SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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NATALE F. CARDINO, Individually and as shareholder of Mana Construction Group, LTD, on Behalf of Himself, and in the Right of MANA CONSTRUCTION GROUP, LTD,

Plaintiff,

- against -

MARK K. FELDMAN and MANA CONSTRUCTION GROUP, LTD (Nominal Defendant), MP3 CONSTRUCTION INC.,

Defendants.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 602747-16
Motion Seq. Nos: 2 and 3
Submission Date: 7/1/16

(Formerly Suffolk County Supreme Court Index Number 612905-15)

The following papers have been read on these motions:

Notice of Motion, Affirmation in Support and Exhibits.....x
Notice of Motion, Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibit.....x
Plaintiffs' Memorandum of Law.....x
Reply Affirmation and Exhibits.....x

This matter is before the Court for decision on 1) the motion filed by Defendants Mark K. Feldman ("Feldman"), Mana Construction Group, Ltd ("Mana") and MP3 Construction Inc. ("MP3") ("Defendants") on May 23, 2016, and 2) the motion filed by Defendants on May 27, 2016, both of which were submitted on July 1, 2016.[1] For the reasons set forth below, the Court

[1] This action was initially filed in the Supreme Court of Suffolk County, New York. The matter was subsequently transferred to the Supreme Court of Nassau County, New York and assigned to the Court.

grants the motions to the extent that the Court 1) converts the Complaint into a Petition under Business Corporation Law § 1104-a; 2) stays the dissolution proceeding brought by Plaintiff and directs that a hearing will be scheduled for the purpose of determining the fair value of Plaintiff's shares in Mana; and 3) dismisses the Complaint as asserted against MP3. The Court reminds counsel for the parties of their required appearance before the Court on August 29, 2016 at 11:00 a.m., at which time the Court will schedule the hearing as directed herein.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) granting Defendants leave to renew their prior motion to dismiss, originally filed in the Suffolk County Supreme Court and, upon renewal, 2) dismissing the Second, Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh causes of action in the Complaint pursuant to CPLR § 3211; 3) dismissing the Complaint as against Defendant MP3 pursuant to CPLR § 3211(a)(7); and 4) converting the Tenth cause of action and all remaining claims including the First, Third and Fifth causes of action into a Petition under Business Corporation Law ("BCL") §§ 1104-a and 1105.

Defendants also move for an Order, pursuant to BCL § 1118(b), staying the dissolution proceeding brought by Plaintiff under BCL § 1104-a and scheduling a hearing for the purpose of determining the fair value of Plaintiff's shares in Mana.

Plaintiff Natale Cardino ("Cardino" or "Plaintiff"), Individually and as shareholder of Mana Construction Group, Ltd, on Behalf of Himself and in the Right of Said Corporation opposes the motions.

B. The Parties' History

The parties' history is outlined in detail in a prior decision ("Prior Decision") of the Court dated May 31, 2016 and the Court incorporates the Prior Decision by reference as if set forth in full herein. In the Prior Decision, the Court denied Plaintiff's prior motion for injunctive relief and the appointment of a receiver, with the exception that the Court directed that the portion of the temporary restraining order previously issued by Suffolk County Supreme Court Justice Garguilo, which directed Defendants to provide Plaintiff with copies of all financial reports of money given to M&T Bank from October 2015 to date within 1 business day after being

provided to M&T, shall remain in effect, pending further court order, on the condition that Plaintiff post a bond in the sum of $5,000 on or before June 24, 2016. As noted in the Prior Decision, the Complaint (Ex. A to Berdnik 5/24/16 Aff. in Supp.) alleges as follows:

Plaintiff, a shareholder of Mana, alleges that he has not made a demand on the shareholders of Mana to bring this action against Defendant because such a demand would be futile in light of the fact that Feldman owns 50% of the voting shares of stock and interest in the Corporation, and it is alleged that Feldman "engaged in a systematic pattern of wrongdoing and fraudulent conduct" (Comp. at ¶ 3) that resulted in harm to Plaintiffs and to Mana. Plaintiff alleges that there is no reasonable belief that Feldman would take action against Mana under these circumstances.

Mana, a New York corporation located in Jericho, New York, operates a construction company. MP3, a New York corporation located in Sands Point, New York, is a new corporation and construction company owned in whole or in part by Feldman and/or Feldman's family, friends or agents. Cardino and Feldman are each 50% shareholders of Mana. Mana has been in operation since 2009 and Feldman was, at all times, its Chief Executive Officer. Since 2009, Mana has had revenues in excess of millions of dollars annually. In 2014, Feldman began to advise Cardino that Mana was no longer making a profit.

On or about April 1, 2012, Cardino was advised that Mana needed to borrow money from Feldman. Plaintiffs allege that Cardino was "required, without representation" (Comp. at ¶ 28), by Feldman, an attorney, to sign an agreement which purported to lend Mana $3,225,000.00 at an interest rate in excess of 9%. Plaintiffs allege that Cardino was never provided with documentation reflecting that Mana received, or needed, these funds. Cardino relied on Feldman's representations regarding Mana's financial matters. In 2014, Feldman began to pressure Cardino to give Feldman shares of Stock, asserting that Mana was no longer profitable. Feldman also allegedly stopped issuing payroll checks to Cardino and demanded that Cardino sign over his interest in the Corporation. When Cardino refused, Feldman took steps to force Cardino from the workplace and "cripple him financially" (Comp. at ¶ 29).

Shortly thereafter, Feldman allegedly began to unilaterally remove from the Corporation assets and employees that Feldman determined should be sold or terminated. Feldman terminated the manager of Mana and sent an email to Cardino which advised Cardino *inter alia* that "If a vehicle or piece of equipment is not helping to bring revenue into the company, it must be sold as soon as possible" (Comp. at ¶ 30). Feldman subsequently terminated the health insurance of Cardino and his family, closed Mana's checking account and canceled Cardino's Corporation email account. Feldman also stopped paying the lease on Cardino's work vehicle and had it repossessed by the leasing company. Plaintiffs also allege, on information and belief, that Feldman is fraudulently conveying assets of Mana, including but not limited to monies and contracts, to Feldman, his family, friends and MP3.

The Complaint contains eleven (11) causes of action: 1) breach of fiduciary duty, 2) fraud, 3) misappropriation/diversion/conversion and misuse of Corporation funds, 4) fraudulent misrepresentation, 5) a request for an accounting, 6) a request for a preliminary injunction, 7) a request for a declaratory judgment that Cardino's agreement with Feldman is not enforceable, 8) fraud in the inducement, 9) a request for the appointment of a receiver, 10) a request for dissolution of the Corporation pursuant to BCL § 1104 et seq., and 11) an action, asserted both derivatively on behalf of Mana and individually, alleging that Defendants fraudulently conveyed assets of Mana. Plaintiff seeks judgment 1) on the First through Fourth, Eighth Causes of Action "in an amount that can only be determined by a full and complete accounting" which is estimated to exceed $4 million, 2) on the Fifth Cause of Action, for an accounting, 3) on the Sixth Cause of Action granting an injunction "in protection of the Plaintiff and Corporations [sic] rights," 4) on the Seventh Cause of Action, for a declaratory judgment that the alleged agreement between Feldman and Mana and Plaintiff is void *ab initio*, 5) on the Ninth Cause of Action for the appointment of a receiver, 6) on the Tenth Cause of Action, dissolving the corporation, and 7) on the Eleventh Cause of Action, in an amount to be determined at trial, which is estimated to exceed $4 million.

In the Prior Decision, the Court denied Plaintiff's prior motion based on its conclusion that, in consideration of the factual disputes regarding issues including the enforceability of the parties' 2012 agreement, Cardino's knowledge of Mana's financial status, Mana's true financial

situation, and the appropriateness of Feldman's conduct, 1) Plaintiff did not establish a likelihood of success on the merits; 2) Plaintiff did not demonstrate that it would suffer irreparable injury without the requested injunctive relief; and 3) Plaintiff did not demonstrate that a balancing of the equities favored Plaintiff. The Court also concluded that Plaintiff did not meet the high burden to warrant the appointment of a receiver. The Court did conclude that it was appropriate that Defendants continue to provide financial documentation to Plaintiff on the condition that Plaintiff post a bond.

In support of Defendants' motion to renew, counsel for Defendants ("Defendants' Counsel") provides a copy of 1) Defendants' prior motion ("Prior Motion"), filed in the Supreme Court of Suffolk County, together with the accompanying exhibits and Memorandum of Law (Ex. B to Berdnik 5/23/16 Aff. in Supp.), 2) Plaintiff's opposition to the Prior Motion, including Plaintiff's Memorandum of Law (Ex. C to Berdnik 5/23/16 Aff. in Supp.), 3) Defendants' Reply Affirmation in further support of the Prior Motion (Ex. D to Berdnik 5/23/16 Aff. in Supp.), and 4) the April 11, 2016 decision by Justice Garguilo ("Suffolk County Decision") denying the Prior Motion "without prejudice to renew upon the removal of the instant action to Supreme Court Nassau County."[2]

In support of Defendants' motion to stay the dissolution proceeding, Defendants' Counsel submits that the allegations in the Complaint and the remedies requested in the First, Third and Fifth Causes of Action are consistent with a shareholder oppression proceeding pursuant to BCL § 1104, *et seq.*, which would include BCL § 1104-a. Defendants' Counsel affirms that the Complaint, which was filed in Suffolk County on December 9, 2015, was served on Defendants on January 4, 2016. Subsequently, on January 14, 2016, Feldman filed an election to purchase Plaintiff's shares in Mana pursuant to BCL § 1118 (Ex. B to Bernik 5/24/16 Aff. in Supp.). In lieu of filing an answer to the Complaint, on January 25, 2016, Defendants filed the Prior Motion in which they sought an order dismissing most of the causes of action in the Complaint and converting the Tenth cause of action and all remaining claims alleged in the First, Third and Fifth

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[2] In the Suffolk County Decision, Justice Garguilo *sua sponte* consolidated the action before him with the related action ("Related Action") titled *Feldman v. Cardino*, Nassau County Index Number 604319/15 and transferred the action before him to Nassau County.

Causes of Action into a Petition pursuant to BCL §§ 1104-a and 1105.

C. The Parties' Positions

Defendants submit that the allegations in the Complaint, and the remedies requested in the First, Third and Fifth Causes of action, are consistent with a shareholder oppression proceeding pursuant to BCL § 1104-a(a)(1) and (2). Feldman thereafter filed an election to purchase Plaintiff's shares in Mana pursuant to BCL § 1118. In light of the allegations in the Complaint, which include Plaintiff's contention that "Feldman has engaged in a systematic pattern of misconduct, having defrauded Plaintiffs, individually, and Mana of substantial sums of monies and assets to himself and/or to his gain and benefit, and/or to his other companies and/or to his family and specifically to MP3" (Comp. at ¶ 18) and that Feldman "misappropriated, diverted, converted transferred and misused funds belonging to Mana..." (Comp. at ¶ 20), it is clear that Plaintiff is seeking dissolution of Mana pursuant to BCL § 1104-a. Defendants submit that once Cardino sought dissolution of Mana pursuant to BCL § 1104-a, he triggered the option for Feldman to purchase his shares, and Feldman thereafter exercised that option by filing an election to purchase Mana's shares pursuant to BCL § 1118. Defendants contend that permitting a buy-out under these circumstances would advance the goals underlying BCL §§ 1104-a and 1118 and accommodate the interests of the respective parties in ensuring the continued function of the business, while also protecting the financial interest of Mana and its creditors. Defendants request that the Court set the matter down for a hearing to determine the fair value of Plaintiff's shares in Mana, to facilitate Feldman's purchase of those shares as the parties are unable to agree on the value of the shares. Defendants advise the Court that they have already produced Mana's financial records, and a complete financial accounting for Mana has been sent to Cardino's counsel for inspection and review.

Plaintiff opposes Defendants' motion to renew on procedural grounds. Plaintiff also submits *inter alia* that 1) Plaintiff seeks judicial dissolution for reasons including the Corporation's inability to pay its bills, not for oppressive action, and it is therefore inappropriate to convert this proceeding, over Plaintiff's objection, to a proceeding pursuant to BCL § 1104-a; 2) the Court should not dismiss the Complaint as asserted against MP3 in light of Plaintiff's allegations that Feldman formed MP3 with the intent to improperly convey Mana's assets to

MP3, and in light of the fact that there is no evidence, other than the filing of a Certificate of Incorporation with the State, demonstrating that MP3 exists as a valid corporation; 3) Plaintiff has adequately pleaded a claim of fraud against Feldman by alleging, *inter alia*, that Feldman engaged in a course of conduct designed to mislead and convince Plaintiff to borrow money from Feldman, thereby making Mana indebted to Feldman, and also designed to coerce Cardino into forfeiting his shares in Mana to Feldman; and 4) Plaintiff has alleged sufficient facts to support his cause of action alleging a fraudulent conveyance.

RULING OF THE COURT

A. Dissolution of Corporation

BCL §§ 1104(a)(1) and (2) provide:

§ 1104. Petition in case of deadlock among directors or shareholders

(a) Except as otherwise provided in the certificate of incorporation under section 613 (Limitations on right to vote), the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on one or more of the following grounds:

(1) 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.

(2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained.

BCL § 1104-a(a) and (b) provide as follows:

(a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, other than a corporation registered as an investment company under an act of congress entitled "Investment Company Act of 1940", no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:

(1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;

(2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

(b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:

(1) Whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

(2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

BCL § 1104-a provides a mechanism for shareholders of at least 20% of the outstanding shares of a non-publicly traded corporation to petition for its dissolution when those in control of the corporation engage in illegal, fraudulent or oppressive actions toward the complaining shareholders or misappropriate corporate assets. *Matter of Dissolution of Clever Innovations, Inc.*, 94 A.D.3d 1174, 1175-1176 (3d Dept. 2012), citing BCL § 1104-a and *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 70 (1984). Oppression has been defined as conduct of a controlling shareholder that substantially defeats expectations that, viewed objectively, were both reasonable under the circumstances and central to the oppressed shareholder's decision to join the venture. *Matter of Dissolution of Clever Innovations, Inc.*, 94 A.D.3d at 1176, citing *Matter of Upstate Med. Assoc.*, 292 A.D.2d 732, 733 (3d Dept. 2002), quoting *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 73.

Where oppressive conduct is found, it falls to the discretion of the courts to consider the totality of the circumstances surrounding the corporation and to determine whether a remedy other than dissolution constitutes a feasible means of satisfying the rights and interest of the shareholders, or whether an alternate remedy if appropriate, such as a forced buy-out. *Matter of Dissolution of Clever Innovations, Inc.*, 94 A.D.3d at 1176, citing BCL § 1111(b)(2); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 73-74; *Matter of Wiedy's Furniture Clearance Ctr. Co.*, 108 A.D.2d 81, 84 (3d Dept. 1985). The appropriateness of an order of dissolution pursuant to BCL § 1104-a is in every case vested in the sound discretion of the court considering the application. *Matter of Fancy Windows & Doors*, 244 A.D.2d 484 (2d Dept. 1997), quoting *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 73. In *Matter of Fancy Windows & Doors*, *supra*, the Appellate Division, Second Department held that, in view of the parties' conflicting assertions, the trial court should have held an evidentiary hearing on the application for dissolution pursuant to BCL

§ 1104-a. 244 A.D.2d at 484-485, citing, *inter alia*, *Matter of Rosen [Hofteller Enters.]*, 102 A.D.2d 855 (2d Dept. 1984); *Matter of Kournianos [H.M.G., Inc.]*, 175 A.D.2d 129 (2d Dept. 1991).

A corporation should be dissolved only as a last resort. *Matter of Parveen*, 259 A.D.2d 389 (1st Dept. 1999); *Matter of Imperatore*, 128 A.D.2d 707 (2d Dept. 1987). Nevertheless, the appropriateness of an order of dissolution pursuant to BCL § 1104-a is within the sound discretion of the court considering that application. *Matter of Fancy Windows & Doors*, 244 A.D.2d 484 (2d Dept. 1997), citing *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63 (1984).

B. Elective Purchase of Shares

BCL § 1118 provides, in pertinent part, as follows:

> (a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court, including the conditions of paragraph (c) herein. An election pursuant to this section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such election be revocable.
>
> (b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, [fig 1] may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed, exclusive of any element of value arising from such filing but giving effect to any adjustment or surcharge found to be appropriate in the proceeding under section 1104-a of this chapter. In determining the fair value of the petitioner's shares, the court, in its discretion, may award interest from the date the petition is filed to the date of payment for the petitioner's share at an equitable rate upon judicially determined fair value of his shares.

Under the clear provisions of the buy-out procedure in BCL § 1118, once the corporation or a nonpetitioning shareholder elects to purchase the petitioner's shares, the dissolution proceeding must be stayed and a hearing held to determine the fair value of the stock. *Matter of Musilli*, 134 A.D.2d 15, 18-19 (2d Dept. 1987), quoting *Matter of Public Relations Aids*, 109 A.D.2d 502, 509 (1st Dept. 1985) and citing *Matter of Cristo Bros.*, 64 N.Y.2d 975, 977 (1985);

Matter of Fleischer [Gift Pax], 79 A.D.2d 636 (2d Dept. 1980). That statute affords the buy-out privilege in any proceeding brought pursuant to BCL § 1104-a. *Matter of Musilli*, 134 A.D.2d at 19, quoting BCL § 1118(a), and unambiguously applies whenever a petition is filed alleging grounds specified in Section 1104-a, *Matter of Musilli*, 134 A.D.2d at 19, quoting *Matter of Cristo Bros.*, 97 A.D.2d 274, 276 (3d Dept. 1983), *aff'd* 64 N.Y.2d 975 (1985). Neither the statute itself nor subsequent case-law interpretations reveal a legislative determination that the election to purchase may be exercised only after the allegations in the petition have been established, but instead show an intent to provide the opportunity to elect in all cases where allegations are made pursuant to BCL § 1104-a. *Matter of Musilli*, 134 A.D.2d at 19, citing *Matter of Cristo Bros.*, 64 N.Y.2d 975, *aff'g* 97 A.D.2d 274.

BCL § 1104-a gives holders of 20% or more of the outstanding voting shares of a close corporation the right to petition for judicial dissolution as a remedy for illegal, fraudulent or oppressive conduct. *Ferolito v. Vultaggio*, 99 A.D.3d 19, 25 (1st Dept. 2012) citing *Fedele v. Seybert*, 250 A.D.2d 519, 521-522 (1st Dept. 1998); *Matter of Public Relations Aids*, 109 A.D.2d 502, 507, 509 (1st Dept. 1985). Pursuant to BCL § 1118(a), however, a petition alleging grounds specified in BCL § 1104-a triggers the right of "any other shareholder or shareholders of the corporation" to "elect to purchase the shares owned by the petitioners at their fair value." *Ferolito v. Vultaggio*, 99 A.D.3d at 25, citing *Fedele v. Seybert*, 250 A.D.2d at 522; *Matter of Hung Yuk Ong*, 299 A.D.2d 173 (1st Dept. 2002), *lv. dism.*, 99 N.Y.2d 610 (2003). This election, once made, is irrevocable. *Ferolito v. Vultaggio*, 99 A.D.3d at 25, citing *Matter of Chu v. Sino Chemists*, 192 A.D.2d 315, 316 (1st Dept. 1991); *Matter of Doniger v. Rye Psychiatric Hosp. Ctr.*, 122 A.D.2d 873 (2d Dept. 1986), *lv. den.*, 68 N.Y.2d 611 (1986). Such an election is superior to dissolution because it permits the continuation of the corporation's existence. *Ferolito v. Vultaggio*, 99 A.D.3d at 25, quoting *Matter of Chu v. Sino Chemists*, 192 A.D.2d at 317.

The buyout election accommodates the interests of the respective parties in ensuring the continued functioning of the business, while also protecting the financial interest of the shareholders and creditors. *Ferolito v. Vultaggio*, 99 A.D.3d at 25-26, quoting *Matter of Public Relations Aids*, 109 A.D.2d at 508. If the parties are unable to agree on the fair value of the shares, the court may stay the proceedings and determine the fair value of the petitioner's shares

as of the day prior to the date on which the petition was filed, exclusive of any element of value arising from such filing. *Matter of the Dissolution of Penepent Corp., Inc.*, 96 N.Y.2d 186, 191 (2001), quoting BCL § 1118(b).

C. Application of these Principles to the Instant Action

Preliminarily, the Court concludes that Defendants' motions are procedurally proper, in consideration of the circumstances under which the motions came before the Court, including the directive in the Suffolk County Decision that the Prior Motion was denied without prejudice to renew upon the removal of the instant action to the Supreme Court of Nassau County. The Court grants the motions to the extent that the Court 1) converts the Complaint into a Petition under Business Corporation Law § 1104-a; 2) stays the dissolution proceeding brought by Plaintiff and directs that a hearing will be scheduled for the purpose of determining the fair value of Plaintiff's shares in Mana; and 3) dismisses the Complaint as asserted against MP3. The Court is persuaded that the allegations in the Complaint, which include claims that Feldman engaged in improper conduct vis a vis Mana, are consistent with a shareholder oppression proceeding pursuant to BCL § 1104-a. Once Cardino sought dissolution of Mana pursuant to BCL § 1104-a, he triggered the option for Feldman to purchase his shares, and Feldman thereafter exercised that option by filing an election to purchase Mana's shares pursuant to BCL § 1118. In light of that election, the Court stays the dissolution proceeding and will set the matter down for a hearing to determine the fair value of Plaintiff's shares in Mana, to faciliate Feldman's purchase of those shares as the parties are unable to agree on the value of the shares. The Court dismisses the Complaint as asserted against MP3 but, to the extent that Feldman's conduct with respect to MP3 is relevant to the Court's valuation of Cardino's shares, the Court will consider that evidence at the valuation hearing.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on August 29, 2016 at 11:00 a.m., at which time the Court will schedule the hearing as directed herein.

ENTER

DATED: Mineola, NY
August 18, 2016

HON. TIMOTHY S. DRISCOLL
J.S.C.