

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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CORNER FURNITURE DISCOUNT CENTER, INC.  
and 2901 FURNITURE OUTLET, INC.,

Index No. 30522/2018E

Plaintiffs,

-against-

GARY SAPIRSTEIN,

Defendant.

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GARY SAPIRSTEIN,

Defendant/Counterclaimant,

-against-

CORNER FURNITURE DISCOUNT CENTER, INC.,

Plaintiffs/Counterclaim  
Defendant,

RONGAR REALTY OF N.Y., INC. and  
2926 REALTY CORP.,

Additional Counterclaim  
Defendants.

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**REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO  
DISMISS DEFENDANT'S COUNTERCLAIMS AND CERTAIN AFFIRMATIVE  
DEFENSES PURSUANT TO CPLR 3211(a)(2) AND CPLR 3211(b)**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT ..... 1

ARGUMENT ..... 2

    I. DEFENDANT’S FIRST COUNTERCLAIM FOR JUDICIAL DISSOLUTION  
    UNDER BUSINESS CORPORATION LAW §1104-A MUST BE DISMISSED  
    AS IT IS IMPROPER, AND DEFENDANT’S ATTEMPT TO CORRECT THIS  
    CLAIM IS DEFECTIVE. .... 2

    II. DEFENDANT’S UNSUBSTANTIATED AFFIRMATIVE DEFENSES SHOULD BE  
    DISMISSED. .... 3

CONCLUSION ..... 7

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Baker v. Andover Assoc. Mgt. Corp.</i> , 30 Misc. 3d 1218(A) (Sup. Ct. Westchester County 2009).....	5
<i>Berma Mgt. Corp. v. 140 W. 42nd St. Realty</i> , 197 N.Y.S. 2d 18 (Sup. Ct. New York County 1960).....	6
<i>Cuddle Wit, Inc. v. Chan</i> , 1990 WL 115620 (S.D.N.Y. 1990).....	3
<i>Executive Leasing Co. v. Leder</i> , 191 A.D.2d 199 (1st Dep't 1993).....	5, 6
<i>Fedele v. Seybert</i> , 250 A.D.2d 519 (1st Dep't 1998).....	2
<i>FTBK Investor II LLC v. Genesis Holding LLC</i> , 7 N.Y.S. 3d 825 (Sup. Ct. New York County 2014).....	5
<i>Higgins v. New York Stock Exch., Inc.</i> , 806 N.Y.S. 2d 339 (Sup. Ct. New York County 2005).....	5
<i>Kent &amp; Co. v Wolf</i> , 143 A.D.2d 813 (2d Dep't 1988).....	5
<i>La Sorsa v. Algen Press Corp.</i> , 105 A.D.2d 771 (2d Dep't 1984).....	3
<i>Matter of Paloma Frocks</i> , 3 N.Y.2d 572 (1958).....	5
<i>Mazzei v. Kyriacou</i> , 98 A.D.3d 1088 (2d Dep't 2012).....	3
<i>Robbins v. Grownny</i> , 229 A.D.2d 356 (1st Dep't 1996).....	4
<i>Sports Legends, Inc. v. Carberry</i> , 2008 N.Y. Slip Op. 30718(U) (Sup. Ct. New York County 2008).....	4
<i>Sterling Indus. v Ball Bearing Pen Corp.</i> , 298 N.Y. 483 (1949).....	5
<i>Stone v. Frederick</i> , 666 N.Y.S. 2d 294 (3d Dep't 1997).....	6

*The Woods Knife Corp. v. Eastman Mach. Co.*,  
2009 N.Y. Slip Op. 32069(U) (Sup. Ct. Nassau County 2009)..... 3

*Tzolis v. Wolff*,  
10 N.Y. 3d 100 (2008)..... 6

*West View Hills v. Lizau Realty Corp.*,  
6 N.Y. 2d 344 (1959)..... 6

<b>Statutes</b>	<b>Page(s)</b>
BCL § 1104.....	1, 2, 3, 7
BCL § 1105.....	2
BCL § 1106.....	2, 3
CPLR 3013.....	4
CPLR 3014.....	4

Plaintiffs Corner Furniture Discount Center, Inc., 2901 Furniture Outlet, Inc., and Counterclaim Defendants Rongar Realty of N.Y., Inc., and 2926 Realty Corp. (collectively, “Plaintiffs” or “Companies”), submit this Reply Memorandum of Law in further support of their motion, brought pursuant to BCL §§ 1105 and 1106, as well as CPLR 3211(a)(2) and 3211(b), to dismiss the First Counterclaim in the Verified Counterclaims (“Counterclaims”) filed by Defendant Gary Sapirstein (“Sapirstein” or “Defendant”), as well as certain of Defendant’s meritless affirmative defenses.<sup>1</sup>

### **PRELIMINARY STATEMENT**

Defendant’s Opposition brief (“Opp.”) is remarkable in its attempt to legitimize Gary Sapirstein’s very elaborate, continuous, and deceptive scheme to embezzle from the Companies. In fact, in his feckless effort to paint himself the victim, Sapirstein actually *concedes* Plaintiffs’ claims in this action: (1) “.RS [*sic*] and PCC have claimed theft and fraud on my behalf for taking money from PCC as reasons for all the above oppressive actions, none of which has any basis in fact as substantial monies have been due to me for many years”<sup>2</sup>; and (2) “Nor could there be any basis for intent to defraud. ... Defendant was duped by Stechler for many years and *was only attempting repayment and offset for the many sums taken from Defendant by Stechler*”<sup>3</sup> (emphasis added).

This Court is now presented with an admitted thief’s plea for judicial dissolution of the Companies. In his Counterclaims, Defendant inartfully alleges both “oppressive” actions under Business Corporation Law section 1104-a(a)(1) and corporate waste under section 1104-a(a)(2).

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<sup>1</sup> Capitalized terms not defined herein have the meaning ascribed to them in Plaintiffs’ December 11, 2018 moving brief (“P. Br.”).

<sup>2</sup> See Declaration of Gary Sapirstein in Support of Petition to Judicially Dissolve Plaintiff Corporations and Related Corporation [*sic*] (“Sapirstein Decl.”), at ¶ 38.

<sup>3</sup> See Defendant’s Response to Demand for Bill of Particulars (“Def. Response to BOP”), at Response No. 11.

(See Counterclaims at ¶¶ 11-40.). Yet Defendant's entreaty via counterclaim for judicial dissolution under BCL § 1104-a was simply improper. As a result, Defendant attempted to correct the improper invocation of judicial dissolution with a new filing. On January 22, 2019, Defendant—rather predictably—filed a defective Notice of Petition and defective Order to Show Cause. Both erroneously filed documents still require correction. Thus, as the procedural mandates of Business Corporation Law § 1106 have not been met, Defendant fails to plead his judicial dissolution cause of action as directed by statute, and it must be dismissed.

Moreover, certain of Defendants' affirmative defenses should be dismissed on the grounds that they are without basis in fact and law. Plaintiffs' legal arguments—with particular concern to Defendant's second and third affirmative defenses—are left wholly unchallenged. Defendant merely makes the conclusory claim that each defense is sufficiently pleaded; he then cites to irrelevant case law, likely in an unsuccessful attempt to obfuscate what is plainly a losing argument. The Court should therefore dismiss these affirmative defenses as well.

### ARGUMENT

#### **I. DEFENDANT'S FIRST COUNTERCLAIM FOR JUDICIAL DISSOLUTION UNDER BUSINESS CORPORATION LAW §1104-A MUST BE DISMISSED AS IT IS IMPROPER, AND DEFENDANT'S ATTEMPT TO CORRECT THIS CLAIM IS DEFECTIVE.**

As detailed at length in the moving brief, Defendant's first counterclaim for involuntary judicial dissolution pursuant to BCL section 1104-a is simply improper. (See Pl. Br. at pp. 5-7; Counterclaims at ¶¶ 32-40.). In order to make a claim for dissolution under the BCL, a party must first comply with the BCL's strict procedures for a dissolution petition as outlined in §§ 1105 and 1106. See BCL §§ 1105, 1106; *Fedele v. Seybert*, 250 A.D.2d 519, 520 (1st Dep't 1998). These procedures direct a special proceeding including the preparation of an order to show cause, verified

petition, and publication. BCL § 1106; see also *La Sorsa v. Algen Press Corp.*, 105 A.D.2d 771, 772 (2d Dep't 1984).

A minority shareholder who seeks involuntary judicial dissolution under 1104-a but neglects to follow the strict procedures of the BCL will fail to meet his objective. See *The Woods Knife Corp. v. Eastman Mach. Co.*, 2009 N.Y. Slip Op. 32069(U) (Sup. Ct. Nassau County 2009) (Trial Order) (dismissing defendant's counterclaim for involuntary corporate dissolution pursuant to BCL § 1104-a as it was inappropriately commenced); *Cuddle Wit, Inc. v. Chan*, 1990 WL 115620 (S.D.N.Y. 1990) (dismissing defendant's counterclaim for involuntary judicial dissolution under BCL § 1104-a on the grounds that the court lacked subject matter jurisdiction given the priority of New York's Business Corporation Law statutory scheme.)

While Defendant claims in his Opposition that these procedures "obviously [have] been followed," Defendant's Petition and Order to Show Cause seeking judicial dissolution have been rejected by this Court. (Opp. at p. 2.) In fact, nearly three weeks have passed since Defendant's filing, and he still has yet to correct the defective nature of the petition. Defendant's counterclaim for judicial dissolution therefore must be dismissed. BCL § 1106; *The Woods Knife Corp.*, 2009 N.Y. Slip Op. 32069(U) (Sup. Ct. Nassau County 2009).<sup>4</sup>

## **II. DEFENDANT'S UNSUBSTANTIATED AFFIRMATIVE DEFENSES SHOULD BE DISMISSED.**

Under CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." *Mazzei v. Kyriacou*, 98 A.D.3d 1088, 1088-89 (2d Dep't 2012) (citations omitted). Defendant's fourth, fifth and ninth affirmative defenses are pled as bare legal conclusions. (See December 11, 2018 Triplett Aff., Ex. "B", at ¶¶

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<sup>4</sup> Plaintiffs reserve their substantive arguments against judicial dissolution for the appropriate time and forum.

59-60, 64.); *see also, e.g., Robbins v. Growny*, 229 A.D.2d 356, 357-358 (1st Dep't 1996) (dismissing defense on the ground that it is unsupported by factual allegations and that "bare legal conclusions are insufficient to raise an affirmative defense"). Defendant, however, augments these unsubstantiated defenses in the Opposition, and pleads each with sufficient particularity so as to ensure compliance with CPLR 3013 and 3014.<sup>5</sup> (*See Opp.* at pp. 4-7.)

Notwithstanding, Defendant's second and third affirmative defenses are without any basis in law and fact, and Defendant's brief fails to proffer any tenable arguments to the contrary. First, Defendant asserts that Plaintiffs lack standing because they chose to initiate the instant suit in the Companies' names rather than in the form of a stockholder derivative action. (*See Opp.* at pp. 2-3; Ex. "B" at ¶¶ 57-58.). Defendant also curiously contends that the suit should have been brought solely by Ronald Stechler: "The only proper parties for standing in this matter are Ronald Stechler and Defendant." (Def. Resp. to BOP, at No. 2.) It is sometimes unclear whether Defendant is advocating that Ronald Stechler sue in his personal capacity, or whether he maintains that a derivative suit is necessary. *Id.*

Regardless, Defendant's primary assertion—that the suit must be brought derivatively—is unsupported. Ronald and Eric Stechler are the majority shareholders of the Companies, all of which are close corporations. New York allows majority, controlling shareholders in close corporations to prosecute actions in the company's name only. *See Sports Legends, Inc. v. Carberry*, 2008 N.Y. Slip Op. 30718(U) (Sup. Ct. New York County 2008) (Trial Order). Defendant cites to no case law in the Opposition that holds contrary. (*See Opp.* at pp. 2-3.)

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<sup>5</sup> Plaintiffs do not concede any of the alleged facts or purported bases supporting Defendant's affirmative defenses. Plaintiffs merely acknowledge that Defendant's fourth, fifth, and ninth affirmative defenses are now sufficiently pleaded in accordance with CPLR 3013.

Defendant instead cites to three cases that possess only scant relationship to the immediate suit. *Id.*

A close reading of these cases reveals that each is *absolutely inapposite* to the central issue as to whether the Companies possess standing to bring the instant action. *Id.* (citing *FTBK Investor II LLC v. Genesis Holding LLC* (“*FTBK Investor*”), 7 N.Y.S. 3d 825, 828-29 (Sup. Ct. New York County 2014) (holding amendments to an answer are allowed if they are meritorious and cause plaintiff no surprise or other prejudice); *Higgins v. New York Stock Exch., Inc.*, 806 N.Y.S. 2d 339, 344 (Sup. Ct. New York County 2005) (addressing whether minority shareholders lack standing to pursue a direct cause of action to redress a diminution in the value of shares suffered by a corporation merger); and *Baker v. Andover Assoc. Mgt. Corp.*, 30 Misc. 3d 1218(A) (Sup. Ct. Westchester County 2009) (addressing whether Plaintiff’s claims for diminution in the value of her membership interest due to the Madoff Ponzi scheme may only be pursued derivatively). To be sure, Plaintiffs are not alleging they will be prejudiced by Defendant’s lack of standing affirmative defense as in *FTBK Investor*; rather, Plaintiffs are alleging that such a defense is without merit. (Pl. Br. at pp. 6-8.). The other two cited cases are similarly immaterial. *Id.* Defendant’s reliance on inapplicable case law appears misleading at best.

The statutory rule in New York is that the business of a corporation shall be managed by its board of directors (BCL § 701) and shall not be circumvented. *Executive Leasing Co. v. Leder*, 191 A.D.2d 199, 200 (1st Dep’t 1993) (citing *Sterling Indus. v Ball Bearing Pen Corp.*, 298 N.Y. 483 (1949); see, *Matter of Paloma Frocks* [Shamokin Sportswear Corp.], 3 N.Y.2d 572, 575 (1958); *Kent & Co. v Wolf*, 143 A.D.2d 813, 814 (2d Dep’t 1988)). Courts have consistently held that “[w]here there has been no direct prohibition by the board ... the president has presumptive authority, in the discharge of his duties, to defend and prosecute suits in the name of the

corporation.”” *Executive Leasing Co.*, 191 A.D.2d at 200 (internal citations omitted); *see also West View Hills v. Lizau Realty Corp.*, 6 N.Y. 2d 344, 348 (1959) (holding absent a contrary provision, the president must be deemed to have presumptive authority to initiate litigation in the name of the corporation); *Berma Mgt. Corp. v. 140 W. 42nd St. Realty*, 197 N.Y.S. 2d 18, 19 (Sup. Ct. New York County 1960) (holding that—absent any formal interdiction otherwise—the president of a corporation has presumptive authority in the discharge of his duties to prosecute suits in the name of the corporation); *Stone v. Frederick*, 666 N.Y.S. 2d 294, 295 (3d Dep’t 1997) (holding the inverse, *i.e.*, when the board of directors authorizes two shareholders each with a 50% share to act as the corporation’s only directors, an action cannot be maintained in the name of the corporation by one shareholder against the other with an equal interest of control; the proper remedy in that situation would be a derivative action). Here, Ronald Stechler, as President and Chairman of the Board of Directors of the Companies, elected to pursue an action in the Companies’ names. New York unquestionably allows this in the context of close corporations. *Berma Mgt. Corp.*, 197 N.Y.S. 2d at 19. Defendant’s affirmative defense of lack of standing is therefore without any merit and must be dismissed.

Defendant’s third affirmative defense of failure to join a necessary party fails under the same reasoning. Defendant makes the conclusory statement that “Plaintiffs are not the proper parties in interest as this claim is derivative in nature, therefore this claim must be brought by a shareholder...who is a necessary and indispensable party to this action.” (Opp. at p. 3.) Defendant then cites to three only marginally-related cases in what appears to be another incompetent effort to substantiate his claim. *Id.* Indeed, in a particularly bizarre twist, one of the inapplicable cases Defendant cites, *Tzolis v. Wolff*, 10 N.Y. 3d 100, 108 (2008), addresses whether courts should uphold the right of LLC members to sue derivatively. The Court of Appeals in *Tzolis* never once

discusses joinder of necessary parties in its decision; in fact, the terms “joinder” and “necessary parties” never even appear in the text. (*See Opp.* at p. 3.)

Consequently, as the Companies’ suit is legitimate, given Ronald Stechler’s role as both majority shareholder and President, Plaintiffs are the proper parties in interest and Defendant’s assertion that Plaintiffs have failed to join a necessary party to the action is baseless. Dismissal of Defendant’s third affirmative defense therefore is warranted as well.

### CONCLUSION

For the foregoing reasons, and for the reasons set forth in Plaintiffs’ December 11, 2018 Memorandum of Law in Support of the instant motion, Plaintiffs respectfully request that the Court grant its Motion to Dismiss Defendant’s counterclaim for involuntary judicial dissolution under BCL § 1104-a in its entirety. The Court should also dismiss certain of Defendant’s affirmative defenses that are without merit, and award Plaintiffs all such other and further relief as the Court deems just and proper.

Dated: New York, New York  
February 13, 2019

Respectfully submitted,  
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