal, but that's  
6 for another day.

7 But at any rate, Judge, what I would like to impress  
8 upon you is, first of all, I don't agree with the Court's  
9 characterization that my side -- that my clients have done  
10 to Neil what Neil has done to them.

11 THE COURT: I didn't say they did exactly what  
12 he did, but the theme, the general theme is the same. New  
13 folks in town, we're going to do things our way. Neil  
14 took the position, fine, you don't want me as manager, you  
15 want to take this case to the Appellate Division, I'm  
16 going to use whatever tools are in my shed to do things my  
17 way now.

18 MR. CARLIN: Judge, I would point this out. In  
19 terms of the tax distributions, Kavcon has issued to all  
20 members, including Neil, tax distributions, and has  
21 continued to do that.

22 THE COURT: All right. Tell me why Neil  
23 couldn't stop them. I remember being a partner in a law  
24 firm a hundred years ago where if we didn't get a tax  
25 distribution that was because the management committee

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1 says there's not enough money in the pool or we want to  
2 use it for other things or we don't want to declare one so  
3 you don't get one, use your home equity line of credit,  
4 Partner X, and pay your taxes, your estimating.

5 So show me here what it is about this particular  
6 arrangement that would not allow Neil to do what he did  
7 with respect to tax draws.

8 MR. CARLIN: Judge, I believe -- I'm not sure  
9 they're in the record, we would have to submit them.

10 THE COURT: They should be if you want to oppose  
11 a motion to dismiss.

12 MR. CARLIN: Judge, on a motion to dismiss  
13 looking at the pleadings, it is sufficient.

14 THE COURT: Yes. And your pleading alleges he  
15 didn't have authority to do it, and I'm asking you then  
16 back that up for me. What is it about this particular  
17 relationship or his position with the company that would  
18 not allow him to say, you know what, I'm not doing a tax  
19 distribution anymore?

20 MR. CARLIN: Judge, I would take -- and I would  
21 ask the Court, and hopefully you'll take the motion under  
22 advisement, I would ask you to look at the -- I'm sure you  
23 have looked at it somewhat in advance of this morning, the  
24 Kemp V Beatley because this is exactly the tactics that  
25 were employed by the majority shareholders there. There

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1 had been a history of distributing money through  
2 additional salaries, bonuses, things like that in  
3 distributions.

4 When the two shareholders -- one was terminated, one  
5 resigned. When they left, they changed it and only  
6 continued to pay those that were still working. The Court  
7 of Appeals held that that was oppressive conduct because  
8 those two shareholders could no longer recover anything.  
9 What the other shareholders, the controlling shareholders  
10 had done was to defeat the expectations and there was no  
11 effective means for the shareholders to recover their  
12 investment, their interest in it.

13 THE COURT: So your point is really, Neil paid  
14 himself and others still on the payroll, but he didn't pay  
15 those who were no longer shareholders?

16 MR. CARLIN: No, that's not my point, Judge.

17 THE COURT: Because that sounds like Kemp.  
18 That's what happened in Kemp, right, distributions were  
19 made to existing shareholders but not those who were no  
20 longer? So I thought that was the point you were trying  
21 to make here; Neil is not saying no tax distributions,  
22 he's saying none to certain people. Is that the case? Is  
23 he saying none at all, or none to certain people?

24 MR. CARLIN: We don't know, Judge. He hasn't  
25 provided an explanation, other than I'm advised he hasn't

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1 made them to anyone.

2 The issue is this, Judge, a long-standing policy and  
3 long-standing practice, just as in Kemp V Beatley, has now  
4 been changed so as to cause harm and injury to all of the  
5 shareholders. And Kemp versus Beatley, again, says is  
6 dissolution also in the interest, not only of the  
7 petitioners, but the other shareholders.

8 THE COURT: Pause. Pause. Pause. I didn't  
9 read in Kemp five other lawsuits pending wherein some or  
10 all of the same claims were raised. Did I miss that in  
11 the Kemp case?

12 MR. CARLIN: No, you didn't, Judge.

13 THE COURT: Because all they had was a petition  
14 for dissolution, a dissolution proceeding.

15 MR. CARLIN: That's right, Judge.

16 THE COURT: They didn't have the panoply of  
17 litigation matters that I have.

18 MR. CARLIN: That's correct.

19 THE COURT: So tell me in the other cases  
20 pending before this Court and scheduled for trial how your  
21 clients can obtain some or all of the relief they seek by  
22 way of dissolution.

23 MR. CARLIN: Judge, I disagree that because  
24 there's other cases pending --

25 THE COURT: Now see, now you're avoiding my

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1 question. I asked you a question. You can think it's  
2 irrelevant or I shouldn't be asking it, but here's the  
3 point, I asked it. I need you to answer it, or tell me  
4 you can't answer it.

5 MR. CARLIN: What's missing, Judge, from any of  
6 those, okay, is that we will not -- that we will be  
7 subject to Neil continuing on each action, needing to  
8 bring a new lawsuit. Judge, none of the pleadings discuss  
9 the tax distributions. So now we need a new lawsuit to  
10 bring a claim against him because he's failing to make tax  
11 distributions.

12 THE COURT: No, you don't. You can amend your  
13 pleading or do a Bill of Particulars, or whatever it is  
14 you all do when you increase your damages or add new  
15 claims. You don't need to start another lawsuit. In  
16 fact, I implored counsel not to start any new actions. In  
17 fact, I think I pushed it when Mr. Milbrand was looking to  
18 start another one by order to show cause, or however that  
19 was done. I'm starting to lose track procedurally here  
20 with the number of motions, et cetera, but I basically  
21 said don't do that. Amend, add claims, do whatever you  
22 need to do, but don't start another one.

23 MR. CARLIN: Judge, our position is the -- on  
24 this motion to dismiss under 3211(a)(7) that as -- that  
25 the Court cannot determine as a matter of law that the



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1 petition is not viable, does not state a claim for which  
2 relief can be granted. On that alone the motion should be  
3 denied.

4 The under -- on the underlying -- and Judge, the  
5 comments so far between you and I have not addressed  
6 common law dissolution, which is clearly a viable claim in  
7 New York. And you know, I'll -- what the Court in Kemp  
8 said is a shareholder who reasonably expected that  
9 ownership in the corporation would entitle him or her to a  
10 job, a share of corporate earnings, a place in corporate  
11 management or some other form of security would be  
12 oppressed in a very real sense when others in the  
13 corporation seek to defeat those expectations and there  
14 exists no effective means of salvaging the investment.  
15 That, in a nutshell, is petitioners have the right to  
16 bring this proceeding, this proceeding should not be  
17 dismissed.

18 In terms of the claims of harm and the employees,  
19 Judge, there isn't a single affidavit in front of you,  
20 Judge, nor could there be under a 3211(a)(7) motion as to  
21 any employee quitting their job because of a dissolution  
22 proceeding, as to any employee rejecting an employment  
23 opportunity at Consumers. This has all been presented to  
24 you as argument by counsel, very able counsel I'll add.

25 But as to what the Court can consider, it is not

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1 evidence, it could not be evidence under 3211(a)(7),  
2 Judge. And quite frankly, the interest of the  
3 shareholders are paramount here with the corporation in a  
4 passive group.

5 I understand the attractive argument of protecting  
6 jobs. Nobody's lost a job because of the dissolution  
7 proceeding. And in fact, by allowing it to go down the  
8 road through a hearing and then after the Judge -- after  
9 Your Honor has had an opportunity to evaluate credibility  
10 of the various parties and determine it, a remedy can be  
11 fashioned. That's procedurally where it should be.  
12 Substantively in our view that's the correct result here,  
13 Your Honor.

14 THE COURT: Anybody else want to chime in before  
15 I go back to Mr. Doyle?

16 MR. COLE: Steve Cole here on behalf of Martha.  
17 I would like to briefly add that from the shareholder  
18 expectation standpoint in general for my client and the  
19 other nonemployee shareholders -- there is a lot in  
20 Mr. Doyle's papers about how successful Consumers has been  
21 over time and how there's been growth in both income and  
22 revenues, but for the nonemployee shareholders they've  
23 really seen absolutely no benefit. And given the present  
24 posture of things, it doesn't look as though they're ever  
25 going to see any benefit with the steps that Neil has

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1 taken. That's all I want to say on that.

2 THE COURT: All right. Mr. Doyle?

3 MR. DOYLE: Judge, the only thing I want to  
4 briefly discuss is the tax distribution. So first of all,  
5 that's a relatively recent event. It's not in the  
6 petition so everything that was argued to you is not  
7 mentioned in the petition because it happened after the  
8 petition.

9 As Mr. Carlin said, and I confirm this is outside of  
10 the record, but there was a communication that no one had  
11 been paid tax distributions, and because the taxes are on  
12 extension, and the reason for that, not surprisingly, is  
13 related to these lawsuits, and a legal and accounting  
14 discussion is going on about how they have to be done in  
15 light of the Fourth Department decision, no one has been  
16 paid. So it's not as the Kemp case was, that only certain  
17 shareholders had been paid tax distributions.

18 Furthermore, it points out the fact that, as was just  
19 argued to you by petitioners' counsel, the practice of  
20 paying tax distributions has gone back years, decades. So  
21 to address Mr. Cole's point, that is the only expectation  
22 that is reasonable considering both the share purchase  
23 agreement, the operative document, and the history of how  
24 this company has been run, first by Mr. Kavanaugh, the  
25 father of all these siblings, and now by Neil. The

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1 company has been run the same. So the expectation that  
2 either Mr. Cole's or anyone else's client has that they  
3 want to get some money out of this, well, according to  
4 Kemp that's not an adequate basis for a dissolution. I'm  
5 quoting from Kemp. It says, the majority conduct is not  
6 to be deemed oppressive simply because the petitioners'  
7 subjective hopes and desires in joining the venture are  
8 not fulfilled. Disappointment alone should not  
9 necessarily be equated with oppression.

10 And then, finally, just to wrap up the tax  
11 distributions, as you said, Judge, there is an adequate  
12 remedy for that. If that were actionable in any way,  
13 which we don't think it is, and we think it will be  
14 addressed once everyone figures out how the taxes have to  
15 be done, even if none of that were true they can simply  
16 amend one of the current actions to compel tax  
17 distributions. But none of that justifies dissolution or  
18 having dissolution hanging over the company's ahead.

19 THE COURT: What about the point Mr. Carlin made  
20 with respect to Helen? The remedies, you don't pick --  
21 you don't decide whether now there's an adequate remedy,  
22 first you decide whether or not there should be a hearing  
23 on the dissolution, and if it's determined then that  
24 petitioners have met their burden, then the Court looks to  
25 see if there are adequate remedies, but not on a motion to

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1 dismiss, what about that argument?

2 MR. DOYLE: Well, what I would say on that, Your  
3 Honor, is that is part of the pleading requirement  
4 according to 1104-a, and in the common law situation it's  
5 part of the pleading requirements that it be established  
6 that there is no adequate remedy.

7 And again, I use the word plethora, I think you used  
8 the word panoply, of other lawsuits. If you compare them,  
9 and one of the cases we cited for Your Honor actually  
10 talked about that, comparing the allegations of other  
11 lawsuits to this lawsuit, sort of lining them up, all of  
12 the allegations, all of the claims that are made, the  
13 causes of action and all of the remedies that are sought  
14 are absolutely equivalent to each other. How can  
15 dissolution, therefore, as a matter of law be necessary?  
16 It just isn't, Judge. Thank you.

17 THE COURT: Sure. Mr. Carlin, anything further?

18 MR. CARLIN: No, Your Honor. Nothing further.

19 THE COURT: Anybody else? All right. The  
20 motion's granted as to Matthew and James based on  
21 standing. Their employment relationships were terminated,  
22 whether for cause or otherwise is irrelevant because the  
23 shareholder agreement does not distinguish between the  
24 two. Once the employment ends, so does the voting  
25 shareholding and they're converted to non-voting shares.

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1 As to Helen, while she may have standing, the Court  
 2 finds based on the related lawsuits there are more than  
 3 adequate remedies to a dissolution. And a dissolution,  
 4 number one, under the common law or statute is disfavored  
 5 in New York, especially when there are other ways to  
 6 handle the grievances and/or differences or legal issues.  
 7 And I find in particular on the records, plural, of these  
 8 six pending lawsuits that Helen has more than adequate  
 9 remedies, and dissolution is not one of them.

10 So the motion is granted in its entirety. Standing  
 11 as to Matthew and James, available remedy more than  
 12 adequate as to Helen.

13 Get a copy of the transcript, the entire transcript,  
 14 attach it to the order, Mr. Doyle.

15 MR. DOYLE: I was just going to ask you, were  
 16 all cross petitions and our motion dismissed, the cross  
 17 petitions as well on the same grounds?

18 THE COURT: On the same grounds, yes.

19 MR. DOYLE: Okay. Thank you.

20 THE COURT: So to be clear, the petition for  
 21 dissolution and the cross petition or petitions, plural,  
 22 are all dismissed for the reasons stated.

23 Get the transcript, attach a copy of it to the order,  
 24 upload a proposed order, e-mail the same to me with the  
 25 transcript in a format that can be electronically edited

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and signed.

MR. DOYLE: We will do that, Judge. Thank you.

THE COURT: Any other pending motions? All right. If you make them now understand they won't be decided until March because I'm out. All right. Thank you, everybody. Take care.

\* \* \* \*

I hereby certify that the foregoing 30 pages are a true and accurate transcription, to the best of my ability, of the stenographic notes taken by me virtually on January 18, 2023, in the matter of Kavanaugh -vs- Consumers Beverages, et al., held before the HONORABLE TIMOTHY J. WALKER.

*Carolyn Kerr*

CAROLYN KERR, RPR  
SENIOR COURT REPORTER