SUPREME COURT OF THE 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 REVOCABLE TRUST,

Index No. 606702/2014

Hon. Vito M. DeStefano

Shareholder-Petitioners,

-against-

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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SHAREHOLDER-PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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STATEMENT OF FACTS

The corporate by-laws of Catalina Operating Corp. provide for a three member board of directors. Prior to March, 2015, the board functioned informally with four de facto members: Sandra Wein, Lorraine Levy, Pauline Perahia and Mildred Quain. However, in March, 2015, Mildred Quain passed away, leaving a three member board of directors of Catalina Operating Corp., as contemplated by its by-laws. The board has since met on several occasions, appointed Sandra Wein as manager for the 2015 season, and conducted other club business.

After this motion to dismiss was filed, there was a change in ownership of the stock of the Corporations that eliminated any possibility of a deadlock between the Shareholder-Petitioners and the Shareholder-Respondents. On July 6, 2015, various Shareholder-Petitioners and Stephen Carasso (the father of David Carasso and Beth Carasso Spector) purchased the shares in each corporation that were previously held by the Mildred Quain Trust. The interests of Stephen Carasso are aligned with those of the Shareholder-Petitioners. As a result of the transfer of the Quain shares of the Carasso Shareholders, the new alignment of interests in each corporation between the Petitioners and Stephen Carasso, on the one hand, and the Respondent Shareholders on the other hand, is as follows:

Shareholders	**Shares**	**Percentage**
Petitioners and Stephen Carasso	33 1/3	66 2/3%
Respondent Pauline Perahia Trust	8 1/3	16 2/3%
Respondent Solomon Sevy[1]	8 1/3	16 2/3%

The shares held at the time of commencement, the shares purchased and the current share holdings of the respective shareholders in each corporation are as follows:

[1] Respondent Solomon Sevy has not appeared in this proceeding.

Carasso Shareholders	**Previously Held**	**Purchased**	**Currently Held**
Beth Carasso	5/6	0	5/6
David Carasso	5/6	0	5/6
Stephen Carasso	0	5/6	5/6
Helaine Fraser	1 2/3	5/6	2 ½
Howard Goldberg	1 2/3	5/6	2 ½
Robert Goldberg	1 2/3	5/6	2 ½
Arthur Israel	1 2/3	5/6	2 ½
Richard Israel	1 2/3	5/6	2 ½
Sol Israel	1 2/3	5/6	2 ½
Lorraine Levy	5	0	5
Sandra C. Wein Rev. Trust	5	2 ½	7 ½
Respondent Shareholders	**Previously Held**	**Purchased**	**Currently Held**
Pauline Perahia Trust	8 1/3	0	8 1/3
Sol Sevy	8 1/3	0	8 1/3

SUMMARY OF ARGUMENT

When this motion was originally made, there already was no longer a deadlock on the three member board of Catalina Operating Corp. ("Catalina"). That board, by a vote of two to one, adopted a resolution reappointing Sandra Wein as Manager for the 2015 season, and the Catalina Beach Club's season is proceeding successfully.

Now, as a result of the recent transfer of the Quain shares, there is no longer any possibility of a deadlock between the Shareholder-Petitioners and Shareholder-Respondents with

respect to Catalina or Sea Isle Realty Corporation ("Sea Isle"), and there is no basis to continue this dissolution proceeding against either corporation.

Since the grounds for corporate dissolution no longer exist as to either corporation, this action for dissolution must be dismissed under BCL §1116.

POINT I

THE COURT MUST DISMISS THIS PROCEEDING UNDER BCL §1116 BECAUSE THE CAUSE FOR DISSOLUTION NO LONGER EXISTS

This proceeding for judicial dissolution was brought under the corporate deadlock provisions of BCL §1104(a) and (c). There can no longer be any doubt that the original cause for dissolution, corporate deadlock, no longer exists. The directors are not so divided that the votes required for action by the board cannot be obtained, the shareholders are not so divided that the votes required for the election of directors cannot be obtained, and dissolution would not be beneficial to the shareholders. Therefore, the proceeding should be dismissed under BCL §1116, which provides that "the court shall dismiss the action" when the cause for dissolution no longer exists.

The corporate deadlock cases cited by respondents, such as Matter of Neville v. Martin, 29 A.D.3d 444 (1st Dept. 2006), are now completely irrelevant. Even though a 50-50 deadlock blocking the election of directors would not by itself constitute grounds for dissolution under Fazio Realty Corp. v. Neiss, 10 A.D.3d 363, 364 (2d Dept. 2004), there is no longer even the possibility of a deadlock between the Shareholder-Petitioners and Shareholder-Respondents. The original cause for dissolution no longer exists, and the proceeding must be dismissed.

POINT II

NO PARTY HAS ASSERTED A CLAIM FOR DISSOLUTION UNDER SPECIAL CIRCUMSTANCES PURSUANT TO BCL §1104-a

Respondents have made various allusions to BCL §1104-a, but they have never asserted a claim for dissolution under that section, which involves "illegal, fraudulent or oppressive actions" or the looting, wasting or diversion of assets. The fact that the minority shareholders are unhappy about who is running a corporation is not a ground for corporate dissolution, nor does it constitute oppression under BCL §1104-a:

> [O]ppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.

Brickman v. Brickman Estate at the Point, Inc., 253 A.D.2d 812, 813 (2d Dept.), *app. denied*, 92 N.Y.2d 488 (1998), *quoting*, Matter of Kemp & Beatley [Gardstein], 64 N.Y. 2d 63, 73 (1984).

> Neither "irreconcilable differences and animosity" nor "dissatisfaction with the management of the corporation" can be the basis for dissolution under Business Corporation Law § 1104-a.

Pappas v. Fotinos, 28 Misc. 3d 1212(A), 911 N.Y.S.2d 694 (Sup. Ct. Kings Co.), *aff'd*, 76 A.D.3d 679 (2d Dept. 2010) (citations omitted), *quoting,* Matter of Brach [88-15 Executive Arms Realty Corp.], 135 A.D.2d 711, 712, (2d Dept. 1987), *app. denied*, 73 N.Y.2d 701 (1988).

Neither side in this case has brought a claim under BCL §1104-a. The petition was brought solely under BCL §1104(a) and (c). In the absence of any claim under BCL §1104-a by either side, respondents' references to that provision should be ignored.

Moreover, the allegedly oppressive acts alluded to by respondents would not justify dissolution under BCL §1104-a. On May 1, 2015, the Board of Directors of Catalina ratified all past compensation paid to Sandra Wein for her services as manager. Further, the respondents have not been excluded from participation in corporate management. Mildred Quain was

corporate president at the time of her death, and Pauline Perahia is a director and now Secretary of both corporations, and is a signatory on all checks other than payroll checks.

POINT III

THERE WAS NO STIPULATED "PLAN OF DISSOLUTION"

Respondent Pauline Perahia's claim that petitioner's counsel stipulated to a "plan of dissolution" is a mischaracterization of what actually occurred. In fluid settlement discussions, the Court and counsel explored how the parties might proceed in the likely event that a sale to Mr. Tommasino failed to materialize. The parties discussed the possibility of listing the Club with a broker after the summer season in the event the sale to Mr. Tommasino failed to materialize. Petitioners' counsel stated that the petitioners were agreed "in principle", but no firm or definite agreement was made, no price or terms were fixed, no plan of dissolution was developed or adopted, no client assent was actually or impliedly given, and no stipulation or Court order was made. In the course of these discussions, the Court suggested a matrimonial style mechanism for adjustment of the listing price to help facilitate a sale. Respondents' counsel requested a written stipulation that the Club would be listed for sale. Petitioners' counsel refused this request, stating unequivocally that petitioners preferred to wait until after the summer season, and to then evaluate the options before making a definite agreement.

POINT IV

THE CATALINA BOARD OF DIRECTORS IS PROPERLY CONSTITUTED WITH THREE MEMBERS

The prior informal practice of having four shareholders serve as directors of Catalina did not and cannot change the size of the board of directors as provided in the by-laws. Under BCL §702, the number of directors is "fixed by the by-laws". The size of a corporate board cannot be

established or changed by "custom, usage [or] acquiescence". In re Rye Psychiatric Hosp. Ctr., 66 N.Y.2d 333 (1985). The requirement of a corporate by-law to change the number of directors is strictly construed. Even a corporate resolution will not suffice, unless the resolution itself is authorized by a by-law. Model, Roland & Co. v. Industrial Acoustics Co., 16 N.Y.2d 703 (1965).

CONCLUSION

The Court should dismiss this proceeding pursuant to BCL §1116.

Dated: Roslyn, New York
July 17, 2015

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& BLINKOFF, LLP
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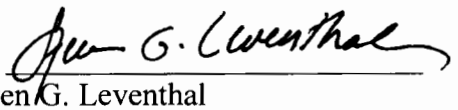
By: 
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