SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of CRISTINA QUAZZO, Petitioner - against- 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION, and UGO QUAZZO as Officer and Director of 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION, and STEPHEN QUAZZO and MARCO QUAZZO as Officers, Directors, and Shareholders of 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION Respondents.	Index No. 652282-2010 Part 60

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT TO DISMISS THE PROCEEDING BY RESPONDENTS 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, ORBIS INTERNATIONAL CORPORATION AND UGO QUAZZO

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 3

ARGUMENT 3

I. LEGAL STANDARD 3

II. RESPONDENTS IGNORE PETITIONER'S CLAIMS AND MISCONSTRUE THE PURPOSE OF THE JUDICIAL DISSOLUTION STATUTE. 4

III. RESPONDENTS' ONLY EVIDENCE IN SUPPORT OF THE MOTION FAILS TO SATISFY THEIR *PRIMA FACIE* BURDEN AND IS CONTRADICTED BY THE OBJECTIVE DOCUMENTARY EVIDENCE. 5

IV. PETITIONER HAS STANDING TO BRING A STATUTORY DISSOLUTION PROCEEDING OR AT LEAST HAS RAISED TRIABLE ISSUES OF FACT. 6

A. Petitioner's Proof 7

B. Respondents' Proof (Or Lack Thereof) 12

V. PLAINTIFF HAS BEEN OPPRESSED WITHIN THE MEANING OF BCL § 1104-a(a)(1) OR HAS AT LEAST RAISED TRIABLE ISSUES OF FACT 15

VI. PETITIONER'S ALLEGATIONS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS. 18

VII. THE EVIDENCE OF FINANCIAL IMPROPRIETY SUPPORTS DISSOLUTION UNDER BCL § 1104-a(a)(2) OR, AT MINIMUM, RAISES TRIABLE ISSUES OF FACT. 20

VIII. THE PETITION HAS BEEN BROUGHT IN GOOD FAITH 21

IX. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE ADDITIONAL DISCOVERY IS NEEDED. 23

CONCLUSION AND REQUEST FOR ORAL ARGUMENT 25

TABLE OF AUTHORITIES

Page(s)

CASES

196 Owners Corp. v. Hampton Mgmt. Co.,
227 A.D.2d 296 (1st Dep't 1996) 19

770 Owners Corp. v. Spitzer,
No. 26835/08, 2009 WL 3018733 (N.Y. Sup. Ct. Sept. 21, 2009) 19

Application of Ng,
174 A.D.2d 523 (1st Dep't 1991) 20

Bartee v. D&S Fire Prot. Corp.,
79 A.D.3d 508 (1st Dep't 2010) 23

Berger v. Pavlounis,
No. 103170/08, 2011 WL 2150770 (N.Y. Sup. Ct. Apr. 14, 2011) 18, 19

Bouhayer v. Georgalis,
169 Misc.2d 779 (N.Y. Sup. Ct. 1996) 21

Buglione v. Emmco Dev. Corp.,
76 A.D.2d 849 (2d Dep't 1980) 16

Buller v. Giorno,
28 A.D.3d 258 (1st Dep't 2006) 21

Bygrave v. N.Y.C. Hous. Auth.,
65 A.D.3d 842 (1st Dep't 2009) 6

Casita, LP v. Maplewood Equity Partners (Offshore) Ltd.,
No. 603525/2005, 17 Misc.3d 1137(A) (N.Y. Sup. Ct. Dec. 7, 2007) 17

Clark v. Pattern Analysis & Recognition Corp.,
87 Misc.2d 385 (N.Y. Sup. Ct. 1976) 17

Cooke v. City of N.Y.,
95 A.D.3d 537 (1st Dep't 2012) 23

Cristina Quazzo v. 9 Charlton St. Corp.,
No. 652002/2011 (N.Y. Sup. Ct. July 17, 2012) (Fried, J.) 19

Donoghue v. Local.com Corp.,
No. 07 Civ. 8550(LBS), 2009 WL 260797 (S.D.N.Y. Feb. 3, 2009) 10

Estate of Essig v. 5670 58 St. Holding Corp.,
No. 8393 2005, 2007 WL 292239 (N.Y. Sup. Ct. Jan. 25, 2007) 10

Gen. Stencils, Inc. v. Chiappa,
18 N.Y.2d 125 (1966) 18

Gonzalez v. Vincent James Management Co., Inc.,
306 A.D.2d 226 (1st Dep't 2003) 23

In re Cablevision Sys. Corp. S'holders Litig.,
21 Misc.3d 419 (N.Y. Sup. Ct. 2008) 8

In re Carroll,
100 A.D.2d 337 (2d Dep't 1984) 10

In re Estate of Szabo,
10 N.Y.2d 94 (1961) 10

In re Farega Realty Corp.,
132 A.D.2d 797 (3d Dep't 1987) 17

In re Kemp & Beatley, Inc.,
64 N.Y.2d 63 (1984) 4, 5

In re Pickwick Realty Ltd.,
246 A.D.2d 863 (3d Dep't 1998) 15, 16

JMD Holding Corp. v. Cong. Fin. Corp.,
4 N.Y.3d 373 (2005) 6

Karan v. Hoskins,
22 A.D.3d 638 (2d Dep't 2005) 21

Lichtenstein v. Eljohnan, Inc.,
161 A.D.2d 397 (1st Dep't 1990) 15

Mahoney-Buntzman v. Buntzman,
12 N.Y.3d 415 (2009) 8

Pappas v. Fotinos,
No. 7799/04, 2010 WL 2891194 (N.Y. Sup. Ct. July 23, 2010) 16

Pell St. Nineteen Corp. v. Mah,
243 A.D.2d 121 (1st Dep't 1998) ..... passim

People ex rel. Cuomo v. Greenberg,
95 A.D.3d 474 (1st Dep't 2012) 3, 4

Quadrozzi v. Estate of Quadrozzi,
99 A.D.3d 688 (2d Dep't 2012) 18

Quasha v. Am. Natural Beverage Corp.,
171 A.D.2d 537 (1st Dep't 1991) 18

Rusyniak v. Gensini,
629 F. Supp. 2d 203 (N.D.N.Y. 2009) 18

Santos v. Temco Serv. Indus., Inc.,
295 A.D.2d 218 (1st Dep't 2002) 15

Shybunko v. Geodesic Homes, Inc.,
65 A.D.3d 581 (2d Dep't 2009) 11

Simcuski v. Saeli,
44 N.Y.2d 442 (1978) 18

Steele v. Anderson,
No. 03-CV-1251, 2004 WL 45527 (N.D.N.Y. Jan. 8, 2004) 19

Tucker v. N.Y.C. Transit Auth.,
42 A.D.3d 316 (1st Dep't 2007) 23

Vega v. Restani Constr. Corp.,
18 N.Y.3d 499 (2012) 3, 6

Welch v. Riverbay Corp.,
273 A.D.2d 66 (1st Dep't 2000) 15

Wenger v. L.A. Wenger Contracting Co.,
No. 31701-2008, 2010 WL 5186679 (N.Y. Sup. Ct. Dec. 14, 2010) 8, 9, 21

Westchester Religious Inst. v. Kamerman,
262 A.D.2d 131 (1st Dep't 1999) 19

Winegrad v. N.Y. Univ. Med. Ctr.,
64 N.Y.2d 851 (1985) 6

STATUTES

BCL § 1104-a 4, 5, 6, 16

BCL § 1104-a(a)(1) 4, 5, 15

BCL § 1104-a(a)(2) ..... passim

CPLR § 105(u) 3

CPLR § 3212(f) 3, 4, 23, 25

OTHER AUTHORITIES

97 N.Y. Jur. 2d Summary Judgment, Etc. § 55 6

97 N.Y. Jur. 2d Summary Judgment, Etc. § 225 6

Petitioner Cristina Quazzo, by and through her undersigned counsel, respectfully submits this Memorandum of Law in Opposition to the Motion for Summary Judgment to Dismiss the Proceeding by respondents 9 Charlton Street Corporation ("9 Charlton"), Pearlbud Realty Corporation ("Pearlbud"), Orbis International Corporation ("Orbis") (individually a "Corporation" and collectively the "Corporations") and Ugo Quazzo (collectively with the Corporations, "Respondents"), filed October 10, 2012 (Docket No. 104) ("Motion"), together with the Affidavit of Cristina Quazzo, sworn to December 14, 2012 ("Petitioner Aff."), and the exhibits thereto, the Affidavit of James J. Donohue, sworn to December 14, 2012 ("Donohue Aff."), and the exhibits thereto, and the Affirmation of Mark A. Berube, Esq., dated December 17, 2012 ("Berube Affirmation"), and the exhibits thereto. For the reasons set forth herein and in the remainder of the record, petitioner respectfully requests that the Court deny the Motion in its entirety.

PRELIMINARY STATEMENT

This proceeding is about the severe oppression of petitioner, a one-third minority shareholder of each of three New York corporations, and the extreme mismanagement of those corporations through looting, waste, and the misappropriation of corporate assets for improper purposes. The objective, documentary evidence that has been uncovered to date, ***unrebutted in any manner by Respondents***, demonstrates that petitioner's signature has been forged on official corporate documents in an effort to deprive her of her shares, undeposited and misappropriated rents from rental properties held by the corporations in excess of $1 million, unpaid income tax in excess of $1 million, and the inexplicable and unexplained transfer of hundreds of thousands of dollars of corporate money to third-party bank accounts controlled by Respondent Ugo Quazzo. Petitioner supports her position not only with dozens of corporate records -- including records filed with state and federal governments deemed legally conclusive -- but also with the expert Affidavits of a forensic document examiner and a forensic accountant.

Relying on the entirely conclusory, four page Affidavit of Respondent Ugo Quazzo -- unsupported by a single document -- Respondents baldly assert that Ugo Quazzo is the 100% shareholder of each corporation and petitioner is not and has never been one. Respondents' contentions are rebutted by every piece of objective, documentary evidence. In actuality, the record before the Court counsels for entry of partial summary judgment finding that petitioner is a one-third shareholder of each corporation. Indeed, Respondents' contention that no issues of fact exist as to this issue borders on the absurd.

Respondents next argue that petitioner has not been oppressed, ignoring her primary complaints -- that Respondents attempted to deprive her of her shares through forgeries and thereafter concealed this fraud by refusing her access to corporate documents. Respondents cite no authority finding that such malfeasance does not amount to oppression, and ignore authority holding that it does. They further contend that petitioner is barred from relying on this evidence of forgeries (which they wholly fail to rebut or deny) under a six year statute of limitations -- an argument already advanced before and rejected by Justice Fried in the related Action. Because Respondents concealed their malfeasance, including these forgeries, from petitioner, they are equitably estopped from relying on a statute of limitations defense.

As to petitioner's request for dissolution under BCL § 1104-a(a)(2), Respondents simply chalk up the gross financial impropriety discussed above to "informal governance." They entirely fail to address the extensive evidence submitted by petitioner, including as to how it does not, at minimum, give rise to triable issues of fact.

Respondents in conclusion contend that the Petition has been brought in "bad faith." In so doing, they wholly ignore petitioner's rationale for commencing the Special Proceeding -- which must be viewed in the light most favorable to petitioner on this Motion. Further, they contend that petitioner's desire for a global settlement is evidence of bad faith when, in fact, it is ***Respondents***

who have insisted on a global settlement addressing all of Ugo Quazzo's assets since before commencement of this Special Proceeding.

Finally, the Motion must be denied pursuant to CPLR 3212(f) for an independent reason unsurprisingly not addressed by Respondents -- there exists significant, ongoing fact discovery related to the central issues addressed by the Motion.

STATEMENT OF FACTS

Petitioner respectfully refers the Court to the Amended Petition, filed September 26, 2012 (Docket No. 48) ("Amended Petition"),[1] Petitioner Affidavit, Donohue Affidavit, and Berube Affirmation, and the Exhibits annexed to each, for a statement of the facts pertinent to the Motion.

ARGUMENT

I

LEGAL STANDARD

As a "drastic remedy" that "depriv[es] the parties of a trial," summary judgment "should only be granted where there is no doubt as to the existence of a triable issue of fact." People ex rel. Cuomo v. Greenberg, 95 A.D.3d 474, 483 (1st Dep't 2012). It should be granted "only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact . . . and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012) (quotation omitted). The failure of the moving party to meet its burden "requires a denial of the motion [for summary judgment], *regardless of the sufficiency of the opposing papers.*" Id. (quotation omitted).

On a motion for summary judgment, "facts must be viewed in the light most favorable to the non-moving party." Id. "Further, where credibility determinations are required, summary

[1] As a verified pleading, the Amended Petition is legally equivalent to an Affidavit. See CPLR § 105(u).

judgment must be denied." Greenberg, 95 A.D.3d at 483. Finally, "in opposition to [a] motion for summary judgment, a court can consider hearsay evidence." Id. at 484.

II

RESPONDENTS IGNORE PETITIONER'S CLAIMS AND MISCONSTRUE THE PURPOSE OF THE JUDICIAL DISSOLUTION STATUTE.

Petitioner seeks dissolution of the Corporations on three independent grounds: the common law, BCL § 1104-a(a)(1), and BCL § 1104-a(a)(2). See Amended Petition at ¶ 57. Turning to the statutory grounds for dissolution (the only ground addressed by the Motion), Respondents begin by contending that "the purpose of BCL § 1104-a is to provide a remedy to minority shareholders who have invested time and money in a company, but have been wrongfully denied the fruits of that investment." Memorandum of Law in Support of Respondents' Motion for Summary Judgment Dismissing the Petition, filed October 10, 2012 (Docket No. 111) ("Respondents' Memo") at 6. Respondents base this assertion on an incomplete analysis of In re Kemp & Beatley, Inc., 64 N.Y.2d 63 (1984).[2] The Court of Appeals there was only analyzing the term "oppression" in the first subpart of BCL § 1104-a pursuant to a unique set of facts -- not the entire statute and certainly not BCL § 1104-a(a)(2). Id. at 70-71.

Respondents' inapt characterization of Kemp & Beatley is symptomatic of a larger flaw with the entire Motion: Respondents have almost entirely ignored this separate financial mismanagement

---

[2] Respondents' reliance on Kemp & Beatley is curious given that the opening sentence of the opinion reads "When the majority shareholders of a close corporation award *de facto* dividends to all shareholders except a class of minority shareholders, such a policy may constitute "oppressive actions" and serve as a basis for an order made pursuant to section 1104–a of the Business Corporation Law dissolving the corporation." Kemp & Beatley, 64 N.Y.2d at 67. Through discovery petitioner has recently learned that since the commencement of this Special Proceeding the Corporations have, for the first time, paid a dividend, although the Corporations have thus far failed to specify to whom the dividend was paid and how much it was. Petitioner Aff. at ¶ 20; see also Affidavit of Ugo R. Quazzo, sworn to October 5, 2012 (Docket No. 109) ("Ugo Quazzo Affidavit") at ¶¶ 3-5. Petitioner did not receive any dividend, nor any notice of the issuance of a dividend. As per the Court of Appeals in Kemp & Beatley, that the Corporations have now issued a dividend to some shareholders but not others may constitute additional oppressive action warranting dissolution. However, because the Corporations have thus far refused to disclose any information about the dividend, further discovery is required. See CPLR 3212(f); infra pp. 23-25.

prong of BCL § 1104-a(a)(2). Their cases and analysis all focus on the oppression prong of BCL § 1104-a(a)(1). Of course, it is understandable why Respondents would choose to ignore BCL § 1104-a(a)(2) -- the extensive evidence of serious financial mismanagement at the Corporations at the very least raises triable issues of fact precluding summary judgment. See Amended Petition at ¶¶ 47-55; Donohue Aff.; Petitioner Aff. at ¶¶ 21-33.

In truth, the purpose of BCL § 1104-a is to supplement the traditional equitable powers of the Court to dissolve a corporation. That power is

> [p]redicated on the majority shareholders' fiduciary obligation to treat all shareholders fairly and equally, to preserve corporate assets, and to fulfill their responsibilities of corporate management with "scrupulous good faith[." T]he courts equitable power can be invoked when it appears that the directors and majority shareholders have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute.

Kemp & Beatley, 64 N.Y.2d at 69-70 (internal quotations omitted). Here, the evidence adduced thus far in discovery demonstrates such "palpable breaches" of fiduciary duty. To offer just the most glaring example, petitioner's name was forged on corporate records in order to divest her of her ownership in the Corporations. Amended Petition at ¶¶ at 31-32; Petitioner Aff. at ¶ 19. Again, such evidence -- as well as the evidence of unaccounted for rents and unexplained transfers of hundreds of thousands of dollars of corporate assets into third-party bank accounts controlled by respondent Ugo Quazzo -- is certainly enough to at least raise triable issues of fact. See Amended Petition at ¶¶ 50-55; Donohue Aff.; Petitioner Aff. at ¶¶ 21-33.

III

RESPONDENTS' ONLY EVIDENCE IN SUPPORT OF THE MOTION FAILS TO SATISFY THEIR *PRIMA FACIE* BURDEN AND IS CONTRADICTED BY THE OBJECTIVE DOCUMENTARY EVIDENCE.

In support of the Motion, the ***only*** evidence Respondents submit is the single, conclusory, entirely unsupported Ugo Quazzo Affidavit. In moving for summary judgment, it is Respondents'

prima facie burden to "tender[] sufficient evidence to demonstrate the absence of any material issues of fact." Vega, 18 N.Y.3d at 503. "A conclusory affidavit . . . does not establish the proponent's prima facie burden." JMD Holding Corp. v. Cong. Fin. Corp., 4 N.Y.3d 373, 384-85 (2005) (movant's summary judgment burden not met where affidavit of movant's president conclusory, relied entirely on the memorandum of law prepared by movant's attorney, and provided no factual basis to support any conclusion); see also Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (same); Bygrave v. N.Y.C. Hous. Auth., 65 A.D.3d 842, 846-47 (1st Dep't 2009) (same); 97 N.Y. Jur. 2d Summary Judgment, Etc. §§ 55 and 225 (same).

The Ugo Quazzo Affidavit is entirely conclusory and not supported by a single piece of documentary evidence. Such a document is insufficient to sustain Respondents' *prima facie* burden. Further, as will be demonstrated in detail below, this Affidavit is blatantly contradicted by the existing documentary evidence. The Motion should be denied on this basis alone, without even considering petitioner's opposition.

IV

PETITIONER HAS STANDING TO BRING A STATUTORY DISSOLUTION PROCEEDING OR AT LEAST HAS RAISED TRIABLE ISSUES OF FACT.

In order to have standing to bring a statutory dissolution proceeding, petitioner must be a shareholder of at least 20% of each Corporation's outstanding shares. BCL § 1104-a. Respondents argue that petitioner is not and never has been a shareholder, and thus lacks standing. See Respondent's Memo at 6-9; Ugo Quazzo Aff. at ¶¶ 3-7. However, contrary to Respondents' contentions, the evidence establishes petitioner is and has been a one-third (1/3) shareholder of each of the Corporations. At the very least, the evidence contradicts each and every one of the conclusory assertions in the Ugo Quazzo Affidavit as to why petitioner is not a shareholder and undoubtedly raises triable issues of fact on this issue, precluding summary judgment.

A. Petitioner's Proof

All of the following evidence, which establishes petitioner's shareholder status in each of the three Corporations, is contained in and attached as Exhibits to the Petitioner Affidavit. See Petitioner Aff. at ¶¶ 3-4, 16-18. Respondents amazingly simply ignore the existence of nearly all of this evidence in both their Memorandum and the Ugo Quazzo Affidavit, which fails to address ***any*** of these documents other than the K-1 statements issued by 9 Charlton and, tangentially, the stock certificates. Respondents' conclusory denials in the face of this overwhelming evidence are insufficient to carry their burden on a motion of summary judgment and establish that the first requirement for an *inter vivos* gift has not been met -- the intention to make a gift. Indeed, the below evidence arguably counsels for the grant of partial summary judgment ***for petitioner*** on this issue. See Pell St. Nineteen Corp. v. Mah, 243 A.D.2d 121, 125 (1st Dep't 1998) (holding valid *inter vivos* gift made where documentary evidence -- including tax filings -- showed a gift, even though stock certificates never delivered; "[i]t is well settled that conclusory allegations as to the lack of donative intent, asserted in the face of a documentary showing to the contrary, are insufficient to defeat summary judgment").

- **Exhibit A:** A March 12, 2001 letter from Charles N. Forchelli, Esq., counsel to the Corporations, to Ugo Quazzo referring to petitioner and her brothers as the shareholders of Orbis. Enclosed with this letter is a March 12, 2001 "Written Consent of Shareholders to Action Without a Meeting," signed by petitioner, that specifically lists petitioner, along with her two brothers, as "the holders of all the outstanding shares of ORBIS INTERNATIONAL CORP. . . . ." Respondents in no way address these documents.

- **Exhibits G-I:** Stock Certificates in petitioner's name issued by each of the three Corporations.

- **Exhibit J:** A March 13, 2001 "Corporate Resolution" for Orbis, providing that the Corporation "wishes to issue new shares to vest ownership of the Corporation as set forth below," and issuing 50 shares of stock each to petitioner and her two brothers. Respondents in no way address this document.

- **Exhibit K:** A May 1, 2001 "Written Consent of Shareholders to Action Without a Meeting," signed by petitioner, that specifically lists petitioner, along with her two brothers, as "the holders of all the outstanding shares of NINE CHARLTON STREET CORP. . . ." This document further provides that petitioner was elected as a Director of 9 Charlton at this time. Respondents in no way address this document.

- **Exhibit L:** A May 1, 2001 "Written Consent of Shareholders to Action Without a Meeting," signed by petitioner, that specifically lists petitioner, along with her two brothers, as "the holders of all the outstanding shares of PEARLBUD REALTY CORP. . . ." This document further provides that petitioner was elected as a Director of Pearlbud at this time. Respondents in no way address this document.

- **Exhibit M:** A 2001 "Written Consent of Shareholders to Action Without a Meeting," signed by petitioner, that specifically lists petitioner, along with her two brothers, as "the holders of all the outstanding shares of ORBIS INTERNATIONAL CORP. . . . ." Respondents in no way address this document.

- **Exhibit N:** A July 29, 2003 "Certificate of Amendment of Certificate of Incorporation of 9 Charlton Street Corp.," ***filed with the New York Secretary of State***, which purports to be signed by petitioner in her capacity as one-third minority shareholder, along with her two brothers. This document, filed pursuant to the New York Business Corporation Law with the affirmation that "the statements made herein are true under penalties of perjury," specifically recites that petitioner and her two brothers are "the shareholders of all the outstanding shares entitled to vote thereon." Statements in such documents give rise to judicial estoppel. See In re Cablevision Sys. Corp. S'holders Litig., 21 Misc.3d 419, 434 (N.Y. Sup. Ct. 2008) (rejecting position contrary to SEC filing; "statements to administrative agencies may give rise to judicial estoppel"). Respondents in no way address this document.

- **Exhibit O:** A New York Department of Taxation and Finance CT-6 Form for 9 Charlton signed by petitioner and listing petitioner and her two brothers as one-third minority shareholders, and specifically providing that petitioner ***"acquired"*** her shares on August 16, 1990 -- the same day as her brothers. This document affirms that the statements contained therein are "to the best of his or her knowledge and belief true, correct and complete." Such documents are particularly fatal to Respondents' case, in that New York law provides that a party may not contradict statements made in filed tax documents. Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422 (2009) ("A party to litigation may not take a position contrary to a position taken in an income tax return. . . . We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns."); Wenger v. L.A. Wenger Contracting Co., No. 31701-2008, 2010 WL 5186679, *8 (N.Y. Sup. Ct. Dec. 14, 2010) ("A party to a litigation is equitably estopped from taking position that is contrary to that taken in an income tax return."). Respondents in no way address this document.

- **Exhibit P:** Internal Revenue Service Schedule K-1s for the years 1996-2001 and 2003-2010 for 9 Charlton, listing petitioner as holding 33.34% of the outstanding shares

and sent to petitioner annually in said capacity. Once again, these are filed tax documents that Respondents cannot controvert under New York law. See Wenger, 2010 WL 5186679 at *8 (holding defendants could not deny plaintiff's status as shareholder in 1104-a dissolution proceeding; "Nine years of corporate tax returns filed by the five corporations as well as corporate K-1's given to [plaintiff] by those entities, many of which are beyond the reach of the IRS at this point, cannot be ignored.").

- **Exhibit R:** A 2001 "Written Consent of Shareholders to Action Without a Meeting," signed by petitioner, that specifically lists petitioner, along with her two brothers, as "the holders of all the outstanding shares of PEARLBUD REALTY CORP. . . ." This document further provides that petitioner was elected as a Director of Pearlbud at this time. Respondents in no way address this document.

- **Exhibit S:** A July 29, 2003 "Certificate of Amendment of Certificate of Incorporation of Pearlbud Realty Corp.," ***filed with the New York Secretary of State***, which purports to be signed by petitioner in her capacity as one-third minority shareholder, along with her two brothers. This document, filed pursuant to the New York Business Corporation Law with the affirmation that "the statements made herein are true under penalties of perjury," specifically recites that petitioner and her two brothers are "the shareholders of all the outstanding shares entitled to vote thereon." Again, Respondents are judicially estopped from controverting the contents of this document. Respondents in no way address this document.

- **Exhibit T:** A September 24, 2010 e-mail from Ugo Quazzo to Petitioner confirming petitioner's one-third shareholder interest in 9 Charlton and offering to "consider the possibility of giving [petitioner] now, in cash, 1/3 of the present market value of the building located at 9 Charlton Street." Respondents in no way address this document.

- **Exhibit U:** A May 24, 2010 "Waiver of Notice of the Annual Meeting of Stockholders" listing petitioner as a shareholder of 9 Charlton. Respondents in no way address this document.

- **Exhibit V:** Minutes from the June 1, 2010 annual stockholders meeting of 9 Charlton listing petitioner as a shareholder. Respondents in no way address this document.

- **Exhibit W:** Stock ledgers for Orbis, Pearlbud and 9 Charlton listing petitioner as a shareholder of each Corporation. Respondents in no way address these documents.

Of all this voluminous evidence, reflecting petitioner's shareholder status over, at minimum, the past 22 years, Respondents only address two pieces of evidence: (i) the stock certificates in petitioner's name (and only to say they were never delivered) and (ii) the K-1 statements issued to petitioner by 9 Charlton. As to the first point, Respondents contend that the stock certificates were

never delivered to petitioner and that, as a result, the second requirement for an *inter vivos* gift has not been satisfied. See Respondents' Memo at 8. First, delivery of stock certificates in not a prerequisite to being validly gifted shares. See Pell St., 243 A.D.2d at 125 (holding valid *inter vivos* gift made where documentary evidence -- including tax filings -- showed a gift, even though stock certificates never delivered; "[i]t is well settled that conclusory allegations as to the lack of donative intent, asserted in the face of a documentary showing to the contrary, are insufficient to defeat summary judgment"); In re Carroll, 100 A.D.2d 337, 338-39 (2d Dep't 1984) ("a valid *inter vivos* gift of securities can be made by registering the securities on the books of the corporation in the name of the donee without a physical delivery of the certificates" and "'acceptance ... may be implied where the gift, otherwise complete, is beneficial to the donee.'"); Estate of Essig v. 5670 58 St. Holding Corp., No. 8393 2005, 2007 WL 292239, *3 (N.Y. Sup. Ct. Jan. 25, 2007) ("It is well settled that the issuance of a certificate for shares is not necessary to create the status of shareholder. It is merely evidence thereof."); Donoghue v. Local.com Corp., No. 07 Civ. 8550(LBS), 2009 WL 260797, *3 (S.D.N.Y. Feb. 3, 2009) (noting "well-accepted rule that ownership of a security does not turn on the possession of a share certificate because the issuance of a share certificate is merely an indicium of ownership"). Even the cases cited by Respondents recognize this. See, e.g., In re Estate of Szabo, 10 N.Y.2d 94, 98 (1961) (acknowledging that "symbolical" as opposed to actual delivery of stock certificates sufficient where "there is a transfer of record on the stock books of the company.").

In any event, the record contradicts the Ugo Quazzo Affidavit even on this point. Notably, Exhibit O to the Petitioner Affidavit specifically provides that petitioner "***acquired***" her shares on August 16, 1990 -- the same day as her brothers. Indeed, perhaps the starkest contradiction can be found in the Affidavit of Stephen Quazzo, dated June 2008, stating that he "is the lawful owner of certain certificated securities more particularly described as follows: Certificate No. 11 for 100 shares

issued to STEPHEN QUAZZO dated June 18, 2003 of ORBIS INTERNATIONAL CORP." The Affidavit continues,

> That neither the said securities nor the rights of the deponent in the said securities have, in whole or in part, been assigned transferred, hypothecated, pledged, or otherwise deposed [sic] of;
>
> That the deponent is entitled to the full and exclusive possession of the said securities.
>
> That the certificates have been misplaced and lost.
>
> That this affidavit is made for the purpose of inducing ORBIS INTERNATIONAL CORP. to issue new or duplicate certificated securities in lieu of those alleged to have been lost or destroyed . . . .

Petitioner Aff. at ¶ 18, Ex. X. This Affidavit reflects that share certificates in Orbis were in fact delivered and subsequently lost, contradicting Ugo Quazzo's contention that no share certificates were ever delivered. See Ugo Quazzo Aff. at ¶ 7 ("The shares were never delivered to any of the children."). In addition, although petitioner does not recall if she ever received original share certificates, many of the share certificates produced in discovery bear a notation that the prior certificate was lost, requiring a new certificate to issue. See Petitioner Aff. at ¶¶ 3, 18, and Exh. Y. Similarly, corporate resolutions authorizing the issuance of the new share certificates -- signed by Ugo Quazzo himself -- state that it is the intent of the corporations to "vest ownership of the corporation" in petitioner and her two brothers. See, e.g., id. at Exhs. D and HH.[3]

As to the K-1 statements issued by 9 Charlton to both petitioner and her brothers since 1996, the evidence contradicts, both directly and circumstantially, Ugo Quazzo's conclusory statement that the K-1 statements were mistakenly issued by the Corporations' accountants. See Ugo Quazzo Aff. at ¶ 7, n.1. First, it is noteworthy that this "mistake" was not committed by one accountant, but two; and not just once, but for the better part of two decades. Petitioner Aff. at ¶

[3] The final requirement for an *inter vivos* gift -- acceptance of the gift -- is presumed "when the gift is of value." Shybunko v. Geodesic Homes, Inc., 65 A.D.3d 581, 584 (2d Dep't 2009). Here, the shares are of value, and Respondents do not contend otherwise. And, again, the evidence demonstrates that petitioner did accept the shares. See Petitioner Aff. at ¶¶ 3, 16, and Exh. Q (affirming that she accepted shares and thanking Ugo Quazzo for delivered K-1 statements).

16(j). Likewise, Respondents did not note this purported mistake in their responses to petitioner's First or Third Sets of Interrogatories. See Berube Aff. at Exhs. A and B. And, Ugo Quazzo fails to explain why he allowed the statement to be delivered to petitioner even *after* the commencement of this Special Proceeding, and why, after petitioner thanked him each year for sending her the statement, he never informed her that it had been sent in error. Petitioner Aff. at ¶ 16(j).

B. Respondents' Proof (Or Lack Thereof)

In the face of this voluminous evidence, Respondents submit the Ugo Quazzo Affidavit -- a four page document entirely devoid of any record support. In sum, all the Ugo Affidavit says is that: (i) he never intended to make, or understood that he had made, petitioner and her brothers shareholders of the Corporations during his lifetime; and (ii) his understanding is that he has always been the 100% shareholder of each of the Corporations. He offers absolutely no evidentiary support for these remarkable propositions. And, not only is his position contradicted by the evidence set forth above establishing petitioner's shareholder status in each of the Corporations, its central assertions are contradicted by numerous additional factors.

The first such factor is the dearth of evidence provided by the individual who, by his own admission, is in control of the Corporations. Despite access to all corporate records, he fails to produce a single document establishing his alleged status as 100% shareholder of the Corporations. Instead, all of the existing evidence contradicts this assertion:

- None of the Corporations have ever issued a K-1 statement to Ugo Quazzo. The only K-1 statements issued by the Corporations have been issued to petitioner and her brothers. See Petitioner Aff. at ¶¶ 16(j), 17(b), and Exh. P.

- The stock ledgers for Orbis, Pearlbud, and 9 Charlton list petitioner and her brothers as the Corporations' shareholders. Not only is Ugo Quazzo not listed as a shareholder, there is not even a column on the ledger for him. See id. at ¶ 17(c) and Exh. W.

- The minutes from the shareholder meetings held June 1, 2010 do not list Ugo Quazzo as a shareholder. See id. at Exhs. V and Z.

- The General Release, prepared by Ugo Quazzo's own attorneys, does not list Ugo Quazzo as a shareholder of any of the Corporations. See Id. at Exh. B.

Indeed, if, as Ugo Quazzo claims, he has always been the sole shareholder of each of the Corporations, how does one explain the existence of myriad corporate resolutions and written shareholder consents signed, or at least purportedly signed, by petitioner and her brothers in their capacity as shareholders to effectuate corporate action, including the purported cancelling of petitioner's shares? See Amended Petition at ¶¶ 29-37, 40-46; Petitioner Aff. at ¶ 17(a).[4] Why would petitioners shares need to be cancelled if they had never been issued? Further, why was it necessary to forge petitioner's signature as a shareholder of the Corporations to effectuate this corporate action, if Ugo Quazzo has always been the sole shareholder? See Amended Petition at ¶¶ 31-32; Petitioner Aff. at ¶ 19.[5]

In short, the Ugo Affidavit is contradicted by every piece of evidence before this Court. All of this evidence (which is virtually wholly ignored by Respondents) at the very least raises triable issues of fact, requiring denial of the Motion.

Of special note is the case of Pell St. Nineteen Corp. v. Mah, 243 A.D.2d 121 (1st Dep't 1998), a very analogous case in which the First Department addressed the validity of an *inter vivos* transfer of shares in a close corporation. In that case, like here, plaintiffs' father, You Tong Mah,

---

[4] The existence of these documents is also at odds with Respondents' assertion that "Ugo has never asked Cristina, nor her brothers, for authority to consummate any transaction or implement any policy at any of the Corporations." Respondent's Memo at 8.

[5] The evidence further contradicts Ugo Quazzo's conclusory statement that "[a]t various times, [he] discussed with Cristina a transfer of stock in the Corporations in exchange for Cristina working for them. Cristina never actually worked for any of the Corporations, and so no shares were transferred to Cristina." Ugo Quazzo Aff. at ¶ 9. Petitioner never had such a conversation with respondent Ugo Quazzo. Petitioner Aff. at ¶ 5. Indeed, the lack of any evidence supporting Ugo Quazzo's statement, or even any details about when and where such discussions took place, is telling. Similarly, the evidence contradicts Ugo Quazzo's conclusory statement that petitioner "has never sought any involvement in the Corporations, or even so much as expressed any opinion to [him] as to their management or governance." Ugo Quazzo Aff. at ¶ 8. Petitioner repeatedly asked what she could do to help with the Corporations, only to be told her help was not needed. Petitioner Aff. at ¶ 5.

emigrated to the U.S., accumulated wealth over his life, and eventually purchased two buildings in New York City. Id. at 122. The title to the buildings was transferred to a corporation that issued three stock certificates, one to Mah, and two to plaintiffs, daughter Margaret and son Paul. Id. Also like this case (according to Respondents), the Pell Street stock certificates were never delivered; instead they were kept by Mah in his home, which also served as his office. Id.

Some years after the corporation was set up, Mah and Margaret had a falling out. Mah then executed, as the alleged sole shareholder, a corporate resolution that purported to revoke the prior stock certificates and to re-issue three new certificates to himself, his new wife, and his son Paul. After Paul refused to side with him in his dispute with Margaret, Mah executed another corporate resolution purporting to remove Paul from any role in the corporation. Id. at 123-24.

The Trial Court denied plaintiffs' motion for summary judgment, finding that a factual issue existed as to whether the gift of shares was completed because the stock certificates were never delivered. Id. at 125. The First Department found that the Trial Court erred in holding that physical delivery of stock certificates is always required -- "In so ruling, the court failed to recognize that physical delivery of a stock certificate is not a rigid requirement; constructive or symbolic delivery may suffice." Id. at 126 (citations omitted). Because the father's "continued possession of the certificates is legally irrelevant and the undisputed facts point, inexorably, to an *inter vivos* gift of the stock," the First Department reversed and granted summary judgment ***to plaintiffs***. Id. at 125. The First Department focused on documentary evidence establishing that a gift had been effectuated and that Paul and Margaret were shareholders, which included many of the same types of documents present here -- the corporation's certificate of incorporation, stock certificates in plaintiffs' names, and a history of filed tax documents -- and concluded that they "clearly establish[] a gift." Id. at 125. The First Department found that these documents demonstrated, sufficient to grant summary judgment ***in favor of plaintiffs***, that "there was, as a matter of law, a constructive

delivery of the shares to support a finding of a gift." Id. at 126; see also In re Pickwick Realty Ltd., 246 A.D.2d 863, 865 (3d Dep't 1998) (finding "petitioner was a one-third owner and had been issued the respective shares of respondent's stock," even where stock certificates never delivered, where respondents "knowingly had engaged in a fraud on the public with respect to petitioner's ownership interest for almost 10 years contradicting all supporting documentary evidence . . . ."[6]

As in Pell St., the evidence here establishes that Ugo Quazzo did make an *inter vivos* gift of shares in the Corporations to petitioner.[7] At the very least, this evidence raises triable issues of fact.[8]

V

PLAINTIFF HAS BEEN OPPRESSED WITHIN THE MEANING OF BCL 1104-a(a)(1) OR HAS AT LEAST RAISED TRIABLE ISSUES OF FACT.

Respondents' attack on petitioner's claim for dissolution under the oppression prong of BCL § 1104-a(a)(1) completely misses the point. Petitioner is not primarily complaining of being denied a role in management, of not receiving a job, or any other incidental benefit one might

---

[6] The principal *inter vivos* case Respondents rely upon is readily distinguishable. In Lichtenstein v. Eljohnan, Inc., 161 A.D.2d 397 (1st Dep't 1990), the First Department found a lack of donative intent because the purported donor placed restrictive legends on the stock certificates to demonstrate "that he continued to regard himself as the owner of the stock," and required that the certificates be endorsed in blank. Id. at 398. Here, no such restrictive legends exist on any of the stock certificates issued in the names of petitioner and her two brothers. See Petitioner Aff. at Exhs. G-I. Similarly, the certificates issued to petitioner and her brothers are not endorsed in blank. See Id. at Exh. Y. Thus, the two primary reasons why the First Department found donative intent lacking in Lichtenstein are actually reversed here. Moreover, in Lichtenstein, the purported donee never exercised "any of the incidents of ownership over the stock." Lichtenstein, 161 A.D.2d at 398. Evidence of the type presented here, including documents filed with the New York Secretary of State and Internal Revenue Service confirming Petitioner's status as a minority shareholder, was not present in Lichtenstein, and petitioner has exercised incidents of stock ownership by, for example, signing corporate documents requiring shareholder approval as a shareholder.

[7] Because a valid *inter vivos* gift of the shares was made to petitioner, her shares could not simply be "voided" as Respondents assert. See Respondents' Memo at 8; Ugo Quazzo Aff. at ¶ 7.

[8] The extensive contradictions between the Ugo Quazzo Affidavit and the documentary evidence render it a seriously suspect piece of evidence. At the very least, because of the credibility determination involved in weighing the conclusory assertions against the documentary evidence, the Motion should be denied. See Santos v. Temco Serv. Indus., Inc., 295 A.D.2d 218, 218-19 (1st Dep't 2002) ("issues as to witness credibility are not appropriately resolved on a motion for summary judgment"); Welch v. Riverbay Corp., 273 A.D.2d 66, 66 (1st Dep't 2000) (summary judgment inappropriate where evidence required determination of credibility issues).

reasonably expect follows from holding shares in a close corporation. Rather, petitioner's complaint goes to something far more fundamental: her very status as a shareholder. It is the fact that Respondents have attempted, through forged and manipulated documents, to take away petitioner's shares and later hide this activity by denying her access to the corporate books and records that forms the basis of her oppression.[9] See Amended Petition at ¶¶ 25-45, 58-59 and the Exhibits thereto; Petitioner Aff. at ¶ 19.

Pappas v. Fotinos, No. 7799/04, 2010 WL 2891194 (N.Y. Sup. Ct. July 23, 2010) is particularly instructive. There, the Court ordered the judicial dissolution of a closely-held corporation upon a one-third minority shareholder's petition pursuant to § 1104-a. Respondent there, like here, had wrongfully denied petitioner was a shareholder. In addressing the oppression inherent in such a wrongful denial, the Court found that "[i]t is difficult to recognize a more reasonable shareholder expectation than that its interest will not be repudiated in its entirety, and that legal action would be required to compel its acknowledgment." Id. at 11. The Court further recognized that a denial of access to books and records might also constitute oppression, id. at 10, and that "[w]hen there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution." Id. at 14; see also Pickwick Realty, 246 A.D.2d at 866 (upholding Order of dissolution based upon respondents' "attempt at voiding petitioner's shares, their falsification of corporate documents and their failure to allow petitioner access to records and documents ... ."); Buglione v. Emmco Dev. Corp., 76 A.D.2d 849, 849 (2d Dep't 1980) (allegations that purpose of recapitalization of corporation was to eliminate interests of minority shareholders

[9] As discussed in footnote 2, supra, petitioner has recently learned that the Corporations have paid dividends in 2010 -- although not to petitioner and with no notice to her. Respondents have failed to respond to outstanding discovery addressing these paid dividends. See Berube Aff. at ¶ 6 and Exh. D. As nearly all of the oppression cases Respondents cite at pages 10 to 13 of their Memorandum acknowledge, the circumstances surrounding the payment of these dividends and the failure to make any payment to petitioner may give rise to independent and further oppression. Indeed, petitioner has historically requested dividends. See Petitioner Aff. at ¶ 6.

sufficient to state cause of action); Casita, LP v. Maplewood Equity Partners (Offshore) Ltd., No. 603525/2005, 17 Misc.3d 1137(A), *8 (N.Y. Sup. Ct. Dec. 7, 2007) (loss of shares and/or voting and decision-making rights in corporation constitutes irreparable injury); Clark v. Pattern Analysis & Recognition Corp., 87 Misc.2d 385, 386 (N.Y. Sup. Ct. 1976) (proposed recapitalization of corporation stripping minority shareholders of shareholder status would constitute irreparable damage).

Of the cases Respondents cite on this point, only one concerns a situation where the very status of a shareholder was denied. That case, In re Farega Realty Corp., 132 A.D.2d 797, 797-98 (3d Dep't 1987), involved the failure of one party to comply with specific contractual provisions, thereby preventing that party from taking ownership of the corporate shares. As such, the party never became the sole shareholder that she believed she was. See Id. The Third Department (after a bench trial and ***not*** on summary judgment) held that the party's refusal to allow the petitioner inspection of the corporate books and records because of the party's "erroneous belief that she was the sole owner" did not constitute oppression. Id. Those facts differ markedly from the facts in this Special Proceeding. Here, the evidence shows not an innocent, erroneous belief or technical mistake. Rather, it establishes the forging of petitioner's signature on corporate documents as part of a conspiracy to divest her of her shares. See Amended Petition at ¶¶ 31-32; Petitioner Aff. at ¶ 19. Respondents do not refute these claims (including in the Ugo Quazzo Affidavit) -- they only anemically argue that the unconfronted and unrefuted evidence of forgery is somehow barred by the statute of limitations. See Respondents' Memo at 14.

Respondents offer no support for the position that taking away shares through forgery and manipulation, and subsequent refusal to allow access to the corporate books and records, does not constitute oppression. Indeed, such a position would plainly be risible. Respondents' actions constitute shareholder oppression, or at the very least raise triable issues of fact.

VI

PETITIONER'S ALLEGATIONS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

Respondents' argument, that evidence of petitioner's oppression -- including the forging of her signature on corporate documents -- should be ignored because it occurred more than six years before the commencement of the Special Proceeding, is incorrect and should be rejected.

First, Respondents are equitably estopped from relying on a statute of limitations defense because petitioner "was induced by fraud, misrepresentations or deception to refrain from filing a timely action." Simcuski v. Saeli, 44 N.Y.2d 442, 448-49 (1978) (defendant equitably estopped from asserting statute of limitations where plaintiff alleged reliance on defendant's misrepresentations). Here, Respondents hid their attempts to take away petitioner's shareholder status, including through the forging of documents, but continued to send petitioner K-1 tax statements, leading her to believe that nothing had changed. Respondents then denied petitioner access to the books and records, preventing her from learning of the malfeasance. See Amended Petition at ¶¶ 15-19; Petitioner Aff. at ¶ 9; Berube Aff. at Exh. H, ¶ 6. Moreover, because of the fiduciary duty Respondents owed to petitioner,[10] Respondents were "duty bound to disclose" the malfeasance, and their failure to do so supports an application of equitable estoppel. See Gen. Stencils, Inc. v. Chiappa, 18 N.Y.2d 125, 128-29 (1966) (recognizing defendant may be equitably estopped from asserting statute of limitation defense where breach of fiduciary duty concealed and finding "[t]his raises issues of fact to be resolved at the new trial."); Quadrozzi v. Estate of Quadrozzi, 99 A.D.3d 688, 691 (2d Dep't 2012) (defendants equitably estopped from asserting statute of limitations where they had fiduciary duty to shareholder to disclose facts underlying cause of action); Berger v.

[10] See Quasha v. Am. Natural Beverage Corp., 171 A.D.2d 537, 537 (1st Dep't 1991) (officers and directors of corporation owe fiduciary duty to shareholder); Rusyniak v. Gensini, 629 F. Supp. 2d 203, 224 (N.D.N.Y. 2009) (shareholders in close corporation have fiduciary duty towards each other).

Pavlounis, No. 103170/08, 2011 WL 2150770, *6 (N.Y. Sup. Ct. Apr. 14, 2011) (plaintiff's failure to timely discover fiduciary breach resulted from defendants' refusal to provide plaintiff access to corporate books and records).

Second, the statute of limitations for an action based on acts related to a fiduciary relationship does not accrue until the fiduciary relationship has ended. See Westchester Religious Inst. v. Kamerman, 262 A.D.2d 131, 131 (1st Dep't 1999) (statute of limitations for breach of fiduciary duty "does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated."); 196 Owners Corp. v. Hampton Mgmt. Co., 227 A.D.2d 296, 296 (1st Dep't 1996) (same); 770 Owners Corp. v. Spitzer, No. 26835/08, 2009 WL 3018733, *8 (N.Y. Sup. Ct. Sept. 21, 2009) (same); Steele v. Anderson, No. 03-CV-1251, 2004 WL 45527, *1 (N.D.N.Y. Jan. 8, 2004) (explaining that statute of limitations for breach of fiduciary duty under New York law does not begin to run until fiduciary relationship openly repudiated or otherwise ended; holding that because "[a]t the very least, there are factual issues concerning when the fiduciary relationship was openly repudiated," the motion to dismiss should be denied).

Finally, Justice Fried has already recognized and ruled that there exist material issues of fact as to the statute of limitations issue. See Memorandum Opinion and Order, Cristina Quazzo v. 9 Charlton St. Corp., No. 652002/2011 (N.Y. Sup. Ct. July 17, 2012) (Fried, J.) (Docket No. 56), at 9 (rejecting statute of limitations defense; "Defendants [who include Respondents in this Special Proceeding] argue that these claims [allegations of fraud including the forging of petitioner's name] are untimely even under a six-year limitation period. However, *questions of fact exist* as to when [petitioner] could have discovered the alleged fraud.") (emphasis supplied); id. at 10 (noting

questions of fact exist as to when petitioner's other claims accrued and declining to dismiss them on statute of limitations grounds).[11]

VII

THE EVIDENCE OF FINANCIAL IMPROPRIETY SUPPORTS DISSOLUTION UNDER BCL § 1104-a(a)(2) OR, AT MINIMUM, RAISES TRIABLE ISSUES OF FACT.

BCL § 1104-a(a)(2) provides for statutory dissolution where "[t]he property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation." The evidence set forth by petitioner of corporate looting and waste is sufficient to support dissolution pursuant to this section, or, at minimum, raises triable issues of fact precluding summary judgment.

In response to the voluminous evidence of waste, looting, and improper transfers of hundreds of thousands of dollars from corporate bank accounts into third-party accounts controlled by respondent Ugo Quazzo, Respondents baldly assert that such behavior is typical of "the informal governance" found in "family-run closely held corporations." See Respondents' Memo at 15. In support of this position, Respondents direct the Court to Application of Ng, 174 A.D.2d 523 (1st Dep't 1991). However, Respondents fail to disclose two important facts about that case. First, in Application of Ng, the First Department only considered whether the actions complained of constituted oppression under the first prong of 1104-a -- the "oppression" prong -- and not whether the actions constituted a violation of the second prong of 1104-a, concerning the diversion of corporate funds. Thus, to the extent Respondents attempt to use Application of Ng to address petitioner's claim for dissolution under § 1104-a(a)(2), the case is inapposite. Second, the ultimate

[11] Respondents notably make no mention of the evidence of financial wrongdoing in their statute of limitations argument. See Respondents' Memo at 14. The evidence presented by petitioner demonstrates unexplained transfers of hundreds of thousands of dollars to third-party accounts and unaccounted for rent payments throughout the six years prior to the filing of the Special Proceeding, as well as following it. See Amended Petition at ¶ 50; Petitioner Aff. at ¶¶ 24-33; Donohue Aff. Even if the Court only considers evidence from the six years preceding the Special Proceeding, such evidence is timely.

holding of the First Department was that an evidentiary hearing was necessary in order to resolve "disputed issues of fact." Id. at 524. In other words, even considering the "informal governance" of the corporation at issue, there were still material issues of fact that could not be resolved without an evidentiary hearing. See Bouhayer v. Georgalis, 169 Misc.2d 779, 785-86 (N.Y. Sup. Ct. 1996) (finding triable issues of fact as to diversion of corporate assets).

As noted above and again demonstrated here, Respondents have consistently failed to address in any way the serious financial improprieties petitioner has uncovered through discovery. Rents have gone uncollected, taxes have been underpaid, and significant amounts of money have been inexplicably transferred to third-party accounts that Ugo Quazzo controls. See Donohue Aff.; Petitioner Aff. at ¶¶ 21-33. Despite repeated opportunities since the filing of the Special Proceeding, Respondents have failed to offer any type of explanation, instead chalking it up to "informal governance." At the very least, the evidence petitioner has put forth creates triable issues of fact as to whether the Corporations should be dissolved pursuant to BCL § 1104-a(a)(2).[12]

VIII

THE PETITION HAS BEEN BROUGHT IN GOOD FAITH.

Respondents' final assertion in the Motion is that petitioner brought the Special Proceeding in bad faith. See Respondents' Memo at 16-18. Respondents base this assertion on two grounds: first, that petitioner brought the Special Proceeding in response to Ugo Quazzo's denial of her

---

[12] Finally, in another attempt to misdirect the Court from the fact that they are ignoring the glaring evidence, Respondents now assert that petitioner should not be able to complain of respondent Ugo Quazzo's "management style" because she has known about it and has benefitted from it, giving her unclean hands. Respondent's Memo at 15-16. First, although petitioner has previously received money from her father, she never knew where that money came from. Petitioner Aff. at ¶ 6. Second, whether petitioner has unclean hands raises questions of fact that cannot be resolved on a motion for summary judgment. See Buller v. Giorno, 28 A.D.3d 258, 258 (1st Dep't 2006) (Defendants[] . . . arguments to the effect that plaintiff's claims for equitable relief are barred by . . . unclean hands . . . present factual issues and accordingly are not amenable to summary disposition."); Karan v. Hoskins, 22 A.D.3d 638, 638 (2d Dep't 2005) (summary judgment properly denied where triable issues of fact existed regarding unclean hands). Third, even if petitioner did know where the money came from, she still should not be estopped from bringing this action. See Wenger, 2010 WL 5186679 at *9.

request for a distribution from a family trust; and second, that petitioner's position in settlement negotiations has been to include assets beyond those at issue in this Special Proceeding. Id. Respondents are wrong as to the first ground, and are actually the genesis of the second.

First, it is not true that petitioner's impetus for this Special Proceeding was the denial of a distribution from a family trust. Rather, the impetus for the Special Proceeding was the unexplained assertion in the General Release that petitioner was no longer a shareholder in the Corporations, coupled with the Corporations' refusal to allow petitioner to inspect their books and records when petitioner attempted to uncover the basis for this assertion. See Petitioner Aff. at ¶¶ 8-12. Indeed, petitioner had no need to bring an action to obtain the money she had requested from the trust because the trustees ultimately agreed to loan petitioner the requested money. Petitioner Aff. at ¶ 7.[13]

Next, Respondents point to petitioner's position in settlement negotiations as purported evidence of bad faith. See Respondents' Memo at 17. It is true that petitioner has made settlement overtures that include assets beyond the Corporations. What Respondents fail to explain, though, is that from prior to the commencement of the Special Proceeding and throughout the majority of settlement discussions, including during a Court-ordered two-day mediation session, it was ***Respondents*** who insisted upon a settlement that included all of Ugo Quazzo's assets (a "global settlement"). Petitioner Aff. at ¶ 35. Indeed, such a global settlement is embodied in the General

---

[13] Respondents also contend in passing that petitioner is trying to embarrass Ugo Quazzo by subpoenaing the bank records of Ugo Quazzo's close friends and harass him by commencing separate lawsuits in this Court and Vermont. Respondents' Memo at 17. Petitioner has already explained why the specific bank records she has sought to obtain (and now has leave of Court to seek) are relevant to the Special Proceeding. See Berube Aff. at ¶ 8. Notably, despite multiple opportunities to explain the suspect third-party transactions, Respondents have failed to offer any explanation for the transfers of hundreds of thousands of dollars of corporate funds to bank accounts of Ugo Quazzo's friends and relatives that he controls. Likewise, petitioner has already explained why commencing a separate action in this Court was necessary to allow her to bring claims not allowed in a Special Proceeding. See Berube Aff. at ¶ 5. As to the Vermont action, as explained in detail in the Petitioner Affidavit, petitioner was forced to commence litigation in Vermont because she found that through the bad faith actions of respondent Ugo Quazzo, her exclusion from the management of a family corporation, and the forging of her signature, she had been divested of property that was placed into trust by her parents for her benefit as the result of their divorce settlement. See Petitioner Aff. at ¶¶ 37-41.

Release that Respondents presented to petitioner for execution prior to commencement of this Special Proceeding. See Petitioner Aff. at ¶ 7 and Exh. B. Although petitioner originally disagreed that such a global settlement was necessary, she was ultimately convinced and now agrees that only a global settlement is appropriate to end all existing and potential litigation between the parties once and for all. Id. at ¶ 35. Even now, following the filing of the Motion, Respondents have indicated that they are willing to consider a global settlement. See Berube Aff. at Exh. C. Thus, the position that any settlement be "global" and include assets beyond the Corporations initially came from Respondents, not from petitioner. In these premises, Respondents argument on this point only demonstrates their bad faith.

IX

SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE ADDITIONAL DISCOVERY IS NEEDED.

Pursuant to CPLR R. 3212(f), a Court may deny a motion for summary judgment where "it appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot [presently] be stated." CPLR R. 3212(f). Indeed, Courts regularly hold that summary judgment is not appropriate where a party has not been able to fully discover the facts necessary to support its case. See, e.g., Cooke v. City of N.Y., 95 A.D.3d 537, 538 (1st Dep't 2012) (grant of summary judgment premature where discovery still outstanding); Bartee v. D&S Fire Prot. Corp., 79 A.D.3d 508, 508-09 (1st Dep't 2010) (lack of opportunity to depose valid excuse for not being able to demonstrate countervailing facts, warranting denial of summary judgment); Tucker v. N.Y.C. Transit Auth., 42 A.D.3d 316, 317 (1st Dep't 2007) (holding Court erred in granting summary judgment before discovery complete); Gonzalez v. Vincent James Management Co., Inc., 306 A.D.2d 226, 228 (1st Dep't 2003) (summary judgment "premature" where party had not taken necessary depositions).

Here, discovery is still proceeding in earnest; indeed, counsel to Respondents (the same counsel who brought the Motion) recently agreed to extend the discovery deadline in the Special Proceeding by four (4) months. Fact discovery is now scheduled to close on February 18, 2013. See Compliance Conference Order, So Ordered October 25, 2012 (Docket No. 112). There are at least four distinct types of discovery still being pursued by petitioner in order to develop the evidence needed to fully support her claims. First, petitioner is awaiting the production of documents responsive to her Third Request for the Production of Documents on Respondents ("Requests"). See Berube Aff. at ¶ 6. The Requests seek documents related to the wholly conclusory assertions made in the Ugo Quazzo Affidavit. See id. With no explanation or excuse, Respondents served their Responses and Objections to these Requests over one month late, and have still not produced a single responsive document after committing to do so. Id. Additionally, *just three days ago, Respondents served on petitioner their second demand for document production* with requests covering many of the issues presented by their current motion. See id.

Second, petitioner is waiting for answers to her Fourth Set of Interrogatories ("Interrogatories"). See id. at ¶ 7. The Interrogatories specifically seek to find out if there is any connection between the Corporations, on the one hand, and the third-parties who have received hundreds of thousands of dollars in corporate money, on the other. Id. Respondents have not provided any answers at all to the Interrogatories, despite their deadline having passed more than one month ago. Because petitioner is still trying to obtain relevant documents and answers, she has not yet taken the depositions of Ugo Quazzo or any corporate representative. Id.

Third, petitioner continues to seek the financial records of certain third-party bank accounts, which evidence already discovered shows may hold significant corporate funds. Id. at ¶ 8. At present there is an Order to Show Cause, filed with leave of Court, seeking permission to subpoena additional financial records from Citibank. Id. Petitioner believes that these records will provide

important evidence concerning the financial mismanagement of the Corporations as well as the location of current corporate assets.

Finally, the parties have yet to take a single deposition. A deposition of Ugo Quazzo, once document discovery has concluded, is necessary in order to explore the blatant contradictions between his various Affidavits and the documentary evidence. Id. at ¶ 9. Likewise, and by way of example, depositions of corporate representatives, as well as the Corporations' attorneys and accountants, are necessary to uncover further facts regarding Respondents' attempt to deprive petitioner of her shares and the Corporations' financial mismanagement. Id.

As discovery is ongoing in each of these areas, petitioner submits that although facts necessary to support her opposition to the Motion exist, she cannot currently state them. See id. at ¶ 10. Therefore, pursuant to CPLR R. 3212(f), the Motion should be denied.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For the foregoing reasons, petitioner respectfully requests that the Court deny the Motion in its entirety, and grant petitioner such additional relief as the Court deems just and proper. Petitioner further requests oral argument on the Motion.

Dated: New York, New York
December 17, 2012

Respectfully submitted,

MISHCON DE REYA NEW YORK LLP

By: _____

Mark A. Berube
Daniel Mandell

750 Seventh Ave., 26th Floor
New York, NY 10019
Telephone (212) 612-3270
Facsimile (212) 612-3297

Attorneys for Petitioner
Cristina Quazzo