6 SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU
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In the Matter of the Application of

DAVID CARASSO, HELAINE FRASER, HOWARD GOLDBERG, ROBERT GOLDBERG, ARTHUR ISRAEL, RICHARD ISRAEL, SOL ISRAEL, LORRAINE LEVY, BETH CARASSO SPECTOR and SANDRA C. WEIN RECOVABLE TRUST,

Shareholder-Petitioners,

v.

PAULINE J. PERAHIA REVOCABLE TRUST, MILDRED S. QUAIN TRUST and SOLOMON SEVY,

Shareholder-Respondents,

For an order granting judicial dissolution of

CATALINA OPERATING CORP. and SEA ISLE REALTY CORPORATION,

Corporate-Respondents.
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Index No. 606702/2014

Assigned to:
Hon. Vito M. DeStefano

SHAREHOLDER-RESPONDENT PAULINE J. PERAHIA REVOCABLE TRUST'S MEMORANDUM OF LAW IN OPPOSITION TO SHAREHOLDER-PETITIONERS' MOTION TO DISMISS THIS PROCEEDING

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PRELIMINARY STATEMENT

Background To The Present Motion.

This dissolution proceeding was initiated on Shareholder-Petitioners' verified petition dated December 15, 2014 (the "Petition"). The Petitioners are all members of the "Carasso Family." On May 12, 2015, Petitioners filed a motion to dismiss the dissolution proceeding. Affirmation of David G. Tobias in Opposition to Motion to Dismiss Dissolution Proceeding, affirmed June 12, 2015 (the "Tobias Affir."), served and filed herewith. ¶2. It should be noted that Petitioners violated Justice Vito M. DeStefano's Part Rules & Procedures, II, titled, "Motions, Pre-Motion Conferences," by failing to arrange a conference call to discuss the issues involved in the Petitioners' motion before making it.

On December 22, 2014, Petitioners filed an order to show cause (the "Order to Show Cause") for Shareholder-Respondents Pauline J. Perahia Revocable Trust ("Pauline's Trust"), Mildred S. Quain Trust ("Mildred's Trust"), and Solomon Sevy (together, the "Sevy Shareholders" or "Sevy Family"), who together own 50% of the issued and outstanding stock of corporate-respondents Catalina Operating Corp. and Sea Isle Realty Corp. (together, the "Beach Club"), to show cause:

> "why an order should not be made appointing a receiver to manage the business and property of the corporate-respondents and why an order should not be made dissolving the corporate-respondents."

Tobias Affir., ¶3.

As of December 15, 2014, Mildred Quain ("Mildred") was one of four members of the Board of Directors of the Beach Club and had been a director since at least 1989. Mildred had been a shareholder in the Beach Club who had contributed her 16 2/3% interest in the Beach Club to Mildred's Trust, and was the trustee of Mildred's Trust until her death on March 2, 2015.

See, the Affidavit of Pauline J. Perahia ("Pauline") in Opposition to Petitioners' Motion to Dismiss Dissolution Proceeding, sworn June 12, 2015, ¶¶1 and 4, served and filed with this Memorandum and the Tobias Affir.

As of December 15, 2014, Pauline was also a member of the four-member Board of Directors of the Beach Club, and had been so from at least 1989. Pauline had also been a shareholder in the Beach Club who contributed her 16 2/3% interest in the Beach Club to Pauline's Trust, and on December 15 was a co-trustee with her daughter, Joann Perahia, of Pauline's Trust. Shareholder-Petitioners Sandra Wein ("Sandra") and Lorraine Levy ("Lorraine") are sisters and part of the Carasso Family, and were the other two members of the four-member Board of the Beach Club on December 15, 2014. Pauline's Affid., ¶¶1, 4, 8 and 20. On February 6, 2015, the Sevy Trusts filed a Verified Answer to the Petition and in Opposition to Appointment of a Receiver, dated February 6, 2015 (the "Answer"). Tobias Affir., ¶6. A hearing before the Court on the Order to Show Cause and the Petition was held on March 12, 2015.

As reflected in the Answer, Pauline showed the Court that Sandra had intentionally manufactured a dispute on December 15, 2014 over Sandra's self-dealing and compensation, which dispute the Petitioners used to support their claim that there were irreconcilable differences in the management of the Beach Club requiring dissolution. According to Pauline, Sandra could have very easily not have taken a "$20,000.00 bonus" in October, 2014, and when requested, just as easily returned the $20,000.00 to the Beach Club, and thereby have solved the problem. Pauline submitted that the fundamental fact was that as of February 6, 2015, the quiet time for the Beach Club's seasonal business, the Club continued to function through Pauline's and Mildred's efforts. Tobias Affir., ¶7.

As of December 15, 2014, Pauline and Mildred had some input into the running of the Beach Club and had gained access to the corporate books. Since Sandra's impetuous resignation as owner-manager of the Beach Club on December 15, 2014, Pauline had been essentially running the Beach Club in consultation with Mildred, and to a more limited extent, Sandra, and there had been discussions concerning Pauline and Mildred selling their shares to the Petitioners, the Carasso Family. Pauline contended that the Petitioners' alleged deadlock did not pose an insurmountable barrier to the continuing functioning of the Beach Club, at least in the short term – which was the quiet period. Pauline accused the Petitioners of acting in bad faith in bringing the Petition. Tobias Affir., ¶8.

On March 12, 2015, Mr. Leventhal, In Open Court, Agreed To The Dissolution Of The Beach Club And Reconfirmed This Agreement In Petitioners' March 17, 2015 Supplemental Papers And At The March 24, 2015 Hearing.

Unfortunately, Mildred died on March 2, 2015. At the same time, Jack Munger, the day-to-day manager of the Beach Club during the past season, was incapacitated and Mike Riginio, the head of the Beach Club's facilities, was incapacitated as well. As a result of Mildred's death, and Jack's and Mike's incapacity, at the March 12, 2015 hearing, at the behest of the Sevy Trusts, David G. Tobias, Esq., their counsel, withdrew the Sevy Trusts' opposition to dissolution and the appointment of a receiver, and requested William Liano, Esq. be appointed receiver. Tobias Affir., ¶¶9 and 10. Shareholder-Petitioners' counsel, Steven G. Leventhal, Esq., responded by asking to withdraw Petitioners' application for the appointment of a receiver. At this hearing, Mr. Leventhal and Mr. Tobias stipulated, in open court, before Justice DeStefano to the dissolution of the Beach Club. This fact is reflected in Pauline's Supplemental Affidavit in Support of Dissolution and the Appointment of a Receiver Other Than Sandra Wein, sworn March 22, 2015 (the "Supplemental Affid."), where Pauline told the Court on March 22, 2015

that "to the extent Petitioners and the Sevy Trusts have agreed to the dissolution of the Beach Club a final judgment of dissolution should be entered immediately." Tobias Affir., ¶9.

Mr. Tobias opposed Sandra Wein's being reinstated as sole-owner manager of the Beach Club, as receiver or otherwise, and proposed Alan Perahia as a co-manager of the Beach Club if Sandra was reinstated during the winding up period or sale of the Beach Club. Pauline told the Court that, "the Sevy Trusts would like the Beach Club sold under judicial supervision and hereby request that this be done." Tobias Affir., ¶14.

Due to the conflict about whether a receiver was needed pending the dissolution of the Beach Club, Mr. Leventhal asked to submit supplemental papers. The Court provided Mr. Leventhal until on or before March 17, 2015 to submit supplemental papers, gave Mr. Tobias until March 22, 2015 and set March 24, 2015 as the next hearing date as to the receiver.

Had Mr. Leventhal not stipulated to dissolution on March 12, the Sevy Trusts could have moved to counterclaim under BCL §1104-a and/or for common law for dissolution. Point 2C, p. 21, of this Memorandum. Mr. Leventhal's agreement to dissolution was consistent with Shareholder-Petitioner Sol Israel's September 16, 2013 letter on behalf of the Petitioners to Mildred (as trustee of Mildred's Trust), Sol Sevy (Mildred's and Pauline's brother, and a 16 2/3% shareholder), and to Pauline (as trustee of Pauline's Trust). Tobias Affir., ¶12. In his letter, Sol Israel said:

> "It is now abundantly clear to the Carasso shareholders, for a variety of reasons that have been manifested over the past several years and most pronouncedly over this past year, that we neither can continue, or desire to continue, to be your business partners."

On March 17, 2015, Mr. Leventhal submitted an Affirmation in Opposition to Appointment of a Receiver, affirmed March 17, 2015 (the "Leventhal Supplemental Affir."), and Petitioners' Memorandum of Law in Opposition to Appointment of Receiver ("Petitioners'

Supplemental Memorandum"). On March 22, 2015, Mr. Tobias served and filed the Sevy Trusts' Supplemental Memorandum of Law in Support of Dissolution and the Appointment of a Receiver or Manager Other Than Sandra Wein, dated March 22, 2015, and the Supplemental Affidavit.

In the Leventhal Supplemental Affir., Mr. Leventhal said that as a result of Mildred's death, "the Board of Directors of Catalina is no longer deadlocked." Mr. Leventhal informed the Court that on March 12, 2015 Sandra had sent a notice of special meeting to be held on March 23, 2015 for the appointment of a President, for the hiring of a general manager, and for the fixing of compensation for that manager. Mr. Leventhal stated in his affirmation that he expected Sandra to be hired as the general manager. Tobias Affir., ¶14. Mr. Leventhal reported that the "deadlock among the shareholders of both corporate-respondents remain," and that "at a conference before the Court on March 12, 2015, the respondents consented to dissolution of the corporation." Tobias Affir., ¶14.

At the March 24, 2015 adjourned hearing, Mr. Leventhal ratified his agreement to the dissolution by not taking issue with judicial dissolution of the Beach Club and by re-affirming the deadlock among the shareholders. On March 24, Mr. Tobias presented the initial written offer by Vincent Tomasino, Jr. to purchase the Beach Club for $10 million, which offer he received the evening before (the "Tomasino Transaction"). At the March 24 hearing, Mr. Tomasino's written offer, net worth statement and resume were discussed by the parties and Justice DeStefano. The Court did not make a formal decision concerning the appointment of a receiver, and in open court, Mr. Tobias asked that the Order to Show Cause and Petition be marked as submitted. Justice DeStefano marked the Order to Show Cause and Petition "submitted," and assured the parties that they would have their "divorce." The Court's electronic file shows the Order to Show Cause and Petition were marked submitted at that time.

On April 27, 2015, A Plan Of Dissolution Was Agreed To With The Court.

On March 24, the Court set April 17, 2015 for a conference telephone call to ascertain the status of the Tomasino Transaction. The judge was unavailable for the April 17 call so Madeleine Petrara, the judge's Law Secretary, took the call, and after some discussion set April 27, 2015 for a conference before the Court. On April 27, 2015, while waiting to speak to Justice DeStefano, Mr. Leventhal told Mr. Tobias that the Petitioners had agreed in principle that if the Tomasino Transaction had not closed by September 15, 2015, Petitioners would agree to a sale of the Beach Club. Mr. Tobias explained to Mr. Leventhal that his clients' wanted this matter over and that the commitment to sell the Beach Club had to be in writing. Tobias Affir., ¶16.

On April 27, when the parties appeared before Justice DeStefano, Mr. Leventhal explained to Justice DeStefano issues which he believed had arisen with the Tomasino Transaction. Mr. Tobias reported to the Court that his clients wanted an end to this litigation and that if the Tomasino Transaction did not close by September 15, 2015 they wanted the Beach Club sold. Mr. Tobias told the Court that Mr. Leventhal said his clients were prepared to agree, in principle, to the sale of the Beach Club if the Tomasino Transaction did not close by September 15, 2015. Mr. Tobias explained to Justice DeStefano that since his clients wanted an end to this litigation, he needed Mr. Leventhal's clients' commitment to the sale of the Beach Club to be in writing. At one point during this discussion with the Court, Mr. Leventhal mentioned his clients were considering withdrawing the Petition. The judge responded to Mr. Leventhal's comment by asking Mr. Tobias whether his clients had filed an answer. When Mr. Tobias responded to the judge that his clients had filed the Answer, Justice DeStefano reminded Mr. Leventhal that he had stipulated to the dissolution of the Beach Club before the Court. Tobias Affir., ¶17.

The Court informed Mr. Leventhal that his clients' commitment to sell the Beach Club if the Tomasino Transaction did not close by September 15 should be in writing. The Court, Mr. Levental, and Mr. Tobias then discussed how the Beach Club should be sold. The judge said that each side should propose two brokers to him and he would select the broker to sell the Beach Club. Mr. Tobias understood Justice DeStefano to say that the sale of the Beach Club was part of a plan of dissolution. The judge also mentioned that the Sevy Trusts should provide a minimum price for the sale of the Beach Club, and if the Beach Club could not be sold for that amount, then an independent appraisal would be done, with the judge selecting the appraiser. The judge suggested the parties use a matrimonial settlement agreement as a model for the selection mechanism for the broker and appraiser. Tobias Affir., ¶18.

At the end of the appearance before Justice DeStefano on April 27, the Court set July 10, 2015 for a status conference on the Tomasino Transaction. Mr. Tobias requested that the Court set a date for a status conference on the stipulation concerning the sale of the Beach Club if the Tomasino Transaction did not close. The judge set May 4, 2015 for a telephone status conference on the stipulation. Tobias Affir., ¶19.

Late in the afternoon on April 27, 2015, Mr. Leventhal e-mailed Mr. Tobias and asked, "pursuant to today's conference, please let me know the amount at which your clients wish to list the club for sale in the event the sale to Mr. Tomasino is not consummated. Thank you." Mr. Tobias responded to Mr. Leventhal on April 29, 2015. Tobias Affir., ¶20.

On May 3, 2015, Mr. Tobias provided a proposed stipulation and order of settlement and dissolution to Mr. Leventhal reflecting what Mr. Tobias understood had been agreed to as a plan of dissolution before Justice DeStefano on April 27 to end this matter. On May 4, 2015, the Court was unavailable for the conference call on the status of the Stipulation and Order and

Donna Kirkland, the judge's personal secretary, set a new May 19, 2015 conference date, which was a date Mr. Leventhal and Mr. Tobias proposed. Tobias Affir., ¶21.

On May 8, 2015, Mr. Tobias telephoned and e-mailed Mr. Leventhal for his comments on the proposed Stipulation and Order, to no avail. Instead of responding to Mr. Tobias' May 3 proposed Stipulation and Order, or his May 8 telephone call and e-mail, on May 12 Mr. Leventhal moved to dismiss the petition on behalf of the Petitioners. Thus, Mr. Leventhal seeks to breach the commitments he made in open court on March 12 and March 24 concerning the dissolution of the Beach Club, notwithstanding the fact that he and his clients knew that Mildred had died and immediately sought to take advantage of her death by noticing a special meeting on March 12, 2015. Tobias Affir., ¶22.

The Petitioners Have Not Been Sincere In Pursuing The Tomasino Transaction And Wish To Purchase The Sevy Family Interests, "On The Cheap."

Lorraine's statement that "while disagreements exist among the corporate shareholders, those disagreements are not preventing shareholders from negotiating for the sale of the corporate assets" is disingenuous as it relates to the Tomasino Transaction. Indicative of the Petitioners' continued lack of good faith and Lorraine's disingenuousness is Petitioners' failure to provide comments on the proposed contracts to sell the Beach Club to Mr. Tomasino, which contracts were prepared and forwarded by Michael C. Cirroto, Esq., Mr. Tomasino's counsel, on May 14, 2015 to Mr. Leventhal and to Mr. Tobias. Moreover, Mr. Leventhal has failed to respond to Mr. Tobias' June 4, 2015 inquiry of him for Petitioners' comments on the contracts, or even whether Petitioners wish to pursue the transaction. Tobias Affir., ¶14.

Indicative of the Petitioners intention not to sell or treat the Sevy family shareholders fairly was Pauline's Trust's offer, conveyed through Mr. Tobias to Mr. Leventhal, to purchase the Petitioner Carasso family stock for $3.5 million. This offer was $66,666.67 more per 16

2/3% interest than the Carasso family offered the Sevy family for their shares, which $3.5 million offer was rejected by Petitioners. Again, the Petitioners are not sincerely interested in selling the Beach Club or their shares, notwithstanding their having professed such an interest since 2013 and an interest in the Tomasino Transaction, though they are prepared to purchase the Sevy family shares, "on the cheap." Tobias Affir., ¶25.

STATEMENT OF FACTS

See the Affidavit of Pauline J. Perahia in Opposition to Petitioners' Motion to Dismiss Dissolution Proceeding sworn June 12, 2015 and the Affirmation of David G. Tobias in Opposition to Motion to Dismiss Dissolution Proceeding affirmed June 12, 2015, both served and filed herewith.

ARGUMENT

POINT 1

PETITIONERS' COUNSEL STIPULATED ON MARCH 12, 2015 IN OPEN COURT TO DISSOLVE THE BEACH CLUB AT WHICH TIME COUNSEL AND THE PETITIONERS KNEW THE FACTS WHICH THEY NOW CLAIM ESTABLISH THAT THERE ARE NO GROUNDS FOR DISSOLUTION

Petitioners seek to dismiss this proceeding under BCL §1116 on the basis that "the grounds for judicial dissolution that existed at the time the proceeding commenced no longer exist." Opposing Memorandum, p. 3. The Petitioners claim that circumstances changed on Mildred's death "in March 2015" which event left a three member Beach Club Board of Directors consisting of Pauline, Sandra and Lorraine. Opposing Memorandum, pp. 2-4.

Petitioners disregard their counsel's, Mr. Leventhal's, stipulation on March 12, 2015 in open court to the dissolution of the Beach Club knowing of Mildred's death. Tobias Affid., ¶9. In that same court session on March 12, Mr. Leventhal also withdrew Petitioners' request for a receiver due to Mildred's death. Since David G. Tobias, Esq., the Sevy Trust's lawyer, asked

that a receiver be appointed, and that the receiver be someone other than Sandra Wein, Mr. Leventhal asked for additional time to submit supplemental papers to address the receiver issue. The Court provided Mr. Leventhal to March 17, 2015 to file supplemental papers on the receiver issue, granted Mr. Tobias until March 22, 2015 to file supplemental papers, and set March 24, 2015 as an adjourned hearing date on the Order to Show Cause and Petition in relation to the request for a receiver. Tobias Affir., ¶11.

On March 17, Mr. Leventhal filed an affirmation and memorandum of law, both titled "in opposition of appointment of receiver," which papers made no mention of withdrawing Mr. Leventhal's stipulation to dissolution. Rather, the papers discussed how Mildred's death would permit the Beach Club Board to hire Sandra as owner-manager and control the Board. See, Mr. Leventhal's Affirmation in Opposition to Appointment of a Receiver dated March 17, 2015 served and filed with the Court. In the supplemental papers filed by the Sevy Trusts on March 22, 2015, Pauline specifically referred to Mr. Leventhal's March 12 stipulation to dissolution of the Beach Club and Petitioners' seeking to take improper advantage of Mildred's death. Pauline's Affid., ¶¶4, 6 and 9.

On March 24, at the adjourned hearing dated on the Order to Show Cause and Petition concerning a receiver, a $10 million offer to purchase the Beach Club from Vincent Tomasino was presented by Mr. Tobias to Mr. Leventhal and the Court (the "Tomasino Transaction"), and this potential transaction was discussed by the parties and the Court. Tobias Affir., ¶15. At the end of the March 24 hearing, Mr. Tobias' requested that the Order to Show Cause and Petition be submitted for decision as to a receiver, which they were. Id.

The law is clear in this State and in this Department that Mr. Leventhal's stipulation to dissolution (which the judge remembered in a conference before him on April 27, 2015) made after knowing of Mildred's death, in open court, was binding on the parties and must be

enforced. Bauer v. Lygren, 113 A.D.2d 913, 914, 493 N.Y.S.2d 815, 817 (2d Dept. 1985), In re Guardianship and Custody of Kim Shantae M, 221 A.D.2d 199, 633 N.Y.S.2d 151, 153 (1st Dept. 1995) and CPLR §2104. See also, Tobias Affir., ¶17. Therefore, the Court should enter the plan of dissolution reflected in the Stipulation and Order presented to Mr. Leventhal by Mr. Tobias on May 3, 2015, which Stipulation and Order reflects the essence of the plan of dissolution agreed to with the Court on April 27, 2015. Tobias Affir., ¶¶17 and 18.

POINT 2

GROUNDS FOR DISSOLUTION UNDER BCL §1104 STILL EXIST AND REQUIRE DISSOLUTION OF THE BEACH CLUB

A. Grounds For Dissolution Exist Under BCL §1104(a)(2) And (c) Since The Beach Club's Present Directors Are Holdovers From 2012, Directors Were Not Elected At The Two Previous Consecutive Annual Meetings Of Shareholders Held On September 27, 2013 And October 29, 2014, And The Beach Club Is Not Functioning Effectively.

Although Petitioners contend that the grounds for dissolution are no longer present, they are wrong. Moving Memorandum, pp. 3-4. In the Petition, Petitioners sought dissolution under BCL §§1104(a)(2) and (c). Tobias Affir., Ex. 2, Petition, p. 1, ¶¶40-46 and 56. Section 1104 is titled, "Petition in case of deadlock among directors or shareholders."

To show deadlock among shareholders entitling the petitioner to dissolution, BCL 1104(a)(2) and (c) require a showing:

> (2) That the shareholders are so divided that the votes required for the election of directors could not be obtained, or
>
> (c) ... any holder of shares entitled to vote in an election of directors of the corporation, may present a petition for its dissolution on the ground that the shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualifications of their successors.

In the Petition, Petitioners stated that these requirements were met because:

> At the joint annual meeting of shareholders of the corporate-respondents held on September 27, 2013, the shareholders failed to elect directors to replace the four holdovers.
>
> At the next joint annual meeting of shareholders of the corporate-respondents held on October 29, 2014, the shareholders again failed to elect directors to replace the four holdovers.
>
> The shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the election and qualification and their successors.

Tobias Affir., ¶27, Ex. 2, and Petition, ¶¶42, 43 and 46.

Notwithstanding Mildred's death, the facts alleged in the Petition have not changed -- Sandra, Lorraine and Pauline are still holdover directors, and the shareholders still have failed to elect directors at the two consecutive annual meetings of the shareholders held on September 27, 2013 and October 29, 2014. The present directors of the Beach Club are holdovers from 2012, which election was governed by voting trust agreements, and the decades-old agreement among the Carasso Family and Sevy Family shareholders for a Board equally divided among the Carasso Family and the Sevy Family shareholders. Pauline's Affid., ¶¶18-20.

Petitioners cite Matter of Fazio Realty Corp., 10 A.D.3d 363, 718 N.Y.S.2d 118 (2d Dept. 2004) for the proposition that the continued deadlock among the shareholders of the Beach Club does not justify dissolution. Opposing Memorandum, p. 4. In the Matter of Fazio, the Court made it clear that it was not addressing a situation where annual shareholders' meetings for the election of directors were ever actually called, or a situation where a third director to break the deadlock of an evenly-constituted board between two factions was ever proposed. Id. 781 N.Y.S.2d at 119.

In this respect, Fazio is wholly distinguishable from the case at bar. As the Petitioners pleaded in the Petition, directors were last elected for the Beach Club in 2012, when voting trusts

agreements were still in effect. Pauline Affid., ¶¶18-20, and Tobias Affir., ¶¶26-28. However, at the annual shareholders meetings held on September 27, 2013 and October 29, 2014, no directors were elected, and thus the directors have been holdovers since 2012. This is precisely the situation BCL §1104(a)(2) and (c) was contemplated to address.

In Neville v. Martin, 29 A.D.3d 444, 445, 815 N.Y.S.2d 91, 92 (1st Dept. 2006), dissolution under §1104(a)(2) was found to be proper where there was a record of dissension between the shareholders, and there was no dispute as to there being a deadlock among the shareholders. At bar, it is clear that dissension between the Carrasso and Sevy Family shareholders has existed at least since December, 2012 and has only intensified over time. Pauline's Affid., ¶¶3, 9-10, 13-15 and 23-27. In his letter dated September 16, 2013 on behalf of the Shareholder-Petitioner Carasso family to Mildred (as trustee of Mildred's Trust), Sol Sevy (Mildred's and Pauline's brother), and to Pauline (as trustee of Pauline's Trust), Shareholder-Petitioner Sol Israel confirmed this dissension. Pauline Affid., ¶4. In his letter, Sol Israel said:

> "It is now abundantly clear to the Carasso shareholders, for a variety of reasons that have been manifested over the past several years and most pronouncedly over this past year, that we neither can continue, or desire to continue, to be your business partners."

Pauline Affid., ¶4.

In Neville, shareholder dissension had no appreciable impact on the company's profitability and the court found that this continued profitability was not an appropriate ground to deny the petition. However, the court found that the evidence of shareholder dissension left no doubt that the corporation could not function effectively.

Like Neville, here there is no question of shareholder dissension and there is significant evidence that the Beach Club is not functioning effectively, even despite the fact that Sandra is now dominating and controlling the Beach Club to an even greater extent than she did when

Mildred was alive. Pauline's Affid., ¶¶5, 9-11, 14-15 and 21-22. The facts before this Court demonstrate that dissension and deadlock actually exist and it will be inequitable not to permit dissolution according to the plan of dissolution the parties agreed to on April 27, 2015 before the Court. Tobias Affir., ¶¶12, 24, 27, 28, 30 and 31.

B. **The Board Of The Beach Club Is Not Presently Legally Constituted And It Is Making Illegal Decisions To Break The Deadlock Which Deadlock Requires Dissolution Pursuant to BCL §1104(a)(1).**

Petitioners sought dissolution under BCL §1104(a)(1) on the grounds that "the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained." Tobias Affir., Ex. 2, Petition, p. 1, ¶¶24-39 and 56. According to the Petitioners, "at the time the dissolution proceeding was initiated in December, 2014, the Catalina Operating Corp. had a deadlocked board of directors which had failed to appoint a manager to repair the Catalina Beach Club for the summer 2015 season. Now, however, the board of directors is no longer deadlocked and Sandra Wein has been reappointed as manager for the 2015 seasons." Moving Memorandum, p. 2. The only reason there are presently three members of the Beach Club's board of directors is that Mildred died on March 2, 2015. Pauline's Affid., ¶¶3, 8, 20-21.

Petitioners argue that "the corporate by-laws of Catalina Operating Corp. provide for a three member board of directors" and that "despite that, prior to March 20, 2015, the board of directors of the Catalina Operating Corp. functioned informally with four de facto members: Sandra Wein, Lorraine Levy, Pauline Perahia and Mildred Quain." In essence, Petitioners are contending that now that Mildred is dead, Sandra and Lorraine can do as they please. Moving Memorandum, p. 2.

Petitioners disregard the fact that since its founding in the 1940's, the Beach Club had a board of directors with an equal number of members of the Petitioners' Carasso Family and the Sevy Trust's Sevy Family. Pauline's Affid., ¶18. Moreover, from 1995 through 2012 Petitioners' Carasso Family and the Sevy Family shareholders memorialized their agreement to a shared Board of Directors in voting trust agreements. Pauline's Affid., ¶18.

Petitioners ignore the voting trust agreements signed by all shareholders of Catalina and Sea Isle which were in place from 1995 to 2012, which reflect the agreement to a shared Board of equal number of members drawn from the Carasso Family and the Sevy Family shareholders. As the Court can see, the 2002 Voting Trust Agreements specifically provided for a Joint Board of Directors of four as follows:

> Board of Directors.
>
> The Trustees agree to elect and to maintain a Board of Directors for Sea Isle and for Catalina consisting of four (4) individuals, two (2) of whom shall be designated by the owners of a majority of the beneficial interests with respect to the shares of which they are Trustees and two (2) of whom are designated by a majority of the owners of the beneficial interests of the corresponding trust with respect to the remaining shares of Sea Isle and Catalina.

Pauline's Affid., ¶18.

Consistent with the law provided to the Court in Point 2 of the Supplemental Memorandum of Law filed in this case on March 22, 2015 (the "Supplemental Memorandum"), at the "duly convened meeting of the Board Directors held on March 23, 2015," the Board should not have adopted a resolution by a vote of Sandra and Lorraine against Pauline to reappoint Sandra as sole owner manager for the 2015 season, at the illegal compensation she had unilaterally taken in 2013 and 2014 for a part-time, seasonal job, and resigned over on December 15, 2014, but, instead, the Board should have replaced Mildred on the Board with a Sevy Family director. Pauline's Affid., ¶10 and 21 and its Exhibit 7, the Supplemental Memorandum.

In a continued showing of illegal and oppressive action, on May 1, 2015 at another special meeting of the improperly-constituted Board noticed by Sandra, Sandra and Lorraine voted, in bad faith, two-to-one against Pauline, to ratify Sandra's self-dealing from 2012 through 2014. Pauline's Affid., ¶11. Had the Board been properly constituted, in accordance with the law set forth in Point 2 of the Supplemental Memorandum, on March 23 and May 1, 2015: (i) neither of the March 23 or May 1 resolutions would have passed, (ii) Sandra would not have been reinstated as sole owner-manager, and (iii) the Board deadlock complained of by Petitioners in the Petition would still exist. Thus, dissolution should be granted pursuant to the plan of dissolution agreed to before the Court on April 27, 2015.

C. **The Internal Dissension Between The Carasso Family And Sevy Family Shareholders Is So Divisive And Corrosive That The Dissolution Under The Plan Of Dissolution Agreed To On April 27, 2015 Will Be Beneficial For All The Shareholders And Is Mandated By BCL §1104(a)(3).**

Petitioners also invoke BCL §1104(a)(3) as grounds for dissolution in the Petition, which BCL section provides for dissolution if "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders." Tobias Affir., ¶26, Ex. 2, Petition, p. 1, ¶¶55 and 56. Paragraph 55 of the Petition tracks 1104(a)(3) word-for-word.

In re Pivot Punch & Die Corp., 15 Misc.2d 713, 182 N.Y.S.2d 459 (Erie Co. 1959), a 50% shareholder's employment by the closely held corporation in question was terminated, and as a result he subsequently had no voice in the management of the business, and received no income from it. Thus, he sought dissolution under the predecessor statute to BCL §1104. In addressing the shareholders' dissolution request, then Justice Matthew Jansen, before his elevation to the Court of Appeals, analyzed the statutory requirement that dissolution be beneficial to the shareholders. In determining what is beneficial, the Court noted the inability to

elect directors and discussed a closely held corporation being "one that has been organized by an individual or a group of individuals seeking the recognized advantages of corporations ... but regarding themselves basically as partners." Id. 15 Misc.2d at 715 and Id. 182 N.Y.S.2d at 46.

Judge Jansen observed that the corporation before him was "simply a partnership consisting of the [the petitioner and respondent], clothed with the benefits peculiar to a corporation, limited liability, perpetuity and the like." Id. at 15 Misc.2d at 715-716, and 182 N.Y.S.2d at 462-465. The judge touched on the tax pass through benefits of closely held corporations which mirrors the treatment of partnerships and explained his analysis in deciding whether dissolution would be "beneficial to shareholders," as follows:

> In addition to the technical rules surrounding a partnership and perhaps from a purely moral point of view, more important, there exists between partners the highest degree of fidelity, loyalty, trust, faith and confidence. When these characteristics in a partnership cease, then the true partnership ceases, and when these characteristics cease between owners of equal, or verily, substantially equal, shares in a close corporation, the close corporation ceases to be beneficial to the deadlocked stockholders.

The express addition of internal dissension as a separate ground for dissolution in BCL §1104(a)(3), together with the de-emphasis on corporate profitability and the omission of the public-injury inquiry as dissolution criteria reflected in BCL §1111, demonstrate a legislative intent to expand the circumstances under which dissolution should be granted. In finding dissolution appropriate under BCL §1104(a)(3), a number of courts after Pivot Punch, Id., have held that the same loyalty and good faith expected of partners in a partnership is expected of shareholders in a close corporation

In re T.J. Ronan Paint Corp., 98 A.D.2d 413, 421-422, 469 N.Y.S.2d 931, 936 (1st Dept. 1984), the court found that when loyalty and good faith between factions of shareholders is destroyed, "dissension becomes the order of the day," and dissolution should be permitted in the interest of the shareholders.

In permitting dissolution under BCL §1104(a)(3), Justice Leonard B. Austin, then of this Court prior to his elevation to the Appellate Division, found, in Patti v. Fusco, 10 Misc.3d 1068(a), 809 N.Y.S.2d 482 (Supp. Ct. Nassau Co. 2005), that the relationship between the shareholders in a close corporation is "akin to that of partners." Justice Austin concluded that "when the relationship [between shareholders of a close corporation] begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation." According to Justice Austin, dissolution is not to be denied merely because the dissension has not yet had an appreciable impact on the corporation's profitability. See also, in this regard, Matter of Gordon & Weiss, 32 A.D.2d 279, 281-301 N.Y.S.2d 839, 842 (1st Dept. 1969).

Loyalty and good faith do not exist between the Petitioners Carasso Family shareholders and the Sevy Family shareholders as shown by the actions of Sandra and Lorraine from at least December, 2012 through today. Pauline's Affid., ¶¶5, 8-11, 14-15 and 23-25. Like the petitioner in In re Dissolution of Eklund Farm Machinery, Inc., 40 A.D.3d 1325, 1326-1327, 836 N.Y.S.2d 732, 733 (3d Dept. 2007), who obtained dissolution under BCL 1104(a)(3), the Sevy Family shareholders have been excluded from the day-to-day management of the Beach Club; the Beach Club is under the sole control of the Carasso Family shareholders through holdover directors Sandra and Lorraine; Sandra tried to keep financial records from Pauline and Mildred, when Mildred was alive; the Sevy Family shareholders have not been receiving any benefit from their ownership interest in the Beach Club while being forced to pay tax on income attributable to their shares; and, on March 23, and May 1, 2015, Sandra and Lorraine have illegally and oppressively sought in bad faith to reverse actions voted against by Mildred and Pauline, who represented the Sevy Family shareholders' interest on the Board of Directors. Pauline's Affid., Id.

On April 27, 2015, before the Court, the Petitioners and the Sevy Trusts' counsel discussed and agreed to a plan of dissolution that contemplated the sale of the Beach Club by a broker chosen by the Court if the Tomasino Transaction did not close on or before September 15, 2015, and if the Beach Club could not be sold at a price specified by the Sevy Trusts by the broker, then the Court would chose an appraiser and the Beach Club would be sold. Tobias Affir., ¶¶17-18. This plan of dissolution will benefit all the shareholders, and the breach of duty and loyalty that Sandra and Lorraine have been visiting on the Sevy Family shareholders since at least December 2012, by not permitting a Sevy shareholders' representative to co-manage the Beach Club, or to even participate in the Beach Club's day-to-day management, or their receiving any benefit of ownership, will be ameliorated. As the court said in Eklund Farm, "While respondents may receive a myriad of benefits from their control of the business, they do not dispute that petitioners receive none. If judicial dissolution will benefit petitioners, it will benefit the other one-half of the shareholders to the same degree." Id. 40 A.D.3d at 1327 and 836 N.Y.S.2d at 733.

Application of Surchin, 55 Misc.2d 888, 286 N.Y.S.2d 580 (Sup. Ct. N.Y. Co. 1960) is also instructive in deciding whether dissolution is "beneficial to the shareholders" under 1104(a)(3). In granting dissolution, in part under BCL 1104(a)(2) and in part under 1104(a)(3), the court said that "I would be blinding myself to the established, and indeed undisputed, facts of this case – that the petitioner Surchin and the respondent Shubin have not agreed and have not been able to agree and would not agree under existing conditions with respect to the election of a director or directors – were I to find otherwise." At bar, there is no dispute that directors have not been and will not be elected by the two factions of shareholders before this Court. Pauline's Affid., ¶¶4, 8, 19-20.

In Surchin, 55 Misc.2d at 891-892, 286 N.Y.S.2d at 583-584, the court found that "as a fact there is serious internal dissension between the two shareholders, that there are two factions of shareholders, and that dissolution will be beneficial to them, individually and together. And here I consider the statutory word beneficial to be applicable in respect of the mental and physical well-being of a shareholder as well as financial gain to him." Thus, due to the lack of confidence and trust Surchin and Shubin had in one another, the court ordered dissolution. Likewise, this Court should order dissolution due to the lack of confidence and trust the Sevy Family shareholders have in the Carasso Family shareholders. Pauline's Affid., ¶¶9, 18 and 23-25.

Pauline's Trust understands this litigation was to end with the agreement before the Court of April 27, 2015. Pauline's Affid., ¶¶26 and 27, and Tobias Affir., ¶¶17 and 18. It is clear that Sandra and Lorraine, as representatives of the Carasso family shareholders, are substantially defeating the reasonable expectations of the Sevy Trusts, and in fact are oppressing them, and that dissolution will be beneficial to all the shareholders. Pauline's Affid., ¶¶23-27.

Mr. Leventhal's citation to Alfred M. Pruskowski's statement about the affect of dissolution on shareholders is misleading in the context of the Beach Club being sold by a broker as an operating business under the April 27, 2015 plan of dissolution. This is not the "fire sale" to which Mr. Pruskowski was speaking for which sale Petitioners seemingly brought their Petition, and under the April 27 plan, the Beach Club's shareholders will get at least the appraised value of a going concern for their stock. See, Mr. Leventhl's Affirmation dated May 12, 2015, ¶¶4-6, filed in support of Petitioners' motion to dismiss.

Moreover, Sandra has been self-dealing, and Sandra and Lorraine have been breaching their fiduciary duties and violating the corporate by-laws, and operating the Beach Club for the sole benefit of Sandra and the Carasso Family shareholders, and have tried to force the Sevy

Trusts to sell their Beach Club interests to the Petitioners Carasso Family shareholders' at a substantial discount from their fair or market value. Indicative of the Petitioners intention not to sell or treat the Sevy family shareholders fairly was Pauline's Trust's offer, conveyed through Mr. Tobias to Mr. Leventhal, to purchase the Petitioner Carasso family stock for $3.5 million. This offer was $66,666.67 more per 16 2/3% interest than the Carasso family offered the Sevy family for their shares, which $3.5 million offer was rejected by Petitioners. Again, the Petitioners are not sincerely interested in selling the Beach Club or their shares, notwithstanding their having professed such an interest since 2013 and an interest in the Tomasino Transaction, though they are prepared to purchase the Sevy family shares "on the cheap." Tobias Affir., ¶25.

Had the Petitioners not stipulated to dissolution on March 12, 2015, the Sevy Trusts could have sought to counterclaim for dissolution under BCL §1104-a and/or the common law. On the record before the Court on March 12, the Sevy Trusts would have been entitled to dissolution under BCL §1104-a and the common law. Cortes v. 3A North Park Ave Rest. Corp., 46 Misc.3d 670, 698-699, 998 N.Y.S.2d 797, 819 (Sup. Ct. Kings Co. 2014), (discusses the grounds for common law dissolution and for dissolution under BCL 1104-a), Ferolito v. Vultaggio, 99 A.D.3d 19, 28, 949 N.Y.S.2d 356, 363-364 (1st Dept. 2012) (describes the basis for common law dissolution), and Liebert v. Clapp, 13 N.Y.S.2d 313, 315-316, 247 N.Y.S.2d 102 (1963) (explaining the basis for common law dissolution).

POINT 3

THE BEACH CLUB NEEDS A MANAGER OTHER THAN SANDRA WHILE IT IS BEING SOLD SINCE SHE IS DISQUALIFIED AS AN OFFICER AND DIRECTOR AS A MATTER OF LAW AND CANNOT DISCHARGE HER SUPERVISORY RESPONSIBILITIES

In prior affidavits, Pauline explained to the Court how the Club was operated from 1969 to 2012 and also told the Court that she repeatedly asked Sandra to permit a Sevy Family member to share oversight of, or to participate in, the Beach Club's operations with Sandra, as co-owner manager, and that Sandra rebuffed her requests. Pauline's Affid., Ex. 3, ¶¶19-20. As late as May 14, 2014, Pauline again made this request in writing, delineating the roles of the Sevy Family representative and Sandra. Pauline's e-mail was ignored. Pauline's Affid., ¶16.

Sandra's husband suffered a serious stroke on or before about April 26, 2015. As a result, Sandra has been unable to attend to the daily operations of the Beach Club, nor has Jack Munger, the day-to-day manager of the Beach Club during the season, has yet to return to the Beach Club. Pauline's Affid., ¶12. As of on or about May 1, 2015, Sandra hired a 23 year old, inexperienced assistant to assist her in the day-to-day management of the Beach Club, and, in the process violated Catalina's by-laws and a decade of precedent by not seeking board approval of this hiring. Pauline's Affid., ¶13-14.

Pauline understands that the Beach Club is rudderless, and matters are not being attended to. The cabana, locker and chair boys, life guards, camp counselors, and receptionists do not know from whom to take direction. Id. Due to her inability to be on-site, Sandra has required Mike Riginio, the Beach Club's head of facilities, to work on weekends, which he has never done because he cares for his sick wife on weekends. The chaos caused by Sandra's absence is creating unnecessary strain on Mr. Rigino, who is a key person to the operation of the Beach Club. Pauline's Affid., ¶14.

Joann Perahia Should Be Appointed To Manage The Beach Club While It Is Being Sold.

In or around May 14, 2014, Pauline proposed to Sandra and Lorraine that her son, Alan Perahia, act as the Sevy representative in operating the Club. This proposal was rejected. Pauline now proposes that her daughter, Joann, be appointed receiver and/or manager while the Beach Club is being sold. Joann's qualifications to be receiver and/or manager are reflected in Pauline's Affidavit. Pauline's Affid., ¶16.

Pauline has outlined Sandra's self-dealing, attempts to prevent the Sevy Family shareholders from receiving financial and other operating information, and exclusion of the Sevy Family from participation in the operation of the Beach Club. Supplemental Affid., ¶24 and Pauline's Affid., ¶9. Pauline has sworn that Sandra, then Vice-President of Catalina, arranged her own increases in compensation, without the authority of the Board of Directors, which increases constituted an unauthorized diversion of corporate funds which should be returned to the corporation by her. Drivas v. Lekas, 292 N.Y. 200, 209 (1944) (where the Court of Appeals said that an officer, like Sandra, could be removed for cause for this kind of self-dealing even if there is an agreement mandating her tenure). In accord, Walker & Zanger v. Zanger, 245 A.D.2d 144, 666 N.Y.S.2d 152 (1st Dept. 1997); citing, Fells v. Katz, 256 N.Y. 67, 72 (1931), in support.

Based on this self-dealing and her disregard of the by-laws, and now her inability to supervise the Beach Club due to her husband's illness and Mr. Munger's incapacity, Sandra should not be permitted to manage the Beach Club or act as a manager, officer or director under a plan of dissolution. Joann is qualified to manage the Beach Club, and she should be appointed to do so while the Club is dissolved. If Sandra is permitted to continue to manage the Beach Club in any capacity, it should be done jointly with Joann, or under the supervision of the Court or a third-party.

CONCLUSION

For the foregoing reasons, the Petitioners' motion to dismiss should be denied in all respects, a plan of dissolution should be entered for the sale of the Beach Club as agreed on April 27, 2015, and Sandra Wein should not be permitted to manage the Beach Club in any capacity, or, in the alternative, only to do so in concert with Joann Perahia, or the Court or a third-party should supervise Sandra while the Beach Club is being sold.

Dated: New York, New York
June 12, 2015

TOBIAS LAW FIRM, P.C.

By: _____
David G. Tobias
Attorneys for Shareholder-Respondent Pauline J. Perahia Revocable Trust
600 Third Avenue, 15th Floor
New York, New York 10016
(212) 661-5460

Of Counsel:

David G. Tobias, Esq.