

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of MICHAEL ZWARYCZ,
as a holder of fifty percent of all outstanding shares of
Marnia Construction Inc.,

Index No. 2014- 63669

Petitioner,
for the Judicial Dissolution of

VERIFIED PETITION

MARNIA CONSTRUCTION INC.,
a New York corporation, pursuant to
Business Corporation Law §1104
and/or the common law of New York

-against-

MARNIA CONSTRUCTION INC.,
KERRY SULLIVAN and
WILLIAM J. SULLIVAN, JR.,

Respondents.
-----X

To the Supreme Court of the State of New York, County of Westchester:

The petition of Michael Zwarycz, by his attorneys the law offices of Peter Piddoubny, Esq.,
respectfully shows and alleges:

THE PARTIES AND VENUE

1. Michael Zwarycz (hereinafter the "Petitioner") is an 88 year old individual residing at 61 Frederic Street, Yonkers, county of Westchester, New York, 10703 and is 50% shareholder of all outstanding shares in Marnia Construction Inc. A copy of a judgment by this Court (Hon. Robert DiBella, JSC) declaring Petitioner a 50% shareholder is attached hereto as **Exhibit "A"**.

2. Respondent Marnia Construction Inc. (hereinafter referred to as "Marnia") is a New York business corporation with its current principal place of business at 75 Spruce Street, Yonkers, county of Westchester, New York, 10701. A copy of Marnia's certificate of incorporation is annexed hereto as **Exhibit "B"**.

3. Marnia's certificate of incorporation designates Westchester county as the county in which this corporation is located. Accordingly, and pursuant to Business Corporation Law (hereinafter referred to as the "BCL") §1112, Westchester county is the proper county for venue of this proceeding.

4. Respondent Kerry Sullivan is an individual residing at 75 Spruce Street, Yonkers, county of Westchester, New York, 10701 and is the acting chief executive officer of Marnia.

5. Upon information and belief, Respondent Kerry Sullivan is the holder of 25% of the outstanding shares of Marnia.

6. Respondent William J. Sullivan, Jr. is an individual residing at 27 Durst Place, Yonkers, county of Westchester, New York, 10701.

7. Upon information and belief, Respondent William J. Sullivan, Jr. is the holder of 25% of the outstanding shares of Marnia.

8. Marnia was originally organized to purchase certain lands, and then to build and develop an apartment building thereon. Upon information and belief, the sole principal income asset of Marnia is one 29 unit apartment building located at: 95 Waring Place, Yonkers, county of Westchester, New York (herein after referred to as the "Apartment Building").

9. Upon information and belief, the Apartment Building is owned by Marnia free of any liens or mortgages of record.

10. Petitioner has consistently maintained that he is and always was a 50% shareholder of Marnia and Respondents Kerry Sullivan and William J. Sullivan, Jr. have since 2009 consistently refused to recognize Petitioner's ownership of Marnia stock and refused to allow him to participate in the corporate affairs of Marnia.

11. Accordingly, since 2009 Petitioner has been forced to litigate each and every aspect of his corporate ownership in Marnia in order to protect his rights against Respondents Kerry Sullivan and William J. Sullivan, Jr.

PRIOR JUDICIAL PROCEEDINGS

12. There were at least two prior judicial proceedings in this Court initiated by Petitioner before the filing of the instant petition.

13. The first proceeding was commenced on or about February 13, 2009¹ pursuant to BCL §624 to obtain court ordered access to inspect the corporate books of Marnia as a shareholder.

14. Respondents Kerry Sullivan and William J. Sullivan, Jr. contested Petitioner's BCL §624 proceeding but after due litigation, this Court granted Petitioner access to inspect the corporate books of Marnia as one of its shareholders.

15. Upon examination of Marnia's corporate books, Petitioner discovered that no share certificates had ever been issued to anyone.

16. Moreover, the corporate books revealed that there were no directors' or corporate minutes, no corporate resolutions, no list of shareholders and no list officers or directors. In addition, there were no records of any meetings of shareholders nor any elections of either officers or directors.

17. Petitioner demanded that Respondents Kerry Sullivan and William J. Sullivan, Jr. recognize his ownership of 50% of the outstanding shares in Marnia and to allow him to participate

¹ This proceeding was entitled: Michael Zwarycz v. Marnia Construction, Inc., Stemar Construction, Inc. and Kerry Sullivan under Index No. 02773/2009, Supreme Court, Westchester County.

in the corporate affairs of Marnia. Again these Respondents refused to recognize Petitioner as a shareholder and continued to exclude Petitioner's participation in Marnia's corporate affairs.

18. Only after the commencement of the Petitioner's BCL §624 proceeding in February, 2009 did Respondents Kerry Sullivan and William J. Sullivan, Jr. for the first time inform Petitioner that he was not the owner 50% of Marnia but instead they alleged that said shares were owned by the Estate of Helen A. Sullivan.

19. Accordingly, in 2009 Petitioner was forced to commence a second proceeding before this Court for declaratory judgment² that Petitioner was a 50% shareholder of Marnia and not, as Respondents alleged, the Estate of Helen A. Sullivan.

20. Respondents Kerry Sullivan and William J. Sullivan, Jr. were now joined by the representative of the Estate of Helen A. Sullivan in contesting Petitioner's claim to be a 50% shareholder of Marnia.

21. It is undisputed that Respondents Kerry Sullivan and William J. Sullivan, Jr. are partial legatees under the last will and testament of Helen A. Sullivan and therefore they stood to enrich themselves further by having the Estate of Helen A. Sullivan dispossess Petitioner as the 50% shareholder of Marnia.

22. Petitioner's declaratory judgment action before this Court was contested by Respondents for more than 4 years of pre-trial discovery and appeals which included 7 days of depositions of Petitioner who was then 86 years old.

23. In an interim pre-trial appeal, the Appellate Division of the Supreme Court of the State of New York, Second Department held that Petitioner had established his *prima facie*

² This proceeding was entitled: Michael Zwarycz v. Marnia Construction, Inc., Stemar Construction, Inc., Kerry Sullivan, William J. Sullivan, Jr. and Geraldine Purdy as the executrix of the Estate of Helen A. Sullivan under Index No. 21513/2009, Supreme Court, Westchester County.

entitlement to judgment to be the 50% share ownership in Marnia as a matter of law. See a copy of the decision of the Appellate Division, Second Department dated January 16, 2013 at page 3 thereof annexed hereto as **Exhibit "C"**.

24. Nevertheless, Respondents Kerry Sullivan and William J. Sullivan, Jr. continued in their refusal to recognize Petitioner's share ownership and refused to allow him to participate in Marnia's corporate affairs by raising unsupported allegations and denials.

25. Petitioner's declaratory judgment action culminated in a 2 weeks bench trial in July, 2013 where Petitioner again prevailed. (A copy of this Court's decision after trial was previously annexed hereto as Exhibit "A").

26. It is respectfully pointed out that the trial judge described Respondents' case as follows: "Defendants' [Respondents'] view of the evidence is not credible. Defendants argue that Plaintiff was only a janitor or superintendent. However such argument is not believable." (See Exhibit "A" at page 15).

27. Steadfastly and more than one year after the conclusion of the bench trial, Respondents Kerry Sullivan and William J. Sullivan, Jr. still persist in their refusal to allow Petitioner to participate in the corporate affairs of Marnia.

**INTERNAL DISSENSION HAS DIVIDED
SHAREHOLDERS INTO TWO OPPOSING FACTIONS**

28. On June 21, 2014, after entry of the trial decision declaring Petitioner to be a 50% shareholder, Petitioner's attorneys requested Respondents Kerry Sullivan and William J. Sullivan, Jr. to have a corporate meeting of shareholders in order to elect directors and to provide Petitioner with basic financial information regarding Marnia. See the letter dated June 21, 2014 annexed hereto as **Exhibit "D"**.

29. Respondents flatly refused these modest requests still contending that Petitioner is not and never has been a shareholder and therefore Petitioner cannot participate in the corporate affairs of Marnia. Further, Respondents refused to hold any corporate meeting with Petitioner. See Respondents' attorney response letter dated June 26, 2014 annexed hereto as **Exhibit "E"**.

30. It is respectfully submitted that Respondents Kerry Sullivan and William J. Sullivan, Jr., who combined possess 50% of the shares of Marnia, have formed a faction to prevent Petitioner from exercising of his rights as a 50% shareholder of Marnia.

31. Respondents Kerry Sullivan and William J. Sullivan, Jr. have consistently refused, and continue to refuse, to recognize Petitioner as a shareholder of Marnia.

32. Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused, and continue to refuse, to hold a shareholders' meeting with Petitioner, even after Petitioner wrote a "cease and desist" demand on June 28, 2014. See petitioner's letter dated June 28, 2014 annexed hereto as **Exhibit "F"**.

33. Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused, and continue to refuse, to allow Petitioner to participate in Marnia's corporate affairs.

34. Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused, and continue to refuse, to disclose any banking statements of Marnia to Petitioner.

35. Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused, and continue to refuse, to provide Petitioner with any information regarding leases in effect in the Apartment Building.

36. Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused, and continue to refuse, to provide Petitioner with any information regarding the location of, and the amounts of, any security deposits of tenants in the Apartment Building.

37. Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused, and continue to refuse, to provide Petitioner with any information regarding the costs of maintenance for the Apartment Building.

38. The refusal to allow Petitioner to participate in the corporate affairs of Marnia results in the entrenchment of Respondents Kerry Sullivan and William J. Sullivan, Jr. in their current positions of control of all aspects of Marnia, including but not limited to, absolute control of all finances, all corporate expenses, all corporate disbursements, all dividends, all directors' remunerations, all employment contracts, all salaries and very significantly, the payment for all professional services.

39. As represented by Respondents' counsel, the attorneys' fees and legal disbursements in the litigations from 2009 through the commencement of the bench trial in July, 2013 amounted to no less than \$130,000.

40. Upon information and belief, these attorneys' fees and legal disbursements were paid of the assets and funds of Marnia and Stemar Construction, Inc., a related and parallel corporation owned by the parties hereto in the same proportions.

41. The unjust effect is that Respondents Kerry Sullivan and William J. Sullivan, Jr. are using Petitioner's equitable assets in Marnia to fund their litigation for several years against Petitioner's interests. This is unfair, inequitable and fundamentally unjust.

42. In addition, Respondents Kerry Sullivan and William J. Sullivan, Jr. have had free and unsupervised access to all the corporate funds of Marnia as their "personal ATM" paying for their personal legal expenses under the guise of corporate expenses.

43. Moreover, it was revealed at trial that Respondents Kerry Sullivan and William J. Sullivan, Jr. issued 1099s for not less than \$290,000 between the years 2004 and 2008 as dividends

to themselves and their cohort the Estate of Helen A. Sullivan and to the absolute exclusion of Petitioner. (See this Court's trial decision annexed hereto as Exhibit "A" at page 8).

44. Although Marnia was a party to the previous litigations, it was only a nominal party and had no legitimate legal interest in the outcome of those controversies. Accordingly, no legitimate legal fees were required to be expended on behalf of this corporation in the prior litigations.

45. It is respectfully submitted that justice requires an immediate stay of the abuses exercised by Respondents Kerry Sullivan and William J. Sullivan, Jr. in their unsupervised access to and spending of Marnia's bank accounts.

46. It is respectfully submitted that all shareholders of Marnia would be not suffer any undue prejudice if Marnia were to be immediately dissolved and the all the net assets were to be distributed according to their respective shareholdings and taking into account the economic abuses perpetrated by Respondents Kerry Sullivan and William J. Sullivan, Jr. since 2003 (6 years prior to the denial of Petitioner's claims as a shareholder).

47. On the other hand, if the *status quo* were allowed to continue, it is submitted, Petitioner will continue to suffer undue prejudice at the hands of Respondents Kerry Sullivan and William J. Sullivan, Jr. and suffer irrevocable economic injury.

AS AND FOR A FIRST CAUSE OF ACTION
GROUND FOR DISSOLUTION UNDER BCL §1104(a)(3)

48. It is respectfully submitted that the statutory conditions prescribed by BCL §1104(a)(3) exist within Marnia in that "...*there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.*"

49. Although Respondents Kerry Sullivan and William J. Sullivan, Jr. could conceivably argue that it is to their benefit NOT to dissolve Marnia because they currently exercise a power monopoly on this corporation, it is submitted that Respondents Kerry Sullivan and William J. Sullivan, Jr. would not suffer any undue prejudice.

50. Moreover, it is respectfully submitted, that the statutory phrase "...beneficial to the shareholders" should not be interpreted as meaning each individual shareholder but understood to apply to all shareholders as a class.

51. Accordingly, Petitioner verily believes that the current situation fits within the provisions of BCL §1104(a)(3) despite the inevitable end to Respondents' monopolistic, abusive and selfish control of Marnia.

AS AND FOR A SECOND CAUSE OF ACTION
GROUND FOR DISSOLUTION UNDER BCL §1104(a)(2)

52. Petitioner repeats and reiterates each and every allegation set forth above as if set forth in full below.

53. In addition to the grounds for dissolution under BCL §1104(a)(3) mentioned hereinabove, Petitioner respectfully alleges that grounds for dissolution also exist under BCL §1104(a)(2), which provides: "*That the shareholders are so divided that the votes required for the election of directors cannot be obtained.*"

54. As stated above, after obtaining declaratory judgment sustaining his 50% ownership in Marnia, Petitioner wrote to Respondents Kerry Sullivan and William J. Sullivan, Jr. requesting a shareholders' meeting and elections. (See Exhibit "D").

55. The answer was short and to the point: NO! It is respectfully submitted that Respondents' constant and continued refusals are sufficient cause for this dissolution proceeding because the shareholders cannot even agree to have a meeting to have an election.

56. Respondents Kerry Sullivan and William J. Sullivan, Jr. have never recognized Petitioner's rights and refuse to allow elections, refuse to allow shareholder meetings and refuse to disclose any corporate financial information to Petitioner.

57. Petitioner is not a signatory to any of Marnia's bank accounts and therefore does not have access to such information or any control.

58. Upon information and belief, Respondents Kerry Sullivan and William J. Sullivan, Jr. are the only individuals who are signatories on Marnia's bank accounts.

59. It is respectfully submitted that the shareholders of Marnia cannot even hold an election because the two factions are so divided between those who acknowledge and accept this Court ruling under the declaratory judgment (Petitioner - 50% of shares) and those who continue to be in denial and cling on to a monopoly of exclusive corporate power (Respondents - 50% of shares combined).

**AS AND FOR A THIRD CAUSE OF ACTION
FOR A PRELIMINARY AND PERMANENT INJUNCTION**

60. Petitioner repeats and reiterates each and every allegation set forth above as if set forth in full below.

61. As alleged above, Petitioner is currently suffering undue prejudice because Respondents Kerry Sullivan and William J. Sullivan, Jr. are looting corporate assets unsupervised for their personal gains and expenses as well as excluding Petitioner from participation in the corporation.

62. In addition, Petitioner is further prejudiced because he cannot obtain any facts or knowledge of the principal asset of Marnia, namely the Apartment Building.

63. Without knowledge of the current leases in effect and a current annual income and expense statements, Petitioner cannot even begin to appreciate nor appraise the value of his investment in Marnia.

64. Moreover, it has been learned that several apartments in the Apartment Building are currently vacant and not rented for several months or years.

65. This fact is driving down the market value of the Apartment Building and Petitioner verily believes that this is being done purposefully by Respondents Kerry Sullivan and William J. Sullivan, Jr. in order to gain an undue advantage against Petitioner and to force a "buy-out" of Petitioner's share at a greatly reduced market price.

66. Furthermore, the Apartment Building is not being maintained as the hallways are filthy and unpainted for many years.

67. All the windows are old, worn and not weather or wind resistant causing unreasonable increases in heating expense and contributing to a general view that the Apartment Building is in decline and deterioration. These factors are also driving down the market value of Marnia's only income asset.

68. The only persons who have access to the banks accounts of Marnia are Respondents Kerry Sullivan and William J. Sullivan, Jr.

69. It is respectfully submitted that this Court should not allow Respondents Kerry Sullivan and William J. Sullivan, Jr. to continue their monopoly on corporate power and their stranglehold on the finances of Marnia.

70. A preliminary and permanent injunction should be granted to prevent Respondents Kerry Sullivan and William J. Sullivan, Jr. from exercising unilateral control of Marnia to the exclusion of Petitioner its largest shareholder.

71. It is verily believed that Respondents Kerry Sullivan and William J. Sullivan, Jr. shall not suffer any undue prejudice if this Court orders and requires them to obtain the consent of Petitioner for any and all expenditures, even for daily expenses in the ordinary course of business.

72. Moreover, no significant delay would occur if Respondents Kerry Sullivan and William J. Sullivan, Jr. are required to obtain e-mail consent on each and every check intended to be issued as Petitioner can respond on one business day's notice.

73. It is respectfully submitted that if no such "checks and balances" are put into place and the *status quo* is allowed to continue, Petitioner shall suffer irreparable harm because the value of Marnia and its principal asset shall continue to decline in the face of pending dissolution and shall result in irreparable economic loss to Petitioner.

74. It is respectfully submitted that Petitioner is likely to succeed in this dissolution proceeding and therefore interim relief such as a preliminary injunction preventing continued unilateral corporate control and looting of assets by Respondents Kerry Sullivan and William J. Sullivan, Jr. is appropriate.

75. As previously alleged and admitted by Respondents' counsel, Respondents Kerry Sullivan and William J. Sullivan, Jr. and their cohort the Estate of Helen A. Sullivan, have spent over \$130,000 in legal fees and litigation expenses which moneys have been siphoned from Marnia and its parallel corporation Stemar Construction, Inc. and used for legal fees against Petitioner.

76. On June 28, 2014, Petitioner wrote to Respondents Kerry Sullivan and William J. Sullivan, Jr. and demanded that they cease and desist from representing themselves as or acting as

officers of Marnia because they have refused to allow elections of directors and/or officers. A copy of the cease and desist letter dated June 28, 2014 was annexed hereto as Exhibit "F".

77. To date, Respondents Kerry Sullivan and William J. Sullivan, Jr. have refused to answer or comply with Petitioner's this written demand to cease and desist.

78. Irrevocable harm to Petitioner is eminent because if dissolution is granted pursuant to BCL §1104, Petitioner may not be able to recover the lost value of his shareholding because of the looting of Respondents Kerry Sullivan and William J. Sullivan, Jr. over the years.

79. Petitioner has no adequate remedy at law if the value and assets of Marnia continue to decline under the monopoly of power exercise by the Respondents. Accordingly, Petitioner prays that this Court grant a temporary restraining order and preliminary injunction against the unilateral control of Marnia's finance by Respondents.

**AS AND FOR A FOURTH CAUSE OF ACTION
FOR ACCOUNTING AND/OR FOR EQUITABLE DISTRIBUTION OF ASSETS**

80. Petitioner repeats and reiterates each and every allegation set forth above as if set forth in full below.

81. It is respectfully pointed out that BCL §1111(c) empowers this Court to issue a judgment or final order of dissolution and: *"...in its discretion to provide therein for the distribution of property of the corporation to those entitled thereto according to their respective rights."*

82. It is not denied that Respondents Kerry Sullivan and William J. Sullivan, Jr. have engaged in unjustified self enrichment by looting Marnia's cash and assets by paying dividends to themselves and third-parties not entitled to dividends to the exclusion of Petitioner.

83. Such excesses and abuses include at least \$290,000 in dividends to Respondents Kerry Sullivan and William J. Sullivan, Jr. and their relatives in the Estate of Helen A. Sullivan as

well as at least \$130,000 in litigation fees and expenses before the commencement of the bench trial in July, 2013. That is more than \$420,000 to the exclusion of Petitioner.

84. Any judgment or final order of dissolution should include accounting and/or distribution of the net corporate assets in light of the looting of the corporation at the hands of Respondents Kerry Sullivan and William J. Sullivan, Jr.

85. It is respectfully submitted that under BCL §1111(c) this Court can and should exercise equity in the allocation of the net assets of the corporation to compensate Petitioner of the many years of exclusion and looting by Respondents Kerry Sullivan and William J. Sullivan, Jr.

86. Petitioner should not be made to suffer many more years of a separate accounting and/or shareholder's derivative action against Respondents Kerry Sullivan and William J. Sullivan, Jr. Petitioner simply does not have the luxury of such time for further legal delays.

87. Respondents Kerry Sullivan and William J. Sullivan, Jr. were always aware of Petitioner's advanced age and were obviously banking on Petitioner not surviving until the trial of the declaratory judgment case and now are just as pleased to sit back and continue litigation for years to come for a lengthy accounting case to be followed by a dissolution action if Petitioner could survive.

88. It is submitted that it would be a just and equitable remedy, for this Court to exercise its discretion and allow for a distribution of the net assets of the corporation after dissolution to include compensation for the years of looting by Respondents.

89. To deny such relief would be to force Petitioner to accept a choice of many more years of litigation or accept and waive the many years of looting by Respondents Kerry Sullivan and William J. Sullivan, Jr. for more than \$420,000.

90. It is respectfully submitted that denial of such relief requested by Petitioner would be in effect to reward Respondents Kerry Sullivan and William J. Sullivan, Jr. for "gaming the system" and escaping responsibility for their unconscionable acts.

91. This Court is empowered to do equity at all times and such exercise is appropriate in these circumstances.

92. Moreover, Petitioner should be awarded reasonable attorneys' fees against Respondents Kerry Sullivan and William J. Sullivan, Jr. due to their unconscionable and intentional exclusion of Petitioner and the looting of his equity in the corporation over these many years.

**AS AND FOR A FIFTH CAUSE OF
ACTION FOR FRAUD AND UNJUST ENRICHMENT**

93. Petitioner repeats and reiterates each and every allegations set forth above as if it were set forth in full below.

94. Respondents Kerry Sullivan and William J. Sullivan, Jr. have been unjustly enrich at the unfair expense of Petitioner for not less than \$210,000 (half of the admitted \$420,000 looted).

95. As an alternative, this Court may impress a constructive trust against Respondents Kerry Sullivan and William J. Sullivan, Jr. share of the net proceeds after dissolution of Marnia for the value of moneys brazenly looted since 2003 (6 years prior to the formal denial of Petitioner's 50% share).

96. Even if Respondents Kerry Sullivan and William J. Sullivan, Jr. deny that they were unjustly enriched by their past and continued misconduct, a constructive trust impressed upon their share of the net proceeds from dissolution for at least \$210,000, or at least a surety bond in that amount, would be appropriate under these circumstances.

97. Further, it is submitted that Petitioner should be entitled to punitive damages in an amount three times the amount of ordinary, compensatory damages, together with interest and reasonable attorneys fee against Respondents Kerry Sullivan and William J. Sullivan, Jr.

**AS AND FOR THE SIXTH CAUSE OF ACTION
FOR BREACH OF FIDUCIARY DUTY AND MISMANAGEMENT**

98. Petitioner repeats and reiterates each and every allegations set forth above as if it were set forth in full below.

99. This count is asserted against Respondents Kerry Sullivan and William J. Sullivan, Jr. as individuals in their capacity as officers, principals and directors of Marnia, for conduct constituting actionable violations of the duties owed by them as fiduciaries to Marnia and to its other shareholder, the Petitioner.

100. As fiduciaries, Respondents Kerry Sullivan and William J. Sullivan, Jr. owed Marnia and their fellow shareholder a duty of loyalty, due care, good faith and fair dealing. Instead, they acted and continue to act, intentionally, unconscionably and so palpably to benefit themselves at the unfair expense of the 88 year old Petitioner.

101. Petitioner has been directly injured by reason of the acts and malfeasants of Respondents Kerry Sullivan and William J. Sullivan, Jr. in their breach of their fiduciary duties.

102. Therefore, Petitioner seeks damages and an accounting of all funds and benefits misappropriated from Marnia together with interest and reasonable attorneys' fees.

103. In the alternative, the distribution of the net proceeds of the assets of Marnia should take into account not merely the respective percentage of shareholding of the individual shareholders but the "respective rights" of shareholders based upon the breaches of fiduciary duties and mismanagement perpetrated by Respondents Kerry Sullivan and William J. Sullivan, Jr.

**AS FOR THE SEVENTH CAUSE OF
ACTION FOR COMMON LAW DISSOLUTION**

104. Petitioner repeats and reiterates each and every allegations set forth above as if it were set forth in full below.

105. Respondents Kerry Sullivan and William J. Sullivan, Jr. have over several recent years engaged in a course of conduct that amounts to systematic looting of Marnia's cash assets.

106. As previously recounted, Respondents and their attorneys have admitted that more than \$420,000 has been expended on dividends and legal fees since 2004 to the exclusion of Petitioner and in many respects specifically used against Petitioner in opposition to his legal rights won in many years of litigation.

107. Moreover, Respondents Kerry Sullivan and William J. Sullivan, Jr. refuse to hold elections or shareholders' meeting in order to avoid any participation of Petitioner in Marnia's corporate affairs.

108. Furthermore, Respondents refuse to share any financial information with Petitioner thus completely "excommunicating" Petitioner from the corporate life of Marnia.


109. As Respondents are the only effective and self proclaimed officers and directors of Marnia, this corporation only exists to benefit these Respondents at the expense of Petitioner.

110. It is respectfully submitted that Respondents Kerry Sullivan and William J. Sullivan, Jr. have so palpably engaged in a course of exclusive discretion and control of Marnia, to the exclusion and prejudice of Petitioner, that this Court is empowered to grant Petitioner the remedy of common law dissolution while preserving Petitioner's rights to an equitable distribution of the net corporate assets taking full account of the abuses and breaches of fiduciary duty practiced by the Respondents.

WHEREFORE, Petitioner respectfully requests Final Order and/or Judgment granting the following relief:

- (A) In the first cause of action, for corporate dissolution pursuant to BCL §1104(a)(3);**
- (B) In the second cause of action for corporate dissolution pursuant to BCL §1104(a)(2);**
- (C) In the third cause of action, for a preliminary and/or permanent injunction preventing unilateral control of the subject corporation by Respondents Kerry Sullivan and William J. Sullivan, Jr.;**
- (D) In the fourth cause of action, pursuant to BCL §1111(c) for accounting and/or equitable distribution of the corporate assets of Marnia in proportion to the respective rights of the parties and of not less than 50% of the net assets of Marnia to Petitioner and the balance thereof to be distributed between Petitioner and Respondents Kerry Sullivan and William J. Sullivan, Jr. in accordance with their equitable rights;**
- (E) In the fifth cause of action, for fraud and unjust enrichment for a constructive trust in favor of Petitioner against Respondents Kerry Sullivan and William J. Sullivan, Jr. holdings and equity in the net proceeds of Marnia after dissolution;**
- (F) In the sixth cause of action, breach of fiduciary duty and mismanagement for damages in favor of Petitioner against Respondents Kerry Sullivan and William J. Sullivan, Jr., together with an award for interest and reasonable attorneys' fees;**
- (G) In the seventh cause of action, for common law dissolution of Marnia and distribution of the net corporate assets of Marnia based upon the respective rights of the parties and damages suffered by Petitioner against Respondents Kerry Sullivan and William J. Sullivan, Jr.; and**
- (H) For such other and further relief as to this Court may appear just and proper.**

Dated: August 23, 2014
Astoria, New York

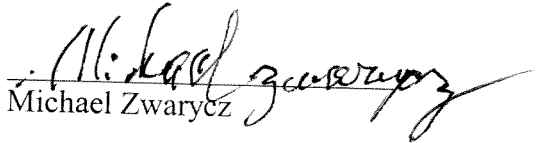

Peter Piddoubny, Esq.

VERIFICATION

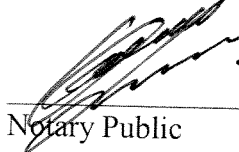
State of New York }
 }
County of Westchester }

Michael Zwarycz, being duly sworn deposes and says:

I am the Petitioner in the within proceeding; that I have read the foregoing petition and know the contents thereof; the same is true of my own knowledge, except as to matter therein alleged upon information and belief, and to those matters I believe it to be true based upon documents, books and records.


Michael Zwarycz

Sworn to before me this
23rd day of August, 2014



Notary Public

OKSANA PELEKH
Notary Public, State of New York
No. 02PE6236795
Qualified in Westchester County
Commission Expires March 7, 2015

Exhibit A

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
MICHAEL ZWARYCZ,

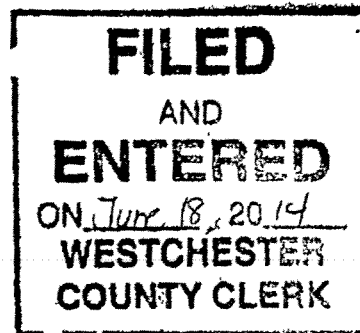
Plaintiff,

-against-

**MARNIA CONSTRUCTION INC., STEMAR
CONSTRUCTION INC., KERRY SULLIVAN,
WILLIAM J. SULLIVAN, JR. and JOAN
HANNIGAN, as the Executrix of the Estate of
Helen Sullivan,**

Defendants.
-----X

DIBELLA, J.



**DECISION AND ORDER
AFTER NON-JURY TRIAL**

INDEX NO. 21513/09

FILED

JUN 18 2014

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHE

The above-captioned matter was referred from the Trial Assignment Part and this Court conducted a non-jury trial which commenced on July 8, 2013 and continued over the course of nine days, concluding on July 23, 2013. At the trial, Michael Zwarycz and Andrew Balint testified on behalf of plaintiff. Julius Ostreicher, William Sullivan, Jr., and David Purdy testified on behalf of defendant. The following exhibits were marked into evidence: Plaintiff's Exhibits 1-7, 10-13, 15, 17-19, 21-45, 48, 51-54, 57 and Defendant's Exhibits B, C, H-L, M-P, Q-T, V-Z, AA-DD, FF-II, KK, MM-TT. Following the conclusion of the trial, the parties submitted post-trial submissions on or about November 18, 2013. The Court has considered the credible testimony and evidence submitted at the trial, as well as the post-trial submissions, and makes the following findings of fact and conclusions of law.

ZWARYCZ v. MARNIA CONSTRUCTION, INC.
INDEX NO. 21513/09

Plaintiff commenced this action seeking a judgment declaring that he is the owner of 50 percent of the outstanding shares of defendants Stemar Construction, Inc. ("Stemar") and Marnia Construction, Inc. ("Marnia").

THE FACTS

Stemar was incorporated on August 9, 1966 and has as its primary asset a 3-story building with 12 apartments located at 209 Cerrato Lane (f/k/a 211 Rockland Avenue/211 Cerrato Lane) in Yonkers, New York (PI Ex. 1). Marnia was incorporated on August 14, 1969 and has as its primary asset a 3-story building with 29 apartments at 97 Waring Place (f/k/a 95 Waring Place) in Yonkers, New York (PI Ex. 15). It is undisputed that William J. Sullivan, Sr. ("Bill"), who has since died, was a 50 percent owner of both corporations.¹ It is the ownership of the remaining 50 percent interest in both corporations that is in dispute. Plaintiff and defendant Estate of Helen A. Sullivan (Bill's sister) both claim ownership of the remaining 50 percent interest.

At the trial, plaintiff Michael Zwarycz testified. Plaintiff had various jobs when he first immigrated to the United States from Ukraine in 1949 (Trial Tr. 20). During the 1950's and 1960's, plaintiff was a successful real estate developer, buying land and building approximately 40 houses (Trial Tr. 21-23). During that time period, plaintiff and Bill were acquaintances, as plaintiff bought building supplies for his developments from Sullivan &

¹ Upon Bill's death, his 50 percent interest was inherited by his wife Marie and three children (Trial Tr. 646). Following the death of Marie Sullivan and one of their children, the 50 percent interest originally held by Bill passed to William J. Sullivan, Jr. and Kerry Sullivan, who presently each have a 25 percent interest in Stemar and Marnia (Trial Tr. 654).

ZWARYCZ v. MARNIA CONSTRUCTION, INC.
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Sons (Trial Tr. 23). The two gentlemen became friends and began seeing each other socially at various events (Trial Tr. 25–27).

At some point, plaintiff wanted to build an apartment building (Trial Tr. 27). He and non-party Angelo Fusino planned on partnering in this venture and purchased land on Rockland Avenue (now 211 Cerrato Lane) (Trial Tr. 27–28). However, Mr. Fusino backed out (Trial Tr. 29). Plaintiff then turned to Bill and asked him to be his partner (Trial Tr. 30). Bill agreed (Trial Tr. 29–30). They formed Stemar for this project development in 1966 (Trial Tr. 35). Plaintiff testified that the first three initials of each of their wives' names were used to come up with the name ("Ste" for Stefania, plaintiff's wife, and "Mar" for Marie, Bill's wife's name) (Trial Tr. 34–35). Plaintiff testified that he and Bill were each 50% owners and shareholders of Stemar (Trial Tr. 38). Plaintiff was President of Stemar and Bill was Vice President (Trial Tr. 40).² Plaintiff further stated that the office address listed for Stemar in 1966 was plaintiff's home address (Trial Tr. 42; PI Ex. 2).

Stemar then purchased the land on Cerrato Lane (Trial Tr. 40, 46; PI Exs. 2, 3-1, 3-2; Def Ex. Q). Mr. Fusino was paid for his 50% share of the land (Trial Tr. 46; PI Exs. 2, 3-1, 3-2; Def Ex. Q). Plaintiff testified that he was not paid for his 50% share of the value of the land because his share was part of his capital contribution to Stemar (Trial Tr. 47–48).

Further, he stated that he also contributed to Stemar by acting as general contractor

² At his deposition, plaintiff testified that maybe he was Vice President and Bill was President (Trial Tr. 522–524).

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at the construction site of the property (Trial Tr. 36, 54). He supervised the subcontractors full time and it took over a year to build the apartment building (Trial Tr. 61-62). Plaintiff testified that he was not paid for his work on this building, as it was his view that this was part of his contribution to the corporation (Trial Tr. 64-65). Once the building was constructed, he and Bill decided to rent out the eleven apartments (Trial Tr. 67). Anthony DePonto was subsequently hired as a superintendent/janitor of the Cerrato Lane building (Trial Tr. 69). All the checks that were issued by Stemar were jointly signed by plaintiff and Bill's wife, Marie (Trial Tr. 45, 52, 77-79; PI Ex. 3, 4, 6, 10). In or about 1971, after the project was completed, plaintiff thought to increase the number of apartments at the building to thirteen (Trial Tr. 79). Stemar hired an attorney to represent it in the application to the Building Department to increase the number of apartments (Trial Tr. 79-80; PI Ex. 12).

Marnia was incorporated on August 16, 1969 to develop another apartment building at 95 Waring Place in Yonkers, New York (Trial Tr. 101; PI Ex. 15). The name of this corporation was again derived from the names of plaintiff's and Bill's wife (Trial Tr. 103). Plaintiff's home address was listed as the office address of the corporation (Trial Tr. 104; PI Ex. 15). Again, plaintiff states that he and Bill were 50/50 shareholders of Marnia (Trial Tr. 105). Plaintiff was Marnia's President and Bill was the corporation's Vice President (Trial Tr. 125). Marnia purchased the land on which it would build the apartment building from plaintiff and his previous partner, and plaintiff was present at the closing (Trial Tr. 126). The other owner of the land cashed his check of the proceeds of the sale, but, even

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though plaintiff was issued a check for his share, he did not cash the check and "left it behind" as investment in Marnia (Trial Tr. 127-130). Plaintiff testified that he acted as general contractor and was responsible for the development of the 29-apartment building (Trial Tr. 126). After the completion of this building, plaintiff and Bill decided to retain the building and rent out the apartments (Trial Tr. 153). Plaintiff testified that he maintained the property and rented the apartments (Trial Tr. 137, 153-154). He was never paid by Marnia for the work, as he considered it his contribution to Marnia (Trial Tr. 151). Bill was responsible for handling the books and the financial side of the projects (Trial Tr. 153).

In January 1971, Marnia acquired four additional properties on St. Andrew's Place in Yonkers, New York (Trial Tr. 155-157). Those properties were to be demolished and multiple units built in their place (Trial Tr. 156). Bill signed the contract of sale, but plaintiff's address was listed as Marnia's corporate address (Trial Tr. 158-159). Plaintiff did not financially contribute to the purchase of the St. Andrew's Place properties (Trial Tr. 218). Plaintiff and Bill both attended the closing (Trial Tr. 180). In 1973, Marnia purchased contiguous land to the rear of the St. Andrew's Place property it already owned (Trial Tr. 183-184; PI Exs. 31-32). Again, plaintiff attended the closing as Marnia's President (Trial Tr. 184). The property on St. Andrew's Place was ultimately sold (Trial Tr. 254-55).

In July 1973, Bill died (Trial Tr. 188). Bill was survived by his wife Marie Grady and three children, Kerry, William Jr. and James (Trial Tr. 192). Plaintiff testified that, after Bill's death, his sister Helen Sullivan ("Helen") began to act as Treasurer on behalf of

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Marnia (Trial Tr. 194).³

With regard to both properties, plaintiff testified that he did not receive any compensation to act as general contractor for the properties but that he did receive some reimbursement for labor costs related to the construction (Trial Tr. 218-221). On cross-examination, plaintiff testified that he began receiving a salary in the late 1970's in the amount of \$250/week (which later was increased to \$300/week) (Trial Tr. 259-260; Def Exs. L, LL). However, later on during cross it became clear that plaintiff was receiving wages from Stemar as early as 1971 (Def Ex. U).

At some point after Bill died, plaintiff stopped signing checks (Trial Tr. 260). Helen told him it was hard to get in touch with him every time a check needed to be signed, so plaintiff willingly took his name off of the accounts for check-writing purposes and authorized Helen to individually sign checks on Stemar and Marnia's behalf (Trial Tr. 260). In addition, at some point after Bill's death, tax bills/statements stopped coming to plaintiff's address which was listed as the corporate address (Trial Tr. 384; Def Exs. SS, TT; PI Ex. 28).

In 1994, certain tenants at 95 Waring Place filed complaints against their landlord Marnia (Trial Tr. 201, 205, 206; PI Ex. 47). Plaintiff was required to attend hearings with respect to those complaints (Trial Tr. 202, 206). Up until around 1994, plaintiff was still signing leases with tenants on behalf of Stemar and Marnia (Trial Tr. 211; PI Ex. 48).

³ Helen also took over the Sullivan & Sons business after Bill died (Trial Tr. 781-782).

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In or around 1995 or 1996, at the time when Sullivan & Sons was faced with bankruptcy, plaintiff learned that approximately \$400,000 was removed from Stemar (Trial Tr. 394-95, 591). There was conflicting testimony during his deposition and trial testimony about whether plaintiff made any inquiry to Helen about the money that was taken out of Stemar (Trial Tr. 396).

Sometime in the 1990's, plaintiff testified that he went to Albany to look at the corporate records and found out that Helen had made herself President of Marnia (Trial Tr. 419). In 2001, Helen died (Trial Tr. 538; Def Exs. D, MM).

Plaintiff testified that he never sold, transferred or gifted any of his shares in Stemar or Marnia and that he remains a 50% owner of both corporations (Trial Tr. 215, 216). He also testified that from the mid 1960's to 2004, he never asked for income or profits from either Stemar or Marnia (Trial Tr. 248).

Plaintiff testified that, in or around 2008 or 2009, plaintiff's employment with Stemar and Marnia was terminated, the locks were changed, and Kerry Sullivan ("Kerry") told him that he was no longer needed (Trial Tr. 466-467).

Plaintiff also called Andrew Balint to testify at trial. Mr. Balint has been an attorney since 1960 (Trial Tr. 744). He was retained in 1971 to apply for a use variance for Stemar to construct additional apartments (Trial Tr. 745). He stated that he met with plaintiff and Bill and the tone of the meeting was that they were principals of Stemar (Trial Tr. 746-747). He also stated that he was told that plaintiff was the President of Stemar and he did not understand plaintiff to only be the superintendent of the building (Trial Tr. 763,

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772). He testified that plaintiff was his main contact regarding the zoning issues, as plaintiff handled the day to day matters regarding such issues for Stemar (Trial Tr. 745). He also testified that he only recalled meeting Helen in person once, although he spoke with Helen from time to time (Trial Tr. 748). His involvement ended in 1975 and he has had no involvement in Marnia (Trial Tr. 759–764).

At the trial, the defense called Julius Ostreicher to testify. Mr. Ostreicher is a trusts and estate attorney who represents the Estate of Helen Sullivan (Trial Tr. 603). He was retained approximately one year after Helen's death (Trial Tr. 603). He testified that he conducted an investigation into the assets of the estate, he spoke to the Executrix of the estate (Geraldine Purdy) and accountants, and he reviewed the estate tax returns (Trial Tr. 604–606). In the federal estate tax return, Helen was listed as owning a 50% share of Stemar and Marnia (Trial Tr. 612; Def Ex. OO). Mr. Ostreicher testified that the corporate assets made up a large part of Helen's estate and without these assets, there would have been little to no tax for the estate to pay (Trial Tr. 614–615). 1099 statements were also admitted into evidence that demonstrated that both corporations issued dividends and/or distributions to the Estate of Helen Sullivan during the years 2004, 2006, 2007, and 2008 in the total amount of \$290,000 (Trial Tr. 614; Def Ex. PP). Mr. Ostreicher further testified that, during the time he has represented the estate, he has had no evidence that plaintiff had any interest in Stemar and Marnia (Trial Tr. 618).

The defense also called William Sullivan, Jr. ("William Jr.") as a witness. He testified that it was his "understanding" that his father Bill and his aunt Helen each had 50%

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of the corporations (Trial Tr. 643–645, 649). According to the witness, plaintiff was an employee—the superintendent—for the apartment buildings and got paid for his services (Trial Tr. 645, 649). He stated that plaintiff never got any distributions or profits, and plaintiff never requested same (Trial Tr. 650). The witness worked at Sullivan & Sons during the summers in the 1970's and then full-time from 1983 through 1995 (Trial Tr. 643–645). While he was working there full-time (which was after his father passed away), plaintiff would come by on Saturdays or weeknights to turn over the rent checks (Trial Tr. 646). After his father's death, William Jr. acquired 10% of his father's 50% interest in the corporations (Trial Tr. 646). He further testified that he never consulted with plaintiff about any issues concerning Stemar and Marnia, such as when the boiler and roof were replaced and the parking lot was paved, and he stated that plaintiff never questioned these decisions (Trial Tr. 647–651).

In the 1990's, funds from Marnia and Stemar were transferred by Helen and used to make payroll payments for Sullivan & Sons. Over the years, the witness testified that “hundreds of thousands” of dollars were taken (Trial Tr. 651). Because the witness did not consider plaintiff to be an owner, he never advised plaintiff of these transfers (Trial Tr. 652). The witness also never advised plaintiff when a turn-off notice was received from Con Edison in late 1994 or with regard to the real estate taxes that were not paid for two years (Trial Tr. 653). Then in 1995, the witness's sister Kerry was added as a required signatory on any written checks to oversee Helen (Trial Tr. 654).

The witness stated that, in 1999, he had a meeting with Kerry and Helen (and no

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notice of this meeting was given to anyone else) and they decided that Kerry would be the President and the witness would be the Secretary for both corporations (Trial Tr. 657, 689-690).

The defense also called David Purdy as a witness. He is the cousin of Kerry and William Jr. and the nephew of Helen (Trial Tr. 776). From late 1973 to 1996, he worked at Sullivan & Sons (Trial Tr. 777). He testified that plaintiff would come in to drop off rent checks and money from the laundry machines to Helen (Trial Tr. 782). Helen controlled the accounts and was the "boss of everything" (Trial Tr. 781-782). He stated that plaintiff's role was as the superintendent of the buildings (Trial Tr. 783). He stated that in 1994, William Jr. and Kerry got more involved in the corporations (Trial Tr. 788). Until that time, Helen was solely involved with Marie (Bill's wife), "her partner", but Marie was busy raising a family so Helen was in charge (Trial Tr. 788-789; Def Ex. TT). The witness testified that he understood that Bill and Helen were each 50% owners of the corporations (Trial Tr. 795).

THE LAW

Plaintiff bears the burden of proving his case by a preponderance of the evidence. *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 NY2d 191 (1976). In order for plaintiff to prevail on his claim, the evidence that supports plaintiff's claim must appeal more as representing what took place than the evidence opposed to plaintiff's claim. See PJI 1:23. This does not mean the greater number of witnesses who support plaintiff's position. See *id.* If, at the close of all the evidence, the evidence is equally balanced, the

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court must determine that plaintiff has failed to meet his burden and his claim is not made out. *Rinaldi & Sons, Inc.*, 39 NY2d at 196. The trial court's determination as to issues of credibility of the witnesses is given great deference, as a trial court is in a position which allows it to observe and evaluate the testimony and demeanor of witnesses, and affords it a better perspective from which to assess their credibility. See *Vizzari v. State of New York*, 184 AD2d 564 (2d Dep't 1992); *Kincade v. Kincade*, 178 AD2d 510 (1991).

Upon consideration of all the credible testimony and evidence in this case, the Court finds that plaintiff has established, by a preponderance of the evidence, that he is a 50% owner of the shares of Stemar and Marnia.

Plaintiff bears the burden of establishing by a preponderance of the evidence proof of his entitlement to ownership of shares in this closely held corporation where no stock certificates were issued. See *Hunt v. Hunt*, 222 AD2d 759 (3d Dep't 1995). The fact that an individual does not have any stock certificates or that none were issued does not preclude a finding that the individual has the rights of a shareholder. *Kun v. Fulop*, 71 AD3d 832, 833 (2d Dep't 2010); *French v. French*, 288 AD2d 256 (2d Dep't 2001). "[T]he mere fact that [an individual] was never formally issued stock certificates or that [the individual] did not physically possess stock certificates or a shareholder agreement, without more, is not dispositive of whether he was a shareholder." *Blank v. Blank*, 256 AD2d 688, 693 (3d Dep't 1998). Where no stock certificates were issued, the court must consider other evidence to determine the validity of an individual's claim of ownership. *Id.* "In the absence of a share certificate a court must determine from other available evidence

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whether a putative shareholder in fact and law enjoys that status." *Kun*, 71 AD3d at 833, quoting *Pappas v. Corfian Enters., Ltd.*, 22 Misc 3d 1113[A] (Sup Ct Kings County 2009); see also *Hunt*, 222 AD2d at 760.

In the real world, particularly that in which close corporations operate, clear evidence of share ownership is often not found in the corporate books and records, for any number of reasons. Other evidence must be found. . . . A court may consider the intent of the parties, particularly evidence of an agreement to form a corporation. . . . A court, in addition, may consider the conduct among the parties reflecting and in furtherance of status as shareholders; the managerial responsibilities borne by the putative shareholder; and how non-parties understand the relationship based upon their observation of the conduct among the parties. Of course, managerial responsibilities or the exercise of executive functions may be as consistent with status as an officer, or even an employee, as it is an indication of shareholder status, and the observations of third parties may be selective or limited.

Pappas, 22 Misc 3d at *4-*5 (internal citations and quotations omitted).

"The relationship between a corporation and its stockholders is contractual." *Id.* at *3 (internal quotations omitted), *aff'd* 76 AD3d 679 (2d Dep't 2010).

The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of those facts. It expresses the contract between the shareholder and the corporation and his co-shareholders. But it is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership. . . . When a corporation has agreed that a person shall be entitled to a certain number of shares for a consideration permitted by law and executed by the person, those shares comes into existence and are owned by him.

United States Radiator Corp. v. State of New York, 208 NY 144 (1913). "Consideration for

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shares 'imports a contribution to the capital stock made by the shareholder and accepted by the corporation.'" *Pappas*, 22 Misc 3d at *3, quoting *United States Radiator Corp.*, 208 NY at 149. Pursuant to Business Corporation Law § 504, consideration for the issuance of shares can include money, other property, and labor or services actually received by or performed for the corporation or for its benefit. *Kun*, 71 AD3d at 834. Experience can also constitute consideration. *Heisler v. Gingras*, 90 NY2d 682, 685 (1997). In addition, the fact that an individual also receives a salary as a corporate employee does not eradicate the consideration for a stock interest in the corporation. *Capizola v. Vantage Int'l Ltd.*, 2 AD3d 843 (2d Dep't 2003). Providing the concept for a business can also be considered viable consideration. *Id.* at 844.

In considering whether plaintiff should be declared an owner and shareholder of Stemar and Marnia, the Court must determine whether there was sufficient evidence of consideration for the entry of a contract between the corporation and plaintiff as a shareholder. See *Pappas*, 22 Misc 3d at *4. The testimony and evidence supports a finding that there was valid and adequate consideration for plaintiff's shares in both corporations.

Plaintiff brought the concept of the business to Bill and was the individual responsible for conjuring up this venture (Trial Tr. 30). Plaintiff, a real estate developer of over 40 homes, owned two pieces of vacant land on which he was to build apartment buildings with other partners (Trial Tr. 23–28). When those arrangements fell through, plaintiff took the idea to Bill, with whom he was acquainted through Bill's business, Sullivan

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& Sons (Trial Tr. 29). After the two decided to partner on these projects together, they formed the corporations, Stemar in 1966 and Marnia in 1969 (Trial Tr. 34, 103).

The testimony and evidence demonstrate that plaintiff made direct capital contributions to each corporation by transferring his 50% ownership of vacant land to both corporations (Trial Tr. 46-48). Those lands were then used to build the apartment buildings which were the main assets of the corporations (Trial Tr. 27-28, 61-62, 153). In addition to transferring his share of vacant lands to the corporations (Trial Tr. 48), other evidence also supports a finding that plaintiff was a shareholder of Stemar and Marnia. Plaintiff's residential address was used as the corporate address of both corporations (Trial Tr. 42, 104; Pl Exs. 15, 17). During the process of the apartment buildings being built, plaintiff worked six days a week as a general contractor for more than one year on each project to supervise the projects (Trial Tr. 36, 61-63). Plaintiff's experience in having previously built over 40 homes was a significant and important asset for the corporations, especially considering Bill had no real estate development experience (Trial Tr. 21-22, 101, 171). Plaintiff was also responsible for taking the steps to hire and assist attorney Andrew J. Balint to apply for a variance to increase the units of Stemar's building (Trial Tr. 66-67, 79-80, 85). Plaintiff appeared at numerous meetings and hearings over the course of four years after construction to litigate the zoning issue (Trial Tr. 79-80, 745-746). Attorney Balint, who was hired by one of the corporations in 1971 before Bill died, testified at trial that, at a meeting held with plaintiff and Bill, he learned that they were partners and shareholders of Stemar (Trial Tr. 746-47, 754-55). Plaintiff also was responsible for

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leasing apartments, choosing tenants and collecting rents, even after a superintendent was hired by Stemar (Trial Tr. 69, 137, 153–154, 211, 577). Numerous documentary evidence denotes plaintiff as the corporations' President (PI Exs. 11, 24, 26–28).

Defendants' view of the evidence is not credible. Defendants argue that plaintiff was only a janitor or superintendent. However, such an argument is not believable. Plaintiff would not have been as involved—or allowed to be as involved—in both businesses if he was a mere superintendent. He took on the role of general contractor supervising the progress and development of the apartment buildings (Trial Tr. 36, 54). He contacted an attorney and worked with an attorney for several years to litigate a zoning issue (Trial Tr. 745). He transferred his share of vacant lands to the corporations (Trial Tr. 48). He signed checks as a signatory for Stemar as President (PI Exs. 3–4, 6, 10). His address was used as the corporate address in the incorporation documents (Trial Tr. 37, 101; PI Exs. 1, 15). Plaintiff was present at the closing for the real estate properties of the corporations, including the property at St. Andrew's Place (which plaintiff individually never had any connection to). The evidence is consistent with plaintiff having a shareholder stake in these two corporations. Even something as simple as the names of the corporations supports plaintiff's position. It is not until after Bill died that there is *any* evidence to support defendants' contentions of Helen's ownership interests. Most, if not all, of the evidence provided by defendants focuses on the decades after Bill's death. Nothing submitted by defendants shows any real involvement or ownership interest in the corporations by Helen when Bill was alive. Further, although the testimony of William Jr. and David Purdy supported defendants' position, William Jr. was only a small child at the

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time the corporations were incorporated and he only became involved in the business ten years after his father died (Trial Tr. 645-646). The witness David Purdy also did not have any knowledge of the corporate affairs of Stemar and Marnia before the death of Bill (Trial Tr. 777).

Even though it is undisputed that Helen was involved in the corporations, the fact that she took charge after Bill's death and was responsible for many of the financial responsibilities of the corporations is not inconsistent with plaintiff's version of the events. In fact, it appears that, from the inception of the corporations, the Sullivans (first Bill, then Helen, and then William Jr. and Kerry) were always in charge of the business/financial aspects of the corporations, as they had more experience in that department, while plaintiff's expertise was in the building of the apartments and project development (Trial Tr. 137, 153-154).


Based on the above, the Court finds that plaintiff has met his burden of establishing by a preponderance of the evidence that it is more likely than not that he was an equal shareholder of Stemar and Marnia. Plaintiff sufficiently established his shareholder status and defendants' evidence was insufficient to overcome that showing.

In accordance with the foregoing, the Court declares that plaintiff is the owner of 50 percent of the shares of Stemar Construction, Inc. and Marnia Construction, Inc.

This is the Decision and Order of the Court after trial.

Settle judgment on notice.

Dated: June 18, 2014
White Plains, New York


Hon. Robert DiBella, JSC

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To: Law Offices of Peter Piddoubny
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235 Mamaroneck Avenue
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White Plains, NY 10605

Piscionere & Nemarrow, PC
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Rye, NY 10580

Exhibit B

STATE OF NEW YORK

DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is a true copy of said original.



WITNESS my hand and official seal of the
Department of State, at the City of Albany, on
December 17, 2008.

Paul LaPointe

Paul LaPointe
Special Deputy Secretary of State

Certificate of Incorporation of
MARNIA CONSTRUCTION INC.

under Section 402 of the Business Corporation Law

IT IS HEREBY CERTIFIED THAT:

(1) The name of the proposed corporation is: **MARNIA CONSTRUCTION INC.**

(2) The purpose or purposes for which this corporation is formed, are as follows, to wit:

(a) To purchase, lease, exchange, hire or otherwise acquire lands with or without buildings thereon, or any interest therein, whatsoever and wheresoever situated; to erect, construct, rebuild, enlarge, alter, improve, maintain, manage, and operate houses, buildings or other works of any description on any lands owned or leased by the corporation, or upon any other lands; to sell, lease, sublet, mortgage, exchange, or otherwise dispose of any of the lands or any interest therein, or any houses, buildings or other works owned by the corporation; to engage generally in the real estate business, as principal, agent, broker, or otherwise, and generally to buy, sell, lease, mortgage, exchange, manage, operate and deal in lands or interests in lands, houses, buildings, or other works; and to purchase, acquire, hold, exchange, pledge, hypothecate, sell, deal in, and dispose of tax liens and transfers of tax liens on real estate.

To make, enter into, perform, and carry out contracts for constructing, building, altering, improving, repairing, decorating, maintaining, furnishing and fitting up buildings, tenements and structures of every description, and to advance money to and enter into agreements of all kinds with builders, contractors, property owners, and others, for said purpose.

(b) To acquire by purchase, lease or otherwise, improve and develop real property. To erect dwellings, apartment houses and other buildings, private or public, of all kinds, and to sell or rent the same. To lay out, grade, pave and dedicate roads, streets, avenues, highways, alleys, courts, paths, walks, parks and playgrounds. To buy, sell, mortgage, exchange, lease, let, hold for investment or otherwise, use and operate, real estate of all kinds, improved or unimproved, and any right or interest therein.

(c) To do any and all acts in the line of its business which it may deem necessary, profitable or desirable for the due promotion thereof, to conduct and carry on any other similar business which may be capable of being profitably carried on in connection with this company's business, or to carry on any similar business that is adapted directly or indirectly to add to the value of the company's property and the profits of its authorized business.

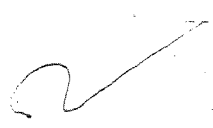
To carry on any business similar to the foregoing permissible under the Business Corporation Law of the State of New York which may be carried on to advantage in connection with the business of the corporation and as an incentive thereto or which may tend to promote its interests.

The corporation, in furtherance of its corporate purposes above set forth, shall have all of the powers enumerated in Section 202 of the Business Corporation Law, subject to any limitations provided in the Business Corporation Law or any other statute of the State of New York.

(3) The office of the corporation is to be located in the City of Yonkers
(city) (town) (incorporated village)
County of Westchester, State of New York.

(4) The aggregate number of shares which the corporation shall have the authority to issue is

Two hundred (200) shares, no par value



(5) The Secretary of State is designated as agent of the corporation upon whom process against it may be served. The post office address to which the Secretary of State shall mail a copy of any process against the corporation served upon him is

61 Frederic Street, Yonkers, New York

The undersigned incorporator, or each of them if there are more than one, is of the age of twenty-one years or over.

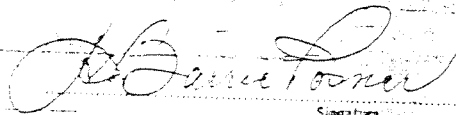
IN WITNESS WHEREOF, this certificate has been subscribed this 11th day of August 1969 by the undersigned who affirm(s) that the statements made herein are true under the penalties of perjury.

H. BARRIE POSNER

Type name of incorporator

20 South Broadway, Yonkers, New York

Address



Signature

Type name of incorporator

Signature

Address

Type name of incorporator

Signature

Address

3

ms/c
Certificate of Incorporation

of

8-10
MARNIA-CONSTRUCTION INC.

under Section 402 of the Business Corporation Law

Filed By: NAYOR & EDMISTON
20 South Broadway
Yonkers, New York 10701

Office and Post Office Address

776327 - 4

STATE OF NEW YORK
DEPARTMENT OF STATE
FILED AUG 14 1969

TAX \$ 10
FILING FEE \$ 50

John F. Thompson
Secretary of State

By

4
J. G. West

Exhibit C

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D37069

O/hu

____AD3d____

Argued - December 5, 2012

MARK C. DILLON, J.P.
RUTH C. BALKIN
CHERYL E. CHAMBERS
L. PRISCILLA HALL, JJ.

2012-00142

DECISION & ORDER

Michael Zwarycz, appellant, v Marnia Construction,
Inc., et al., respondents.

(Index No. 21513/09)

Peter Piddoubny, Astoria, N.Y., for appellant.

Piscionere & Nemarow, P.C., Rye, N.Y. (Anthony G. Piscionere of counsel), for
respondents Marnia Construction, Inc., Stemar Construction, Inc., Kerry Sullivan,
and William J. Sullivan, Jr.

Philip F. Menna, White Plains, N.Y., for respondent Estate of Helen A. Sullivan.

In an action for a judgment declaring that the plaintiff is the owner of 50% of the
outstanding shares of both Stemar Construction, Inc., and Marnia Construction, Inc., the plaintiff
appeals from an order of the Supreme Court, Westchester County (Murphy, J.), entered November
30, 2011, which denied his motion for summary judgment on the complaint and granted the cross
motion of the defendants Marnia Construction, Inc., Stemar Construction, Inc., Kerry Sullivan, and
William J. Sullivan, Jr., and the separate cross motion of the defendant Joan Harrigan, successor
executor of the Estate of Helen A. Sullivan, for summary judgment dismissing the complaint insofar
as asserted against each of them on the grounds that the action is barred by the statute of limitations
and the doctrine of laches.

ORDERED that the order is modified, on the law, by deleting the provision thereof
granting the cross motion of the defendants Marnia Construction, Inc., Stemar Construction, Inc.,
Kerry Sullivan, and William J. Sullivan, Jr., and the separate cross motion of the defendant Joan
Harrigan, successor executor of the Estate of Helen A. Sullivan, for summary judgment dismissing

January 16, 2013

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Page 1.

the complaint insofar as asserted against each of them on the grounds that the action is barred by the statute of limitations and the doctrine of laches, and substituting therefor a provision denying the cross motions; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff commenced this action for a judgment declaring that he is the owner of 50% of the outstanding shares of Stemar Construction, Inc. (hereinafter Stemar), incorporated in 1966, and Marnia Construction, Inc., incorporated in 1969, both formed for the purpose of constructing and operating apartment buildings. It is undisputed that William Sullivan was the owner of the remaining 50% of the shares of each corporation. William Sullivan died in 1973, and his interests ultimately were inherited by the defendants Kerry Sullivan and William Sullivan, Jr. No stock certificates were ever issued for either corporation.

After William Sullivan's death, his sister, Helen A. Sullivan (hereinafter Helen), took over the paperwork and bookkeeping for the corporations. The plaintiff continued to handle maintenance and the operation of the buildings, and received compensation as an employee of Stemar. Throughout the next few decades until her death in 2001, Helen exerted increasing control over the affairs of the corporations, while the plaintiff continued in his role as superintendent.

In 2004, the plaintiff, through counsel, sought access to the corporate records. By letter dated March 29, 2005, counsel for Kerry Sullivan and William Sullivan, Jr., denied the request on the ground that the plaintiff was not a shareholder in either corporation. In February 2009, the plaintiff commenced a proceeding to obtain access to the corporate records pursuant to Business Corporation Law § 624. That petition ultimately was granted. Shortly after the plaintiff commenced that proceeding, Kerry Sullivan terminated his employment and barred him from the premises. The plaintiff then commenced this action in September 2009.

The plaintiff moved for summary judgment on the complaint. The Estate of Helen A. Sullivan cross-moved, and the remaining defendants separately cross-moved, for summary judgment dismissing the complaint insofar as asserted against each of them. The Supreme Court granted the cross motions and denied the plaintiff's motion, determining that the action is barred by the statute of limitations and the doctrine of laches.

A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties (*see* CPLR 3001; *Waterways Dev. Corp. v Lavalley*, 28 AD3d 539; *Elbert v N. Village of Hills*, 262 App Div 470). "A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff. The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (*Waterways Dev. Corp. v Lavalley*, 28 AD3d at 540 [citation omitted]; *see Park Ave. Clinical Hosp. v Kramer*, 26 AD2d 613, 614, *affd* 19 NY2d 958). A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights (*see Stein v Garfield Regency Condominium*, 65 AD3d 1126; *Boyce v Rinehart*, 263 AD2d 377; *Matter of Cavallo v Davenport Neck Corp.*, 198 AD2d 104; *Charney v North Jersey Trading Corp.*, 172 AD2d 390; *Vanderbilt v Vanderbilt*, 28 AD2d 861). Here, the defendants failed to establish that they or Helen directly and definitively repudiated the plaintiff's alleged interests in the corporations prior to the letter from counsel dated March 29, 2005, denying the plaintiff access to the corporate records.

Since the applicable statute of limitations is six years (*see* CPLR 213[1]), this action, commenced in September 2009, is timely. Moreover, the action is not barred by the doctrine of laches, as the defendants were not prejudiced by the plaintiff's 4½ -year delay in commencing the action after the cause of action accrued (*see Matter of Barabash*, 31 NY2d 76, 81). Accordingly, the Supreme Court erred in granting the defendants' cross motions based upon the statute of limitations and the doctrine of laches.

However, contrary to the plaintiff's contention, he is not entitled to summary judgment on the complaint. Although the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he is a 50% owner in the subject corporations, the defendants raised a triable issue of fact in opposition thereto (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

DILLON, J.P., BALKIN, CHAMBERS and HALL, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

Exhibit D

PETER PIDDOUBNY
ATTORNEYS AT LAW
25-84 STEINWAY STREET
ASTORIA, NEW YORK 11103-3706
TEL. (718) 721-7600
FAX (718) 721-9892

Peter Piddoubny, Esq.
Oksana Pelekh, Esq.

Kerry Sullivan
75 Spruce Street
Yonkers, NY 10701

June 21, 2014

Re: Stemar Construction Inc. and Marnia Construction Inc.

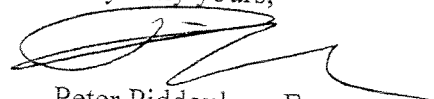
Dear Ms. Sullivan:

As you are no doubt aware, our client Michael Zwarycz has been found to be a 50% shareholder of each of the above referenced "Two Corporations." Demand is hereby made for a true and complete copy of each of the following Two Corporations:

Copies of all leases and/or terms of tenancies in effect and for the previous 10 years for the buildings known as 95 Waring Place and 211 Cerrato Lane, Yonkers, NY;
Copies of all bank statements for the Two Corporations for the previous 10 years;
Copies of all federal and NYS corporate tax returns filed for the past 10 years for each of the Two Corporations;
Copy of any appraisal report(s) for 95 Waring Place and 211 Cerrato Lane, Yonkers, NY within past 10 years;
Copies of any and all financial statements for the Two Corporations;
Copies of all 1099-div issued within the past 10 years by the Two Corporations;
Copies of all checks issued to any attorney(ies) for any legal services or litigation expenses paid for by the Two Corporations within the past 10 years;
Copies of all checks from either of the Two Corporations issued to the following within the past 10 years: Kerry Sullivan, William Sullivan, Jr. and/or Estate of Helen Sullivan or issued to a designated payee of the aforementioned.

Further, my client demands an immediate meeting of all shareholders of the Two Corporations at a mutually designated date, time and place. Failure to comply with these demands by noon Friday June 27, 2014 shall force my client to commence an immediate action for judicial dissolution of the Two Corporations. In the event you cannot make copies by the designated time, kindly provide the original for pick up and copying by the aforesaid deadline.

Very truly yours,


Peter Piddoubny, Esq.

cc. Wm. Sullivan, Jr.
Anthony Piscionere, Esq.



Exhibit E

PISCIONERE & NEMAROW, P.C.

A T T O R N E Y S A T L A W

ANTHONY G. PISCIONERE

JERYL LYNN NEMAROW
ADMITTED NY, FL, OH, DC

MICHAEL J. KONICOFF

363 BOSTON POST ROAD
RYE, NEW YORK
10580-1105
TELEPHONE (914) 835-6900
FACSIMILE (914) 835-6931

June 26, 2014

Via Facsimile – (718) 721-9892

Peter Piddoubny, Esq.
25-84 Steinway Street
Astoria, New York 11103

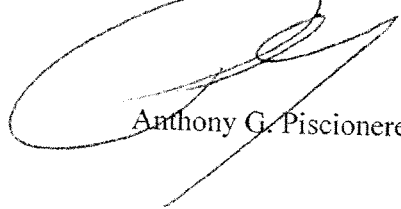
Re: Zwarycz v. Marnia Construction, Inc., et al
Index No.: 21513/09

Dear Mr. Piddoubny:

We are in receipt of a copy of your letter dated June 21, 2014, to Kerry Sullivan. Please be advised that at the moment, we are considering what options we are going to take with regard to the court's decision and any possible appeal and/or any stay pending appeal. Until that decision is made, our client will not be producing anything. Once the decision is made and a final judgment is rendered, we will of course comply with the terms of any final judgment and any of your client's possible rights under any final judgment. Given that there may very well be an appeal, I do not see any necessity for having a shareholders' meeting of the Two Corporations.

Until further notice from this office, please forward all correspondence, motions, etc. related to this litigation directly to this office and please do not contact our clients directly.

Very truly yours,



Anthony G. Piscionere

AGP:

CC: Philip F. Menna, Esq. (Via Facsimile)
Clients



Exhibit F

Michael Zwarych
61 Frederick Street
Yonkers, NY 10703

June 28, 2014

Kerry Sullivan
75 Spruce Street
Yonkers, New York 10701

BY HAND DELIVERY

William Sullivan, Jr.
27 Durst Place
Yonkers, New York 10704

Re: Marnia Construction Inc. and Stemar Construction Inc.
Cease & Desist notice from acting as corporate officers & directors

Dear Kerry and William:

As you know, the court has declared that I am the owner of 50% shareholder of the above referenced two corporations. During the trial of this action, it was revealed that there have not been any formal meetings of shareholders nor any elections of directors or officers. Accordingly, you two have been acting as *de facto* officers and/or directors without any formal ratification or procedure.

Demand is hereby made for each of you immediately to **cease and desist** from presenting yourselves, or acting as, or holding yourselves out to be, an officer and/or director of either Marnia Construction Inc. and/or Stemar Construction Inc.

My previous written request to you for a shareholders' meeting and to provide me with basic accounting information regarding these corporations has been refused by you. The accounting information I requested is reasonable and urgently needed for me to protect my interests in these two corporations. Your refusal to be reasonable and failure to cooperate is forcing a deadlock situation in both these corporations.

Sincerely,


Michael Zwarych

MICHAEL ZWARYCZ,

Plaintiff/Petitioner,

MARNIA CONSTRUCTION INC,
KERRY SULLIVAN and WILLIAM J. SULLIVAN, Jr.
Defendant/Respondent.

Index No. 2014-6366

HARD COPY SUBMISSION - - E-FILED
(This Form Must be Annexed to Hard Copy Submissions in E-Filed Cases)

With limited exceptions, all documents in mandatory e-filed cases and e-filed cases in which consent has been given must be filed electronically. Counsel who seek to submit original hard copy documents in an e-filed case must indicate the reason for hard copy submission by checking the relevant box and signing below.

1. Consensual Cases

☒ I am authorized to and do withhold consent to e-filing on behalf of my client, a party to the case, or, if self-represented, myself and therefore submit this document in hard copy form.

2. Mandatory Cases

☐ I am exempt from the requirement to e-file because I have filed with the court the exemption form required by the Rules or the court has granted my application upon good cause shown.

3. Consensual or Mandatory Cases

☒ As provided by the Protocol on Electronic Filing, I am submitting a proposed order to show cause and supporting papers seeking a TRO, together with the required showing pursuant to Uniform Rule 202.7(f) and/or Commercial Division Rule 20 demonstrating significant prejudice to the applicant from the giving of notice. If these documents are served in hard copy only, I shall, as required by the Protocol, e-file these documents within 3 business days after service.

☐ I am authorized to sign these documents on behalf of the undersigned.

☐ I am authorized to file this document in hard copy pursuant to an emergency exception and am submitting the explanatory affirmation/affidavit required by the E-Filing Rules. I shall, as required by the Rules, e-file these documents within 3 business days.

☐ I am applying for a sealing order and the need to protect sensitive information.

☐ I am applying for a sealing order and the need to protect sensitive information in the moving papers requires that I submit the papers in hard copy form, as permitted by the Protocol on Electronic Filing.

☐ I am authorized to file this document in hard copy because of a technical failure on the e-filing site as defined in the E-Filing Rules. I shall, as required by the Rules, e-file these documents within 3 business days after restoration of normal operations at the site.

☐ I am submitting an ex parte application pursuant to statute.

☐ I am submitting an ex parte application pursuant to statute [redacted] within 3 business days after restoration of normal operations at the site.
in hard copy only, I shall, as required by the Protocol, e-file these documents within 3 business days after service.

☐ I am submitting documents for in camera review.

☐ I am submitting documents for in camera review.

☐ I am filing an exhibit that cannot be e-filed (Rule 202.5-b(d)(6)).

Dated: 08/26/2014

(Signature)

Peter Piddoubny (Name)

Peter Piddoubny, Esq. (Firm Name)

25-84 Steinway Street (Address)

Astoria, NY 11103

718-721-7600 (Phone)

peter@lawyers-ny.com (E-Mail)