

Select Language▼

All State Agencies | All State Services |

## Nebraska Judicial Branch

### Case Summary

In the District Court of Douglas County  
 The Case ID is CI 18 0004138  
 Michael P Sortino v. Brian K Magee Sr  
 The Honorable Gregory M Schatz, presiding.  
 Classification: Receiverships, etc-Other Equity  
 Filed on 05/01/2018  
 This case is Open as of 05/01/2018

### Parties/Attorneys to the Case

Party	Attorney
Plaintiff ACTIVE Michael P Sortino 444 Riverfront Plaza #604  Omaha NE 68102	Daniel P Bracht 128 N. Main Street PO Box 252 West Point NE 68788 402-372-5500
Alias is Upstream Brewing Company LLC Defendant ACTIVE Brian K Magee Sr 1337 South 101 St #1 Omaha NE 68124	Lawrence K Sheehan 9290 West Dodge Road Suite 3 Omaha NE 68114 402-390-0390
Defendant ACTIVE Gary Hoffman 914 Wicklow Road Papillion NE 68046	Kathryn J Derr 1301 S. 75th Street, Suite 1 Omaha NE 68124 402-827-7000
Defendant ACTIVE Upstream Partners LLC 514 South 11th Street Omaha NE 68102	Kathryn J Derr 1301 S. 75th Street, Suite 1 Omaha NE 68124 402-827-7000
Defendant ACTIVE Sortino Asset Management Co LLC Registered Agent: Michael Sortino 444 Riverfront Plz, #1402 Omaha NE 68102	Colin J Bernard 11404 West Dodge Road, Suite  Omaha NE 68154 402-492-9200
Intervenor ACTIVE Upstream Brewing Company LLC	T R Wright 1700 Farnam Street Suite 1500 Omaha NE 68102 402-344-0500

### Court Costs Information

Incurring By	Account	Date	Amount
Plaintiff	Petition	05/01/2018	\$35.00
Plaintiff	Filing Fee - State	05/01/2018	\$1.00
Plaintiff	Automation Fee	05/01/2018	\$8.00
Plaintiff	NSC Education Fee	05/01/2018	\$1.00

Incurring By	Account	Date	Amount
Plaintiff	Dispute Resolution Fee	05/01/2018	\$0.75
Plaintiff	Indigent Defense Fee	05/01/2018	\$3.00
Plaintiff	Uniform Data Analysis Fee	05/01/2018	\$1.00
Plaintiff	J.R.F.	05/01/2018	\$6.00
Plaintiff	Filing Fee-JRF	05/01/2018	\$6.00
Plaintiff	Legal Aid/Services Fund	05/01/2018	\$6.25
Plaintiff	Complete Record	05/01/2018	\$15.00
Plaintiff	Service Fees	05/09/2018	\$5.66
Plaintiff	Service Fees	05/09/2018	\$5.66
Plaintiff	Service Fees	05/09/2018	\$5.66
Intervenor	Service Fees	06/14/2018	\$7.62

### Financial Activity

No trust money is held by the court  
No fee money is held by the court

### Payments Made to the Court

Receipt	Type	Date	For	Amount
296511	Electronic Trans	05/02/2018	Sortino, Michael, P	\$83.00
			Petition	\$35.00
			Filing Fee - State	\$1.00
			Automation Fee	\$8.00
			NSC Education Fee	\$1.00
			Dispute Resolution Fee	\$.75
			Indigent Defense Fee	\$3.00
			Uniform Data Analysis	\$1.00
			J.R.F.	\$6.00
			Filing Fee-JRF	\$6.00
			Legal Aid/Services Fun	\$6.25
			Complete Record	\$15.00

### Register of Actions

07/13/2018 Order

This action initiated by Gregory M Schatz

RE: PLFS Mot for Temp Restraining Order and DEFS Mot to Dismiss / RT  
\*\*SEE ORDER\*\*  
Image ID 001712580D01

07/13/2018 Appearance of Counsel  
This action initiated by party Sortino Asset Management Co LLC  
Re: Sam King & Colin Bernard JB  
Image ID N18194N30D01

06/14/2018 Return Summons/Alias Summons  
The document number is 00543545  
JB  
Served 06/05/2018, Certified Mail  
Image ID N181654P2D01

06/13/2018 Notice-Hearing

6-26-18 This action initiated by group DEFS  
2:00 PM JB  
Image ID N181640KAD01

06/12/2018 Motion-Restraining Order  
This action initiated by party Upstream Brewing Company LLC  
6-15-18 9:00 AM #501 JB  
Image ID N18163T8ED01

06/12/2018 Motion-Restraining Order  
This action initiated by party Upstream Brewing Company LLC  
6-15-18 9:00 AM #501 JB  
Image ID N18163SB8D01

06/06/2018 Answer  
This action initiated by party Brian K Magee Sr

a1  
Image ID N181572SSD01

06/04/2018 Summons Issued on Sortino Asset Management Co LLC  
The document number is 00543545  
Summons-Inverse  
EMAILED: rwright@bairdholm.com  
Image ID D00543545D01

06/01/2018 Praecipe-Summons/Alias  
This action initiated by party Upstream Partners LLC  
as  
Image ID N18152L9MD01

06/01/2018 Complaint-Intervene  
This action initiated by party Upstream Brewing Company LLC

ag  
Image ID N18152KGID01

05/31/2018 Motion-Dismiss  
This action initiated by party Upstream Partners LLC  
JB  
Image ID N18151DR8D01

05/31/2018 Motion-Dismiss  
This action initiated by party Gary Hoffman  
JB  
Image ID N18151DQMD01

05/31/2018 Motion-Dismiss

JB This action initiated by party Gary Hoffman

Image ID N18151DOAD01

05/23/2018 Order

This action initiated by Gregory M Schatz  
RE: Intervene and Add Party GRANTED / RT eNotice Certificate Attached  
not mailed  
Image ID 001686408D01

05/18/2018 Motion-Intervene

filed by Upstream Brewing Co., LLC 5-21-18 9:00 AM #501 JB  
Image ID 001622992D01

05/09/2018 Notice-Hearing

This action initiated by party Michael P Sortino  
Re: App Temp Restrain Order & Temp Inj 5/21/18 9am CR 501 /mg  
Image ID N18129PRCD01

05/09/2018 Application

This action initiated by party Michael P Sortino  
Re: Temp Restrain Order & Temp Injunction /mg  
Image ID N18129PRAD01

05/09/2018 Affidavit-Support of Motion

This action initiated by party Michael P Sortino  
MG  
Image ID N18129PR4D01

05/09/2018 Return Summons/Alias Summons

The document number is 00535698  
MG  
Served 05/05/2018, Certified Mail  
Image ID N18129S0KD01

05/09/2018 Return Summons/Alias Summons

The document number is 00535697  
MG  
Served 05/07/2018, Certified Mail  
Image ID N18129S08D01

05/09/2018 Return Summons/Alias Summons

The document number is 00535696  
MG  
Served 05/07/2018, Certified Mail  
Image ID N18129S00D01

05/02/2018 Summons Issued on Upstream Partners LLC

The document number is 00535698  
Summons e-mailed

Image ID D00535698D01

05/02/2018 Summons Issued on Gary Hoffman

The document number is 00535697  
Summons e-mailed  
Image ID D00535697D01

05/02/2018 Summons Issued on Brian K Magee Sr

The document number is 00535696  
Summons e-mailed  
Image ID D00535696D01

05/01/2018 Praecipe-Summons/Alias

MM This action initiated by party Michael P Sortino  
Image ID N18121P2MD01

05/01/2018 Complaint-Praecipe  
This action initiated by party Michael P Sortino  
Praecipe filed separate MM  
Image ID N18121P2CD01

## Judges Notes

05/21/2018  
05-21-2018 Schatz  
Parties appear by attorneys. Motion to intervene granted. Order to be submitted. By agreement, hearing continued to June 15, 2018 at 9:00 am.  
05/22/2018  
05-22-2018 Schatz  
Signed Order Granting Motion to Intervene and Add Additional Party.  
06/15/2018  
06-15-2018 Schatz  
Parties appear by attorneys. Evidence received on cross applications for temporary restraining orders. Matter submitted on arguments and briefs to be submitted.  
06/26/2018  
06-26-2018 Schatz  
Parties appear by attorneys. Defendant Upstream Partners' and Gary Hoffman's motions to dismiss submitted on arguments. Briefs to be submitted and matter taken under advisement.  
07/12/2018  
07-12-2018 Schatz  
Signed Order (see order for details). Nothing under advisement.

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA**

<b>MICHAEL P. SORTINO, as member of and on behalf of UPSTREAM BREWING COMPANY, LLC., a Colorado limited liability Company,</b>	)	<b>CASE NO. CI 18-_____</b>
	)	
	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	<b><u>COMPLAINT</u></b>
	)	<b>(Equity)</b>
<b>BRIAN K. MAGEE, Sr., GARY HOFFMAN, and UPSTREAM PARTNERS, LLC, a Nebraska limited liability company,</b>	)	
	)	
	)	
<b>Defendants.</b>	)	

COMES NOW the Plaintiff and for his causes of action against the Defendants states and alleges as follows:

**GENERAL ALLEGATIONS AS TO ALL COUNTS**

1. Plaintiff Michael P. Sortino is an individual and resident of Douglas County, Nebraska.
2. The Upstream Brewing Company, LLC., (hereinafter the "Company") is a Colorado limited liability company with its principal business location in Omaha, Douglas County, Nebraska.
3. The Defendant Upstream Partners, LLC., (hereinafter "Upstream Partners") is a Nebraska limited liability company with its principal place of business in Douglas County, Nebraska. At all relevant times herein, Defendant Upstream Partners owned a 50.3800% membership interest in and to the Company.

4. The Defendant Brian K. Magee, Sr., is an individual and resident of Douglas County, Nebraska. At all relevant times herein, Defendant Magee was an individual member of the Company owning a 16.11250% membership interests in and to the Company. At all relevant times herein, Defendant Magee was a member of Defendant Upstream Partners.

5. The Defendant Gary Hoffman is an individual and, upon information and belief, is a resident of Sarpy County, Nebraska. At all relevant times herein, Defendant Hoffman was a member of Defendant Upstream Partners.

6. At all relevant times Plaintiff Michael P. Sortino owned a minority membership interest in and to the Company.

7. Plaintiff, Michael P. Sortino, owns a minority membership interest in and to the Company. Plaintiff is similarly situated with other minority members of the Company, other than Defendant Magee, referred to in paragraph 8 herein below.

8. Upon information and belief, there are persons and entities also owning minority membership interests in and to the Company other than Plaintiff and Defendant Magee. Plaintiff and these remaining minority members are similarly situated in respect to owning minority membership interests in the Company and entitlement to the claims, damages and relief asserted and requested by Plaintiff herein against Defendant Magee, Defendant Hoffman and Defendant Upstream Partners. The minority members other than Defendant Magee owning this remaining 33.5075% of the membership interests of the Company will hereinafter be referred to as the "Similarly Situated Members". Upon information and belief, the following Similarly Situated Members have expressed their desire to affirmatively support and request the relief sought by Plaintiff herein on behalf of the Company: Anna M. Sortino, Marie D. Decker Roth/IRA, John J. Frenking, John J. Frenking and Norreen A. Frenking, Robert S. Howard, Kayla Howard, Lois Jane Meredith, Michael G. Mullin, David Pauley, H. Russell Semm, MD,

Jeffrey J. Tiedeman MD, and Nancy M. Tiedeman, Thomas L. Tiedeman, MD., and Cecilia J. Wortman.

9. Upon information and belief, at all relevant times herein, Defendants Magee and Defendant Upstream Partners owned a combined 66.4925% of the issued and outstanding membership interests in the Company.

10. Defendant Magee was the Manager of the Company at all relevant times herein.

11. Defendant Magee was the Manager of Defendant Upstream Partners at all relevant times herein.

12. At all relevant times herein, the Company owned assets which included real estate located at 514 South 11th Street, Omaha, Nebraska, and fixtures and equipment used in the operation of a brewery and restaurant at that location.

13. The Operating Agreement of the Company expressly prohibits the payment of any management fees to any member of the Company.

14. Upon information and belief, at all relevant time periods herein, Defendant Magee and Defendant Hoffmann were the members of Defendant Upstream Partners.

15. Upon information and belief, at all relevant times Defendant Magee was the majority owner of Defendant Upstream Partners.

16. Defendant Magee caused money of the Company to be wrongfully diverted and paid to Defendant Upstream Partners as a management fee.

17. Defendant Magee has caused money of the Company to be diverted and paid to Defendant Upstream Partners and to himself as distributions when the Plaintiff and Similarly Situated Members did not get paid proportionate distributions.

18. Defendant Magee has caused money of the Company to be wrongfully diverted and paid to Defendant Upstream Partners, to Defendant Magee, and to other entities in which



Defendant Magee and Defendant Hoffman had a financial interest. Defendant Magee purported to record these payments on the books and records of the Company as intercompany loans. At all relevant time periods to these payments, the Company did not own any interest in Defendant Upstream Partners or any other entity to which the funds were being diverted and paid by Defendant Magee, nor did the Company enter into any loans to any of these entities.

19. Defendant Magee has caused money of the Company to be wrongfully diverted and paid to other persons and entities not owned by the Company to satisfy obligations of Defendant Magee, Defendant Hoffman and Defendant Upstream Partners, or other entities in which one or more of them owned an interest.

20. Defendant Magee and Defendant Hoffman borrowed money in the name of Defendant Upstream Partners and used the assets of the Company as security for the repayment of the loans made to Defendant Upstream Partners. Defendant Upstream Partners has defaulted on the payment of the loans, exposing Company assets to be sold for the payment of Defendant Upstream Partner's debt.

21. Defendant Magee has caused the name of the Company to be used in connection with a new entity or entities in which Defendant Magee and Defendant Hoffman owned financial interests, to operate a different restaurant from that owned and operated by the Company.

22. Defendant Magee has caused the credit of the Company to be used in connection with a new entity or entities in which Defendant Magee and Defendant Hoffman owned financial interests, to operate a different restaurant from that owned and operated by the Company.

23. Defendant Magee caused money of the Company to be diverted and paid to Upstream Management Company, LLC., a company owned or controlled by Defendant Magee.

24. Defendant Magee has caused catering and other food and beer brewing services of the Company to be diverted to other entities in which Defendant Magee and Defendant Hoffman

had an ownership or financial interest, thereby competing with and decreasing revenues to the Company and increasing revenue to entities owned by or in which Defendant Magee and Defendant Hoffman have a financial interest.

24. Defendant Magee has caused employees of the Company to provide services for, and work to, entities owned by Defendant Magee or in which Defendant Magee and Defendant Hoffman held a financial interest, other than the Company, all while being paid by the Company.

25. Defendant Magee caused himself and Defendant Gary Hoffman to spend time and work at entities owned by or in which Defendant Magee and Defendant Hoffman held a financial interest other than the Company, all while being paid by the Company.

26. Defendant Magee diverted food and brewery related products from the Company to other entities owned by Defendant Magee or in which Defendant Magee and Defendant Hoffman held a financial interest. Payment for those items has not been made by the entities to which the food and products were diverted.

27. Defendant Magee has caused the Company to borrow money from lenders. But for the diversion of money from the Company by Defendant Magee as described herein above, the Company would not have needed to borrow money from lenders. Defendant Magee's actions in diverting money from the Company caused the Company to incur interest, late fees, loan fees, appraisal costs, extension fees, and other loan related expenses on money borrowed.

28. Defendant Magee has caused himself and Defendant Gary Hoffman to be paid unreasonable and excessive compensation from the Company.

29. Defendant Magee has caused members of the family of Defendant Gary Hoffman to be paid unreasonable and excessive compensation from the Company.

30. Defendant Magee has caused preferred distributions owed to Plaintiff and the Similarly Situated Members to be withheld by the Company.

31. Plaintiff Michael Sortino has requested financial information from the Company for which he is entitled pursuant to the Operating Agreement of the Company and applicable statutes. Defendant Magee has failed and refused to provide all of the financial information of the Company requested by Plaintiff.

32. At all relevant times herein, Plaintiff and the Similarly Situated Members were minority members of the Company.

33. As Manager of the Company, Defendant Magee owed the Company, Plaintiff and the Similarly Situated Members fiduciary duties in the conduct of the business and management of the Company.

34. Pursuant to Colorado Revised Statute § 7-80-404 (1), Defendant Magee, as Manager of the Company, owed certain statutory duties to the Company, including but not limited to, the duties to:

- (a) Account to the limited liability company and hold as trustee for it any property, profit, or benefit derived by the member or manager in the conduct or winding up of the limited liability company business or derived from a use by the member or manager of property of the limited liability company, including the appropriation of an opportunity of the limited liability company;
- (b) Refrain from dealing with the limited liability company in the conduct or winding up of the limited liability company business as or on behalf of a party having an interest adverse to the limited liability company; and
- (c) Refrain from competing with the limited liability company in the conduct of the limited liability company business before the dissolution of the limited liability company.

35. Pursuant to Colorado Revised Statute § 7-80-404 (2), Defendant Magee, as Manager of the Company, owed a duty of care to the Company, including but not limited to “a duty of care in the conduct and winding up of the business of the limited liability company, which shall be limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”

36. Pursuant to Colorado Revised Statute § 7-80-404 (3), Defendant Magee, as Manager of the Company, was required to discharge his duties to the Company and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

37. Defendant Magee has diverted funds and money of the Company by the actions alleged herein above in an amount to be proven at trial, but at least in the amount of \$2,245,295.00 through December 31, 2016.

37. Defendant Magee has withheld preferred distributions owed to the Plaintiff and Similarly Situated Members in the aggregate amount to be proven at trial but at least the amount of \$167,544.00 through December 31, 2016.

38. Defendant Magee has caused improper management fees to be paid to Defendant Upstream Partners in the amount to be proven at trial but at least in the amount of \$1,170,000.00.

39. By virtue of the actions of Defendant Magee alleged herein above, Defendant Magee has breached his fiduciary and statutory duties owed to the Company, Plaintiff and the Similarly Situated Members. Defendant Magee has diverted labor, assets, business, and money of the Company, dissipated assets of the Company, exposed Company assets to his own debts and obligations, and competed against the Company to the detriment and harm of the Company.

40. By virtue of the actions of Defendant Magee alleged herein above, Defendant Magee has breached and violated his obligations to fairly deal with the Company, Plaintiff and the Similarly Situated Members in good faith to the detriment and harm of the Company.

41. By virtue of the actions of Defendant Magee alleged herein above, Defendant Magee has failed to account for and hold for the benefit of the Company, Plaintiff and the Similarly Situated Members all benefits which were derived from the business of the Company to the detriment and harm of the Company.

41. By virtue of the actions of Defendant Magee alleged herein above, Defendant Magee, Defendant Hoffman and Defendant Upstream have all received financial and other benefits rightly belonging to the Company, such that they should be held to account for and hold in trust on behalf of the Company all of the financial and other benefits received.

42. The Plaintiff and the Company are entitled to interest on all sums found due and owing by Defendants herein in an amount to be proven at trial.

43. Defendant Magee has advised all or a portion of the members of the Company of his current intention to borrow in excess of \$1,800,000.00 for Defendant Upstream Partners and to secure that loan to Defendant Upstream Partners with the assets of the Company. The term of the loan would be for 15 years. This will further dissipate the assets of the Company for the benefit of Defendant Magee, Defendant Hoffman and Defendant Upstream Partners and to the detriment of the Company.

44. If Defendant Magee is not enjoined from executing and delivering documents on behalf of the Company securing the Defendant Upstream Partners loan as described in paragraph 43 herein above, the Company will be irreparably harmed and will have no adequate remedy at law.

45. If Defendant Magee is not enjoined from continuing to divert funds and property of the Company to Defendant Magee, to Defendant Hoffman, and to Defendant Upstream Partners as generally described herein above, the Company will be irreparably harmed and will have no adequate remedy at law.

46. In order to adequately protect the money and property of the Company, a receiver should be appointed by the court to manage and account for the money of the Company during the pendency of this lawsuit or until further order of the Court.

47. Plaintiff has made demand upon the Company as may be required by Colorado Revised Statute § 7-80-714 to commence and take suitable action against Defendant Magee, Defendant Hoffman, and Defendant Upstream Partners, for their individual and collective actions and failures to act which have caused harm and financial damage to the Company. The Company has not taken any action against the Defendants. Irreparable injury will result for the Company if immediate action is not taken to stop and eliminate the actions and failures to act on the part of Defendant Magee, Defendant Hoffman, and Defendant Upstream Partners.

48. Plaintiff is pursuing this action for the benefit of the Company.

49. Plaintiff is entitled to the costs and expenses, including attorney fees, expended in prosecuting this action and as may be allowed by law.

WHEREFORE, Plaintiff prays for an order and judgment against Defendants, jointly and severally, for the following relief:

- i) an accounting of all of their actions and payments made to or on behalf of all of the Defendants as alleged herein above from the Company;
- ii) an order temporarily and permanently enjoining the Defendants from entering into any new loan transactions for Defendant Upstream Partners using property of the Company as collateral or security;
- iii) removing Defendant Magee as Manager of the Company and appointing a suitable receiver to manage the money of the Company until further order of the Court;
- iv) for damages in the amount proven at trial,
- v) for a constructive trust to be imposed upon the Defendants, and each one of them,

for money wrongfully received from the Company as alleged herein above;

vi) for such other equitable relief as is appropriate and may be provided by law; and

vii) for the costs of this action, including his attorney fees expended.

Dated this 1st day of May, 2018.

Michael P. Sortino, Plaintiff

BY: s/Daniel P. Bracht \_\_\_\_\_

Daniel P. Bracht #19501

Wendy J. Ridder #24320

Benjamin D. Borgmann #26150

Law Offices of Daniel P. Bracht, P.C., L.L.O.

128 N Main Street

P.O. Box 252

West Point, NE 68788

(402) 372-5500

(402) 372-5400 facsimile

ATTORNEYS FOR PLAINTIFF

**IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA**

---

MICHAEL P. SORTINO, as a Member of  
and on behalf of Upstream Brewing  
Company, LLC, a Colorado Limited  
Liability Company

CASE NO. CI 18-4138

Plaintiff,

v.

**INTERVENOR'S COMPLAINT**

BRIAN K. MAGEE, GARY HOFFMAN, and  
UPSTREAM PARTNERS, LLC

Defendant.

UPSTREAM BREWING COMPANY, LLC

Intervenor,

v.

SORTINO ASSET MANAGEMENT  
COMPANY, LLC

Additional Defendant.

---

COMES NOW UPSTREAM BREWING COMPANY, LLC, Intervenor herein,  
(hereinafter "UBC"), by and through its undersigned counsel, and for its Complaint in  
Intervention states as follows:

1. UBC is a Colorado Limited Liability Company which owns the restaurant,  
bar and brewery located in Omaha, Douglas County, Nebraska, known as the  
"Upstream".

2. UBC is owned by approximately 26 members, whose interests range from  
a fraction of one percent up to 50.38 per cent, which is the amount owned by Defendant  
Upstream Partners, LLC ("Upstream Partners").



3. UBC is naming Sortino Asset Management, LLC ("SAM") as an additional defendant herein. On UBC's information and belief, two revocable trusts own SAM, and Plaintiff and his wife, Anna M. Sortino, are the respective trustees of the two trusts. According to Plaintiff's affidavit in this case, SAM purchased loan and security documents formerly held by UBC's lender, Mutual of Omaha Bank. Those loan documents include promissory notes, security agreements and various deeds of trust filed and/or recorded against UBC's real and personal property. As a result, SAM is UBC's secured lender.

4. Beginning in 2002, UBC borrowed money and pledged its assets, initially for the purpose of allowing Defendants Upstream Partners and Brian Magee to purchase 50 units held by another former member of UBC. As a result of that purchase, Upstream Partners became the majority owner of UBC. That loan was unanimously authorized by UBC and all of its members, including the Plaintiff.

5. Since 2002, UBC has borrowed, from time to time, additional amounts for various reasons related to the Upstream, and has pledged its assets to Mutual of Omaha Bank (or other, prior lenders) for those purposes. Thus, the loans held by SAM are in some respects a continuation of the 2002 loan. The principal amounts UBC owes SAM pursuant to the outstanding loans total approximately \$2.2 million.

6. UBC's obligations owed to SAM under the loans have matured and are now due. SAM has begun exercising its remedies under its loan documents, and has commenced a non-judicial foreclosure against UBC's real property by sending and recording notices of default. Copies of those notices of default are attached hereto as Exhibits 1, 2 and 3.

7. UBC seeks to repay its secured debt owed to SAM, in its entirety, by obtaining a new loan from a private lender, and thereby halting the foreclosure. That loan, which will be in sufficient amount to pay the debt owed to SAM in full, will be used exclusively for that purpose. By paying off the debt owed to SAM, UBC will avoid SAM's pending foreclosure on UBC's assets, and thus preserve its ability to maintain operations.

8. UBC's operating agreement, at paragraph 7.1(b) and (c), permits UBC to borrow funds and encumber its property on the vote or written consent of more than 50% voting interest of its members, and this requirement is met by the votes and/or consents of UPC and Brian K. Magee.

9. To commence the non-judicial foreclosure against UBC's real property, SAM instructed the trustees under its deed of trust to record notices of default in the Douglas County Register of Deeds' office. The notices of default assert that the UBC real property stands as collateral for not only principal and interest with respect to the loans, but also late fees in the approximate total amount of \$141,000. These asserted late fees are an impermissible penalty, are improperly calculated, and even if some late fees are permissible the amount of any such late fees UBC owes SAM are far less than the amounts SAM asserts.

10. UBC's real estate, situated in Omaha's Old Market area, is extraordinary and unique and cannot be replicated or replaced. It has been UBC's home for more than 20 years. It has an appraised value of at least \$4 million. Because of UBC's long-standing ownership of the real estate, and its unique character, age and location, it has become a critical part of the Upstream brand.

11. The debt is secured by UBC's real estate. The amount of the debt is significantly less than the real estate's value.

12. UBC is aware Defendant Upstream Partners and Brian K. Magee have loaned certain monies from UBC to pay obligations of a separate company which owned another Upstream restaurant and brewery, which was formerly at a location in the west part of Omaha. An accountant has calculated the amount owing from Upstream Partners and Brian K. Magee to be \$904,851. The Defendants have been working with UBC on a plan to repay those monies, and have agreed to repay the sum of \$904,851 from distributions they would otherwise be entitled to receive as members of UBC.

13. Plaintiff's actions in seeking an injunction to stop UBC from obtaining a loan to pay its obligations owed to Plaintiff's related company, SAM, threaten to irreparably harm UBC. If UBC loses its very valuable and unique real estate in which it conducts its restaurant, bar and brewery operations, an important and irreplaceable portion of its brand will be lost as well, and it may be forced out of business. In addition, foreclosure will cause UBC to lose its very considerable equity in that building to the benefit of one minority investor, which is the Plaintiff.

14. The Court should deny the injunctive relief Plaintiff requests. If Plaintiff's requested injunction is granted, UBC will be unable to pay off its loans owed to SAM.

15. The fact that UBC assets are being pledged as collateral for the new loan that UBC seeks is not a sufficient reason to halt UBC's ability to repay the SAM loans. UBC's assets were pledged for this and prior loans many ago, and the new loan will only be sufficient to pay the loans owed to SAM.

16. This litigation has already caused UBC to lose the benefit of a prior, arranged loan from another lender. Plaintiff threatens to ruin UBC's ability to repay the loans owed to SAM.

17. In its Complaint, Plaintiff requests appointment of a receiver for the real estate and restaurant/brewery business. Appointment of a receiver would have an extremely detrimental effect on UBC, and would likely cause it to lose business and revenues. Appointment of a receiver is not necessary because the property is being well cared-for and the business has a track record of profitability. In addition, the value of the real property exceeds the debt to SAM.

#### **FIRST CAUSE OF ACTION—DECLARATORY RELIEF**

18. The allegations of paragraphs 1-17 are incorporated herein by reference as if plead in full.

19. SAM seeks to recover from UBC the late fees described above, and the amounts SAM demands are in violation of the promissory notes UBC signed and delivered to Mutual of Omaha Bank, which SAM now owns and holds. True and correct copies of these notes are attached hereto as Exhibits 4-6, respectively, and are incorporated herein by this reference (collectively, the "Notes").

20. According the Notes' terms, late fees are incurred only if UBC made a late installment payment, and the late fee is based on the amount of the installment payment. The late fees are not applicable if the loan is not paid in full at maturity and/or should not be calculated on the entire principal balance owed under the Notes.

21. SAM's asserted late fees constitute a penalty which is unenforceable under Nebraska law.

22. UBC must be allowed to close the loan it will use to pay SAM in full. If the dispute over the amount of late fees is not resolved, UBC seeks an order from the Court allowing it to pay into the court registry an amount equivalent to the disputed portion of the late fees, to be held until the Court decides that issue and awards such amount to SAM or to UBC.

WHEREFORE, UBC seeks a declaration from this Court that the late fees are not recoverable by SAM, and a further declaration that UBC shall be permitted to repay the Notes, without regard to the late fees, and that upon such payment SAM is required to release its liens and security interests against UBC's real and personal property.

#### **SECOND CAUSE OF ACTION—INJUNCTIVE RELIEF**

23. The allegations of paragraphs 1-22 are incorporated herein as if pleaded in full.

24. In order to avoid further irreparable harm, UBC requests the Court issue an order allowing UBC to borrow the funds necessary to pay its obligations owed to SAM in full, and enjoining Plaintiff and/or SAM from further interference with UBC's efforts to borrow money. In addition, if the dispute over the late fees is not resolved in time for the closing of UBC's new loan, UBC requests the Court order that the disputed portion of the late fee be paid into the registry of the court for determination of that issue, and that SAM should accept the payoff amount, less the disputed portion, and instruct SAM to release its liens and security interests against UBC's real and personal property, which includes but is not limited to SAM instructing the trustee under its deeds of trust to release/reconvey the deeds of trust recorded against UBC's real property.

25. In the event that the Court determines, contrary to the urgings of UBC and the defendants, to grant the injunction requested by Plaintiff to stop UBC from borrowing money to pay off the SAM loans, the Court should likewise enjoin SAM and Plaintiff from taking further actions to foreclose on UBC's real estate. Absent such an injunction, the foreclosure will proceed and UBC will be irreparably harmed, for the reasons already stated herein.

26. Neither Plaintiff nor SAM will be harmed by such an injunction because UBC's continued operation of the restaurant, and payment by UBC of its ordinary obligations and real-estate related obligations, such as real estate taxes and maintenance of the building, will maintain the value of the real estate.

WHEREFORE, UBC requests that the court (a) deny the injunction requested by Plaintiff; (b) deny the request for a receiver; (c) if Plaintiff's injunction is granted, that Plaintiff be enjoined from continuing with the foreclosure of the UBC real estate; and (d) require SAM to release/reconvey the deeds of trust recorded against UBC's real estate, even if the late fee is not paid, so long as UBC pays into the registry of the Court an amount sufficient to cover those disputed late fees, should they be found to be enforceable and/or recoverable from UBC.

Dated this 1<sup>st</sup> day of June, 2018.

UPSTREAM BREWING COMPANY, LLC,  
INTERVENOR

By: /s/ T. Randall Wright

T. Randall Wright (NE #16398)  
Brandon R. Tomjack (NE #22981)  
of BAIRD HOLM LLP  
1700 Farnam Street, Suite 1500  
Omaha, Nebraska 68102-2068  
Phone: 402-344-0500  
Email: rwright@bairdholm.com



### NOTICE OF DEFAULT

THE UNDERSIGNED, Daniel P. Bracht, being the substitute Trustee under the Deed of Trust dated June 20, 2012 ("Deed of Trust") and recorded on June 25, 2012 in the Official Records of Douglas County, Nebraska as Document No. 2012060869 among Upstream Brewing Company, LLC a Colorado limited liability company, as Trustor, Mutual of Omaha Bank ("Lender"), as Beneficiary and Lender as Trustee, and which Deed of Trust has been endorsed, sold, transferred, assigned, granted, conveyed and delivered by Lender to Sortino Asset Management Company, LLC., a Nebraska limited liability company, by an Assignment of Beneficial Interest under Assignment of Rents and Deed of Trust executed effective as of February 6, 2018, hereby gives notice that a breach and default of an obligation for which the trust property was conveyed as security has occurred and that the nature of such breach or default is the failure to make timely payments of interest, fees, extension fees, late payment fees and principal due, all as provided by the Deed of Trust, and the Promissory Note dated January 24, 2018, by and between Lender and Upstream Partners, LLC, a Nebraska limited liability company ("Borrower"), and other related loan agreements. The legal description of the property affected by this Notice of Default is as follows:

Lot Eight (8), Block One Hundred Sixty Five (165), Original City of Omaha, Douglas County, Nebraska,

You, as Trustor, are hereby further notified that because of the default referenced above, the undersigned has elected to sell the property to satisfy the obligations under the Deed of Trust insofar as the same are hereby identified, plus all sums which may be advanced for expenses incurred by Trustee for the enforcement of Trustor's obligations under the Deed of Trust (including title search charges for real estate and Trustee's attorneys fees) and any further such expenses and any advances thereafter made to protect the security of the Deed of Trust.

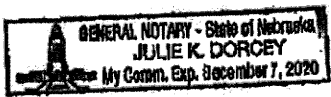
You, as Trustor, are further notified that pursuant to Neb. Rev. Stat. § 76-1012, you may cure the default described above, and the obligations and Deed of Trust may be reinstated, by (1) making payment to Beneficiary of \$1,640,162.09 (which amount includes \$1,474,703.54 in principal, a diligence fee of \$5.00, an extension fee of \$14,747.04, interest through February 5, 2018 of \$13,559.08, interest from February 5, 2018 to April 18, 2018 of \$33,918.18, a late payment fee of \$103,229.25); and (2) paying accruing interest at the per diem rate of \$471.08583 from and after April 19, 2018; and (3) making payment to Trustee of all expenses and fees

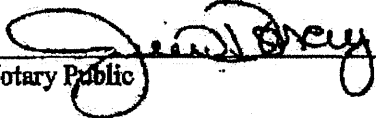
incurred by Trustee for the enforcement of Trustor's obligations under the Deed of Trust; but, in any event, the payments and other actions specified above must be made and completed within one (1) month from the date this Notice of Default is filed of record or resale of the property under the power of sale shall commence. You have the right to bring a court action to assert the nonexistence of a default or any other defense to acceleration and sale, and this may give you a right to reinstate after acceleration, if any.

  
Daniel P. Bracht, Substitute Trustee

STATE OF NEBRASKA    )  
                                  ) SS.  
COUNTY OF CUMING    )

The foregoing instrument was executed and acknowledged before me this 18th day of April, 2018, by Daniel P. Bracht, Substitute Trustee, as his own voluntary act and deed.



  
Notary Public

My Commission Expires: \_\_\_\_\_



### NOTICE OF DEFAULT

THE UNDERSIGNED, Daniel P. Bracht, being the substitute Trustee under the Deed of Trust dated June 20, 2012 among Upstream Brewing Company, LLC a Colorado limited liability company ("Borrower"), as Trustor, Mutual of Omaha Bank ("Lender"), as Beneficiary and Lender as Trustee, and recorded on June 25, 2012 in the Official Records of Douglas County, Nebraska, as Document No. 2012061243 and as amended by that certain Modification of Deed of Trust dated February 27, 2014, between Borrower as Trustor and Lender, as Lender, and recorded on February 28, 2014 in the Official Records as Document No. 2014015132 (as amended the "Deed of Trust") and which Deed of Trust has been endorsed, sold, transferred, assigned, granted, conveyed and delivered by Lender to Sortino Asset Management Company, LLC., a Nebraska limited liability company, by an Assignment of Beneficial Interest under Assignment of Rents and Deed of Trust executed effective as of February 6, 2018, hereby gives notice that a breach and default of an obligation for which the trust property was conveyed as security has occurred and that the nature of such breach or default is Trustor's failure to make timely payments of interest, fees, extension fees, late payment fees and principal due, all as provided by the Deed of Trust and the Promissory Note dated January 24, 2018, and other related loan agreements. The legal description of the property affected by this Notice of Default is as follows:

Lot Eight (8), Block One Hundred Sixty Five (165), Original City of Omaha, Douglas County, Nebraska,

You, as Trustor, are hereby further notified that because of the default referenced above, the undersigned has elected to sell the property to satisfy the obligations under the Deed of Trust insofar as the same are hereby identified, plus all sums which may be advanced for expenses incurred by Trustee for the enforcement of Trustor's obligations under the Deed of Trust (including title search charges for real estate and Trustee's attorneys fees) and any further such expenses and any advances thereafter made to protect the security of the Deed of Trust.

You, as Trustor, are further notified that pursuant to Neb. Rev. Stat. § 76-1012, you may cure the default described above, and the obligations and Deed of Trust may be reinstated, by (1) making payment to Beneficiary of \$70,891.73 (which amount includes \$63,333.48 in principal, a diligence fee of \$5.00, an extension fee of \$1,000.00, interest through February 5, 2018 of \$663.24, interest from February 5, 2018 to April 18, 2018 of \$1,456.67, a late payment fee of


\$4,433.34); and (2) paying accruing interest at the per diem rate of \$20.231528 from and after April 19, 2018; and (3) making payment to Trustee of all expenses and fees incurred by Trustee for the enforcement of Trustor's obligations under the Deed of Trust; but, in any event, the payments and other actions specified above must be made and completed within one (1) month from the date this Notice of Default is filed of record or resale of the property under the power of sale shall commence. You have the right to bring a court action to assert the nonexistence of a default or any other defense to acceleration and sale, and this may give you a right to reinstate after acceleration, if any.

  
Daniel P. Bracht, Substitute Trustee

STATE OF NEBRASKA    )  
  ) SS.  
COUNTY OF CUMING    )

The foregoing instrument was executed and acknowledged before me this 18th day of April, 2018, by Daniel P. Bracht, Substitute Trustee, as his own voluntary act and deed.



  
Notary Public

My Commission Expires: \_\_\_\_\_



### NOTICE OF DEFAULT

THE UNDERSIGNED, Daniel P. Bracht, being the substitute Trustee under the Deed of Trust dated August 12, 2013 ("Deed of Trust") among Upstream Brewing Company, LLC a Colorado limited liability company ("Borrower"), as Trustor, Mutual of Omaha Bank ("Lender"), as Beneficiary and Lender as Trustee, and recorded on August 13, 2013 in the Official Records of Douglas County, Nebraska, as Document No. 2013082603 and which Deed of Trust has been endorsed, sold, transferred, assigned, granted, conveyed and delivered by Lender to Sortino Asset Management Company, LLC., a Nebraska limited liability company, by an Assignment of Beneficial Interest under Assignment of Rents and Deed of Trust executed effective as of February 6, 2018, hereby gives notice that a breach and default of an obligation for which the trust property was conveyed as security has occurred and that the nature of such breach or default is Trustor's failure to make timely payments of interest, fees, extension fees, late payment fees and principal due, all as provided by the Deed of Trust and the Promissory Note dated January 24, 2018, and other related loan agreements. The legal description of the property affected by this Notice of Default is as follows:

Lot Eight (8), Block One Hundred Sixty Five (165), Original City of Omaha, Douglas County, Nebraska,

You, as Trustor, are hereby further notified that because of the default referenced above, the undersigned has elected to sell the property to satisfy the obligations under the Deed of Trust insofar as the same are hereby identified, plus all sums which may be advanced for expenses incurred by Trustee for the enforcement of Trustor's obligations under the Deed of Trust (including title search charges for real estate and Trustee's attorneys fees) and any further such expenses and any advances thereafter made to protect the security of the Deed of Trust.

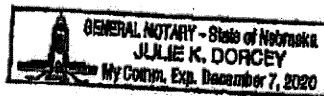
You, as Trustor, are further notified that pursuant to Neb. Rev. Stat. § 76-1012, you may cure the default described above, and the obligations and Deed of Trust may be reinstated, by (1) making payment to Beneficiary of \$526,930.53 (which amount includes \$473,917.52 in principal, a diligence fee of \$5.00, an extension fee of \$4,739.18, interest through February 5, 2018 of \$4,194.50, interest from February 5, 2018 to April 18, 2018 of \$10,900.10, a late payment fee of \$33,174.23); and (2) paying accruing interest at the per diem rate of \$151.39031 from and after April 19, 2018; and (3) making payment to Trustee of all expenses and fees incurred by Trustee for the enforcement of Trustor's obligations under the Deed of Trust; but, in

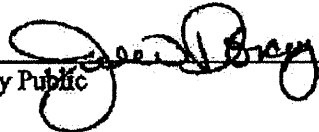
any event, the payments and other actions specified above must be made and completed within one (1) month from the date this Notice of Default is filed of record or resale of the property under the power of sale shall commence. You have the right to bring a court action to assert the nonexistence of a default or any other defense to acceleration and sale, and this may give you a right to reinstate after acceleration, if any.

  
Daniel P. Bracht, Substitute Trustee

STATE OF NEBRASKA    )  
  ) SS.  
COUNTY OF CUMING    )

The foregoing instrument was executed and acknowledged before me this 18th day of April, 2018, by Daniel P. Bracht, Substitute Trustee, as his own voluntary act and deed.



  
Notary Public

My Commission Expires: \_\_\_\_\_

## PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No	Call / Gov	Account	Officer	Initials
\$473,917.52	10-24-2017	12-15-2017	1610476001	593		****	

References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "\*\*\*\*" has been omitted due to text length limitations.

<b>Borrower:</b> Upstream Brewing Company, L.L.C., a Colorado limited liability company 514 S 11th St Omaha, NE 68102-2874	<b>Lender:</b> Mutual of Omaha Bank Omaha Banking 3333 Farnam St Omaha, NE 68131
--	---

**Principal Amount: \$473,917.52**

**Date of Note: October 24, 2017**

**PROMISE TO PAY.** Upstream Brewing Company, L.L.C., a Colorado limited liability company ("Borrower") promises to pay to Mutual of Omaha Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of Four Hundred Seventy-three Thousand Nine Hundred Seventeen & 52/100 Dollars (\$473,917.52), together with interest on the unpaid principal balance from October 24, 2017, until paid in full.

**PAYMENT.** Borrower will pay this loan in accordance with the following payment schedule, which calculates interest on the unpaid principal balances as described in the "INTEREST CALCULATION METHOD" paragraph using the interest rates described in this paragraph: 2 monthly consecutive interest payments, beginning October 31, 2017, with interest calculated on the unpaid principal balances using an interest rate of 4.375% per annum based on a year of 360 days; and one principal and interest payment of \$474,781.43 on December 15, 2017, with interest calculated on the unpaid principal balances using an interest rate of 4.375% per annum based on a year of 360 days. This estimated final payment is based on the assumption that all payments will be made exactly as scheduled; the actual final payment will be for all principal and accrued interest not yet paid, together with any other unpaid amounts under this Note. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any late charges; and then to any unpaid collection costs. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**INTEREST CALCULATION METHOD.** Interest on this Note is computed on a 365/360 basis; that is, by applying the ratio of the interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. All interest payable under this Note is computed using this method. This calculation method results in a higher effective interest rate than the numeric interest rates stated in this Note.

**PREPAYMENT.** Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Mutual of Omaha Bank, 4950 South 48th Street Phoenix, AZ 85040.

**LATE CHARGE.** If a payment is 11 days or more late, Borrower will be charged 7.000% of the unpaid portion of the regularly scheduled payment or \$100.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased by adding an additional 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to each succeeding interest rate change that would have applied had there been no default. After maturity, or after this Note would have matured had there been no default, the Default Rate Margin will continue to apply to the final interest rate described in this Note. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**DEFAULT.** Each of the following shall constitute an event of default ("Event of Default") under this Note:

**Payment Default.** Borrower fails to make any payment when due under this Note.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Default in Favor of Third Parties.** Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to repay this Note or perform Borrower's obligations under this Note or any of the related documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the disputes.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.

**PROMISSORY NOTE  
(Continued)**

Loan No: 1610476001

Page 2

**Insecurity.** Lender in good faith believes itself insecure.

**Cure Provisions.** If any default, other than a default in payment, is curable and if Borrower has not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, it may be cured if Borrower, after Lender sends written notice to Borrower demanding cure of such default: (1) cures the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

**JURY WAIVER.** Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.

**GOVERNING LAW.** This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Nebraska without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Nebraska.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Douglas County, State of Nebraska.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$30.00 if Borrower makes a payment on Borrower's loan and the check or preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the debt against any and all such accounts, and, at Lender's option, to administratively freeze all such accounts to allow Lender to protect Lender's charge and setoff rights provided in this paragraph.

**COLLATERAL.** Borrower acknowledges this Note is secured by the following collateral described in the security instruments listed herein:

(A) a Deed of Trust dated August 12, 2013, to a trustee in favor of Lender on real property described as "Real Property located at 514 South 11th Street, Omaha, NE 68102" and located in Douglas County, State of Nebraska.

(B) an Assignment of All Rents to Lender on real property described as "Real Property located at 514 South 11th Street, Omaha, NE 68102" and located in Douglas County, State of Nebraska.

**AMENDED AND RESTATED PROMISSORY NOTE.** This note and instrument evidences a complete amendment and restatement of the previous amended and restated note dated August 7, 2017. (called, as applicable, together with the original note and all prior renewals, restatements, and amendments, the "Prior Note") in the principal amount of \$476,661.89, previously executed by Borrower for the benefit of Lender, the principal balance of which on the date of this note is \$473,917.52. Notwithstanding its date of execution, this amended and restated note is intended to relate back to the maturity date of the Prior Note, so that all unpaid indebtedness evidenced by the Prior Note (as of the scheduled maturity date of the Prior Note) is included in this amended and restated note and instrument. From and after its execution, this amended and restated note and instrument shall act as evidence of Borrower's indebtedness to Lender. All loan documents, as may have been previously amended and/or restated, executed in connection with the Prior Note will remain in full force and effect (including all documents that secure the payment of all indebtedness of Borrower to Lender) and are not extinguished by the execution of the amended and restated note and instrument. Additionally, all collateral that secured repayment of the Prior Note will remain as security for this amended and restated note.

**SUCCESSOR INTERESTS.** The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

**GENERAL PROVISIONS.** If any part of this Note cannot be enforced, this fact will not affect the rest of the Note. Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

**PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE. BORROWER AGREES TO THE TERMS OF THE NOTE.**

**BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.**

**BORROWER:**

**UPSTREAM BREWING COMPANY, L.L.C., A COLORADO LIMITED LIABILITY COMPANY**

**By:**

Brian K. Magee, Sr., Manager of Upstream Brewing  
Company, L.L.C., a Colorado limited liability  
company

## PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$1,474,703.54	10-24-2017	12-15-2017	1610288002	897		***	

References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "\*\*\*\*\*" has been omitted due to text length limitations.

<b>Borrower:</b> Upstream Partners, LLC, a Nebraska limited liability company 514 S 11th St Omaha, NE 68102-2808	<b>Lender:</b> Mutual of Omaha Bank Omaha Banking 3333 Farnam St. Omaha, NE 68131
--	--

**Principal Amount: \$1,474,703.54**

**Date of Note: October 24, 2017**

**PROMISE TO PAY.** Upstream Partners, LLC, a Nebraska limited liability company ("Borrower") promises to pay to Mutual of Omaha Bank ("Lender"), or order, in lawful money of the United States of America, the principal amount of One Million Four Hundred Seventy-four Thousand Seven Hundred Thre & 54/100 Dollars (\$1,474,703.54), together with interest on the unpaid principal balance from October 24, 2017, until paid in full.

**PAYMENT.** Borrower will pay this loan in accordance with the following payment schedule, which calculates interest on the unpaid principal balances as described in the "INTEREST CALCULATION METHOD" paragraph using the interest rates described in this paragraph: 2 monthly consecutive interest payments, beginning October 31, 2017, with interest calculated on the unpaid principal balances using an interest rate of 4.600% per annum based on a year of 360 days; and one principal and interest payment of \$1,477,530.06 on December 15, 2017, with interest calculated on the unpaid principal balances using an interest rate of 4.600% per annum based on a year of 360 days. This estimated final payment is based on the assumption that all payments will be made exactly as scheduled; the actual final payment will be for all principal and accrued interest not yet paid, together with any other unpaid amounts under this Note. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any late charges; and then to any unpaid collection costs. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**INTEREST CALCULATION METHOD.** Interest on this Note is computed on a 365/360 basis; that is, by applying the ratio of the interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. All interest payable under this Note is computed using this method. This calculation method results in a higher effective interest rate than the numeric interest rates stated in this Note.

**PREPAYMENT.** Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments under the payment schedule. Rather, early payments will reduce the principal balance due and may result in Borrower's making fewer payments. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Mutual of Omaha Bank, 4950 South 48th Street Phoenix, AZ 85040.

**LATE CHARGE.** If a payment is 11 days or more late, Borrower will be charged 7.000% of the unpaid portion of the regularly scheduled payment or \$100.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased by adding an additional 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to each succeeding interest rate change that would have applied had there been no default. After maturity, or after this Note would have matured had there been no default, the Default Rate Margin will continue to apply to the final interest rates described in this Note. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**DEFAULT.** Each of the following shall constitute an event of default ("Event of Default") under this Note:

**Payment Default.** Borrower fails to make any payment when due under this Note.

**Other Defaults.** Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Note or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

**Default in Favor of Third Parties.** Borrower or any Grantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may materially affect any of Borrower's property or Borrower's ability to repay this Note or perform Borrower's obligations under this Note or any of the related documents.

**False Statements.** Any warranty, representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

**Death or Insolvency.** The dissolution of Borrower (regardless of whether election to continue is made), any member withdraws from Borrower, or any other termination of Borrower's existence as a going business or the death of any member, the insolvency of Borrower, the appointment of a receiver for any part of Borrower's property, any assignment for the benefit of creditors, any type of creditor workout, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower.

**Creditor or Forfeiture Proceedings.** Commencement of foreclosure or forfeiture proceedings, whether by judicial proceeding, self-help, repossession or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a garnishment of any of Borrower's accounts, including deposit accounts, with Lender. However, this Event of Default shall not apply if there is a good faith dispute by Borrower as to the validity or reasonableness of the claim which is the basis of the creditor or forfeiture proceeding and if Borrower gives Lender written notice of the creditor or forfeiture proceeding and deposits with Lender monies or a surety bond for the creditor or forfeiture proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

**Events Affecting Guarantor.** Any of the preceding events occurs with respect to any guarantor, endorser, surety, or accommodation party of any of the indebtedness or any guarantor, endorser, surety, or accommodation party dies or becomes incompetent, or revokes or disputes the validity of, or liability under, any guaranty of the indebtedness evidenced by this Note.

**Adverse Change.** A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.

**PROMISSORY NOTE  
(Continued)**

Loan No: 1610268002

Page 2

**Insecurity.** Lender in good faith believes itself insecure.

**Cure Provisions.** If any default, other than a default in payment, is curable and if Borrower has not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, it may be cured if Borrower, after Lender sends written notice to Borrower demanding cure of such default: (1) cures the default within ten (10) days; or (2) if the cure requires more than ten (10) days, immediately initiates steps which Lender deems in Lender's sole discretion to be sufficient to cure the default and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

**JURY WAIVER.** Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.

**GOVERNING LAW.** This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Nebraska without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Nebraska.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Douglas County, State of Nebraska.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$30.00 if Borrower makes a payment on Borrower's loan and the check or preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the debt against any and all such accounts, and, at Lender's option, to administratively freeze all such accounts to allow Lender to protect Lender's charge and setoff rights provided in this paragraph.

**COLLATERAL.** Borrower acknowledges this Note is secured by the following collateral described in the security instruments listed herein:

(A) a Deed of Trust dated June 20, 2012, to a trustee in favor of Lender on real property located in Douglas County, State of Nebraska.

(B) an Assignment of All Rents to Lender on real property located in Douglas County, State of Nebraska.

(C) a life insurance policy described in an Assignment of Life Insurance Policy as Collateral dated June 20, 2012.

(D) fixtures described in a Commercial Security Agreement dated June 20, 2012.

**INTEGRATION.** The Related Documents constitute a complete integration of the agreement of Lender and Borrower respecting the Loan, and may be amended, modified or waived in the future only by written instrument signed by the party sought to be charged with the amendment, modification or waiver. Any and all prior oral and/or written commitments from Lender to Borrower, any Related Party, or any principals or agents thereof, with respect to all or any portion of the financing described in this Note (including Lender's loan commitment or term sheet (if any), except to the extent that particular provisions thereof are expressly incorporated by reference in provisions of the Related Documents) have been merged in the Related Documents and the other documentation executed and delivered concurrently herewith, and shall, except as expressly provided, in the Related Documents be of no further force or effect. No representations, promises, warranties, understanding or agreements, express or implied, verbal or written, exist with respect to the Loan except those expressly set forth in the Related Documents and the other documentation executed and delivered concurrently herewith. Borrower acknowledges that its execution and delivery of the Related Documents is its free and voluntary act and deed, and that its execution and delivery has not been induced by, or done in reliance upon, any representations, promises, warranties, understanding or agreements made by Lender or its agents, officers, employees or representatives that are not set forth in the Related Documents.

**AMENDED AND RESTATED PROMISSORY NOTE.** This note and instrument evidences a complete amendment and restatement of the previous amended and restated note dated August 7, 2017, (called, as applicable, together with the original note and all prior renewals, restatements, and amendments, the "Prior Note") in the principal amount of \$1,482,359.42, previously executed by Borrower for the benefit of Lender, the principal balance of which on the date of this note is \$1,474,703.54. Notwithstanding its date of execution, this amended and restated note is intended to relate back to the maturity date of the Prior Note, so that all unpaid indebtedness evidenced by the Prior Note (as of the scheduled maturity date of the Prior Note) is included in this amended and restated note and instrument. From and after its execution, this amended and restated note and instrument shall act as evidence of Borrower's indebtedness to Lender. All loan documents, as may have been previously amended and/or restated, executed in connection with the Prior Note will remain in full force and effect (including all documents that secure the payment of all indebtedness of Borrower to Lender) and are not extinguished by the execution of the amended and restated note and instrument. Additionally, all collateral that secured repayment of the Prior Note will remain as security for this amended and restated note.

**SUCCESSOR INTERESTS.** The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

**GENERAL PROVISIONS.** If any part of this Note cannot be enforced, this fact will not affect the rest of the Note. Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.



Loan No: 1610268002

**PROMISSORY NOTE  
(Continued)**

Page 3

---

**PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE. BORROWER AGREES TO THE TERMS OF THE NOTE.**

**BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.**

**BORROWER:**

**UPSTREAM PARTNERS, LLC, A NEBRASKA LIMITED LIABILITY COMPANY**

**By:**

**Brian K. Magee, Sr., Managing Member of Upstream  
Partners, LLC, a Nebraska limited liability company**

# PROMISSORY NOTE

Principal	Loan Date	Maturity	Loan No	Call / Coll	Account	Officer	Initials
\$100,000.00	01-24-2018		1610300001	151		***	
References in the boxes above are for Lender's use only and do not limit the applicability of this document to any particular loan or item. Any item above containing "*****" has been omitted due to text length limitations.							

<b>Borrower:</b> Upstream Brewing Company, L.L.C., a Colorado limited liability company 514 S 11th St Omaha, NE 68102-2874	<b>Lender:</b> Mutual of Omaha Bank Omaha Banking 3333 Farnam St. Omaha, NE 68131
--	--

**Principal Amount: \$100,000.00**

**Date of Note: January 24, 2018**

**PROMISE TO PAY.** Upstream Brewing Company, L.L.C., a Colorado limited liability company ("Borrower") promises to pay to Mutual of Omaha Bank ("Lender"), or order, in lawful money of the United States of America, on demand, the principal amount of One Hundred Thousand & 00/100 Dollars (\$100,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance, calculated as described in the "INTEREST CALCULATION METHOD" paragraph using an interest rate of 6.500% per annum based on a year of 360 days. Interest shall be calculated from the date of each advance until repayment of each advance. The Interest rate may change under the terms and conditions of the "INTEREST AFTER DEFAULT" section.

**PAYMENT.** Borrower will pay this loan in full immediately upon Lender's demand. Borrower will pay regular monthly payments of all accrued unpaid interest due as of each payment date, beginning January 31, 2018, with all subsequent interest payments to be due on the same day of each month after that. Unless otherwise agreed or required by applicable law, payments will be applied first to any accrued unpaid interest; then to principal; then to any late charges; and then to any unpaid collection costs. Borrower will pay Lender at Lender's address shown above or at such other place as Lender may designate in writing.

**INTEREST CALCULATION METHOD.** Interest on this Note is computed on a 365/360 basis; that is, by applying the ratio of the interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding. All interest payable under this Note is computed using this method. This calculation method results in a higher effective interest rate than the numeric interest rate stated in this Note.

**PREPAYMENT.** Borrower may pay without penalty all or a portion of the amount owed earlier than it is due. Early payments will not, unless agreed to by Lender in writing, relieve Borrower of Borrower's obligation to continue to make payments of accrued unpaid interest. Rather, early payments will reduce the principal balance due. Borrower agrees not to send Lender payments marked "paid in full", "without recourse", or similar language. If Borrower sends such a payment, Lender may accept it without losing any of Lender's rights under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument that indicates that the payment constitutes "payment in full" of the amount owed or that is tendered with other conditions or limitations or as full satisfaction of a disputed amount must be mailed or delivered to: Mutual of Omaha Bank, 4950 South 48th Street Phoenix, AZ 85040.

**LATE CHARGE.** If a regularly scheduled interest payment is 11 days or more late, Borrower will be charged 7.000% of the unpaid portion of the regularly scheduled payment or \$100.00, whichever is greater. If Lender demands payment of this loan, and Borrower does not pay the loan in full within 11 days after Lender's demand, Borrower also will be charged either 7.000% of the unpaid portion of the sum of the unpaid principal plus accrued unpaid interest or \$100.00, whichever is greater.

**INTEREST AFTER DEFAULT.** Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased by 5.000 percentage points. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

**LENDER'S RIGHTS.** Upon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest immediately due, and then Borrower will pay that amount.

**ATTORNEYS' FEES; EXPENSES.** Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

**JURY WAIVER.** Lender and Borrower hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by either Lender or Borrower against the other.

**GOVERNING LAW.** This Note will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Nebraska without regard to its conflicts of law provisions. This Note has been accepted by Lender in the State of Nebraska.

**CHOICE OF VENUE.** If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Douglas County, State of Nebraska.

**DISHONORED ITEM FEE.** Borrower will pay a fee to Lender of \$30.00 if Borrower makes a payment on Borrower's loan and the check or preauthorized charge with which Borrower pays is later dishonored.

**RIGHT OF SETOFF.** To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or Keogh accounts, or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or setoff all sums owing on the debt against any and all such accounts, and, at Lender's option, to administratively freeze all such accounts to allow Lender to protect Lender's charge and setoff rights provided in this paragraph.

- COLLATERAL.** Borrower acknowledges this Note is secured by the following collateral described in the security instruments listed herein:
- (A) a Deed of Trust dated June 20, 2012, to a trustee in favor of Lender on real property described as "Real Property located at 514 S. 11th Street, Omaha, NE 68102" and located in Douglas County, State of Nebraska, and any amendments or modifications thereto.
  - (B) an Assignment of All Rents to Lender on real property described as "Real Property located at 514 S. 11th Street, Omaha, NE 68102" and located in Douglas County, State of Nebraska.
  - (C) inventory, chattel paper, accounts, equipment and general intangibles described in a Commercial Security Agreement dated February 27, 2014.

**LINE OF CREDIT.** This Note evidences a revolving line of credit. Advances under this Note may be requested orally by Borrower or as provided

Exhibit 6

**PROMISSORY NOTE  
(Continued)**

Loan No: 1610300001

Page 2

in this paragraph. All oral requests shall be confirmed in writing on the day of the request. All communications, instructions, or directions by telephone or otherwise to Lender are to be directed to Lender's office shown above. The following person or persons are authorized to request advances and authorize payments under the line of credit until Lender receives from Borrower, at Lender's address shown above, written notice of revocation of such authority: **Brian K. Magee, Sr., Manager of Upstream Brewing Company, L.L.C., a Colorado limited liability company.** Borrower agrees to be liable for all sums either: (A) advanced in accordance with the instructions of an authorized person or (B) credited to any of Borrower's accounts with Lender. The unpaid principal balance owing on this Note at any time may be evidenced by endorsements on this Note or by Lender's internal records, including daily computer print-outs. Lender will have no obligation to advance funds under this Note if: (A) Borrower or any guarantor is in default under the terms of this Note or any agreement that Borrower or any guarantor has with Lender, including any agreement made in connection with the signing of this Note; (B) Borrower or any guarantor ceases doing business or is insolvent; (C) any guarantor seeks, claims or otherwise attempts to limit, modify or revoke such guarantor's guarantee of this Note or any other loan with Lender; (D) Borrower has applied funds provided pursuant to this Note for purposes other than those authorized by Lender; or (E) Lender in good faith believes itself insecure.

**INTEGRATION.** The Related Documents constitute a complete integration of the agreement of Lender and Borrower respecting the Loan, and may be amended, modified or waived in the future only by written instrument signed by the party sought to be charged with the amendment, modification or waiver. Any and all prior oral and/or written commitments from Lender to Borrower, any Related Party, or any principals or agents thereof, with respect to all or any portion of the financing described in this Note (including Lender's loan commitment or term sheet (if any), except to the extent that particular provisions thereof are expressly incorporated by reference in provisions of the Related Documents) have been merged in the Related Documents and the other documentation executed and delivered concurrently herewith, and shall, except as expressly provided, in the Related Documents be of no further force or effect. No representations, promises, warranties, understanding or agreements, express or implied, verbal or written, exist with respect to the Loan except those expressly set forth in the Related Documents and the other documentation executed and delivered concurrently herewith. Borrower acknowledges that its execution and delivery of the Related Documents is its free and voluntary act and deed, and that its execution and delivery has not been induced by, or done in reliance upon, any representations, promises, warranties, understanding or agreements made by Lender or its agents, officers, employees or representatives that are not set forth in the Related Documents.

**AMENDED AND RESTATED PROMISSORY NOTE.** This note and instrument evidences a complete amendment and restatement of the previous amended and restated note dated February 27, 2014, (called, as applicable, together with the original note and all prior renewals, restatements, and amendments, the "Prior Note") in the principal amount of \$150,000.00, previously executed by Borrower for the benefit of Lender, the principal balance of which on the date of this note is \$100,000.00. Notwithstanding its date of execution, this amended and restated note is intended to relate back to the maturity date of the Prior Note, so that all unpaid indebtedness evidenced by the Prior Note (as of the scheduled maturity date of the Prior Note) is included in this amended and restated note and instrument. From and after its execution, this amended and restated note and instrument shall act as evidence of Borrower's indebtedness to Lender. All loan documents, as may have been previously amended and/or restated, executed in connection with the Prior Note will remain in full force and effect (including all documents that secure the payment of all indebtedness of Borrower to Lender) and are not extinguished by the execution of the amended and restated note and instrument. Additionally, all collateral that secured repayment of the Prior Note will remain as security for this amended and restated note.

**EXTENSION OPTION.** A one time 60-day extension will be allowed for an additional fee of 1.00% and an increase in the interest rate to 7.50%.

**SUCCESSOR INTERESTS.** The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender and its successors and assigns.

**GENERAL PROVISIONS.** This Note is payable on demand. The inclusion of specific default provisions or rights of Lender shall not preclude Lender's right to declare payment of this Note on its demand. If any part of this Note cannot be enforced, this fact will not affect the rest of the Note. Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. All such parties also agree that Lender may modify this loan without the consent of or notice to anyone other than the party with whom the modification is made. The obligations under this Note are joint and several.

**PRIOR TO SIGNING THIS NOTE, BORROWER READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS NOTE. BORROWER AGREES TO THE TERMS OF THE NOTE.**

**BORROWER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS PROMISSORY NOTE.**

**BORROWER:**

**UPSTREAM BREWING COMPANY, L.L.C., A COLORADO LIMITED LIABILITY COMPANY**

By: \_\_\_\_\_  
**Brian K. Magee, Sr., Manager of Upstream Brewing  
Company, L.L.C., a Colorado limited liability  
company**

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MICHAEL P. SORTINO, AS MEMBER )  
OF AND ON BEHALF OF UPSTREAM )  
BREWING COMPANY, LLC, A )  
COLORADO LIMITED LIABILITY )  
COMPANY, )

Plaintiffs, )

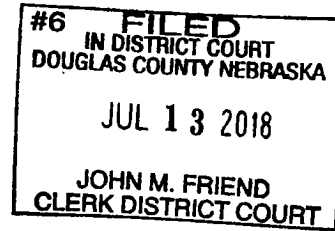
vs. )

BRIAN K. MAGEE, SR., GARY )  
HOFFMAN, AND UPSTREAM )  
PARTNERS, LLC, A NEBRASKA )  
LIMITED LIABILITY COMPANY, )

Defendant. )

CASE NO. CI 18-4138

ORDER



This matter came on for hearing to the Court on June 15, 2018, and June 26, 2018 on motions of Plaintiff and Defendant Upstream Brewing Company (UBC), for temporary restraining orders, and motions of Defendants Gary Hoffman and Upstream Partners to dismiss Plaintiff's Complaint. Evidence was received, and the matter submitted to the Court on arguments and briefs of the parties. Based on the foregoing, the Court finds as follows:

The Plaintiff filed his suit against the Defendants, claiming that Plaintiff is a member of UBC, a Colorado limited liability company, which operates a restaurant in Omaha. The Plaintiff claims that Defendant Upstream Partners owns more than fifty percent of UBC, and Defendants Magee and Hoffman are members of Upstream Partners. The Plaintiff further claims that Defendants run the business of UBC, in the operation of UBC's restaurant in Omaha, and in doing so, have taken excessive compensation, and have diverted and misappropriated funds of UBC. In his motion for



a temporary restraining order, the Plaintiff seeks to restrain the Defendants from refinancing a UBC debt by entering into a new loan agreement which would pledge UBC's building from which it operates its restaurant as collateral.

The Plaintiff operates Sortino Asset Management Company (SAM), which has acquired the UBC debt collateralized by the UBC restaurant building, and has declared the UBC obligation to be in default, and seeks to foreclose on the UBC restaurant building.

Defendant Magee opposes the Plaintiff's motion to restrain the Defendants from refinancing its loan secured by the restaurant building, and in its claim against SAM, UBC has moved for a temporary restraining order to stop SAM from foreclosing on its loan to UBC collateralized by the building.

UBC has offered evidence that it is in a position to refinance its debt owed to SAM which would stop SAM's foreclosure action. UBC claims that if SAM is allowed to foreclose on its loan to UBC, and take UBC's restaurant building, UBC would suffer irreparable harm by being put out of business. UBC and Defendant Magee are asking the Court to restrain SAM from foreclosing on its loan, and denying the Plaintiff's motion to restrain UBC from refinancing its debt owed to SAM by using the restaurant building as collateral. Defendant Magee and UBC offered evidence that the UBC operating agreement allows Upstream Partners in the management of the restaurant business to borrow money in the operation of the business, and to use UBC assets as collateral.

Under Nebraska law, a party is entitled to a temporary restraining order if it appears that such relief would restrain the commission of an act during litigation which would produce great or irreparable injury to that party, and to protect the subject matter

of the litigation and preserve the status quo of the parties until a determination can be made of the case on its merits. The Court finds that the Plaintiff has failed to show that he would suffer irreparable injury were the Court to deny his motion for a temporary restraining order, and that UBC would suffer irreparable harm, with foreclosure against its restaurant building, if its motion for a temporary restraining order is denied. The Plaintiff has failed to show why UBC refinancing the debt owed to SAM, and to stop SAM's foreclosure, would not be in UBC's best interest, and UBC has shown that it would suffer irreparable harm were SAM allowed to foreclose against UBC. The Court finds that to best preserve the status quo of the parties, and under the equities of the circumstances, Plaintiff's motion for a temporary restraining order should be denied, and UBC application for a temporary restraining order should be granted, and UBC should be allowed to refinance its debt to SAM, and to pay its obligations owed to SAM, and SAM should be temporarily enjoined from foreclosure on UBC's restaurant building, and SAM's recorded liens against UBC's assets subject to its refinancing should be released.

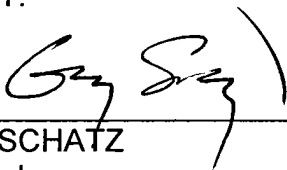
The Court further finds that to give SAM adequate security to forego its foreclosure, and release UBC's assets as ordered, and pursuant to Section 25-1067 of the Nebraska Revised Statutes, UBC shall give an undertaking in an amount of \$2,250,000.00.

As to the motions of Defendants Hoffman and Upstream Partners to dismiss Plaintiff's Complaint against them, they claim that the Plaintiff has failed to state a claim against each of them upon which the Plaintiff might recover in this case. The Plaintiff in his Complaint claims that in operating UBC, Defendants Magee and Hoffman were

members of Defendant Upstream Partners, and in operation of UBC's restaurant business, misappropriated funds in the form of improper management fees, disproportionate distributions, and took excessive compensation, and otherwise misappropriated company funds to themselves. The Plaintiff alleges in Paragraph 41 of his Complaint that Defendants Magee, Hoffman and Upstream Partners have all received financial benefits belonging to UBC, and that they should be held to account for and hold in trust on behalf of UBC benefits received. The Plaintiff has stated in his Complaint causes of action against all three named Defendants for an accounting, imposition of a constructive trust, and recovery of misappropriated funds. The Court finds that the motions of Defendants Hoffman and Upstream Partners should therefore be denied.

IT IS SO ORDERED this 12 day of July, 2018.

BY THE COURT:

  
\_\_\_\_\_  
GREGORY M. SCHATZ  
District Court Judge

cc: Daniel P. Bracht  
Attorney at Law  
128 N. Main Street  
P.O. Box 252  
West Point, NE 68788

Lawrence K. Sheehan  
Attorney at Law  
9290 West Dodge Road, Suite 303  
Omaha, NE 68114

Kathryn J. Derr  
Attorney at Law  
1301 South 75<sup>th</sup> Street, Suite 100  
Omaha, NE 68124

T.R. Wright  
Attorney at Law  
1700 Farnam Street, Suite 1500  
Omaha, NE 68102



**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on July 13, 2018 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Lawrence K Sheehan  
lsheehan@ellickjones.com

Kathryn J Derr  
kderr@berkshire-law.com

Colin J Bernard  
colinbernard@mgwl.com

T R Wright  
rwright@bairdholm.com

Daniel P Bracht  
dan.bracht@brachtlaw.com

Date: July 13, 2018

BY THE COURT:

*John M. Friend*  
CLERK

