

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

<p>IN THE MATTER OF THE APPLICATION OF NISSIM KASSAB, individually and as a member of Mall 92- 30 Associates LLC and as a shareholder of Corner 160 Associates, Inc., <i>Petitioner,</i></p> <p>For An Order Dissolving Mall 92-30 Associates LLC Pursuant To N.Y. LLC Law §702 and other relief</p> <p>-against-</p> <p>AVRAHAM KASAB</p> <p><i>Respondent.</i></p>	<p>Index No.: _____/2017</p> <p>VERIFIED PETITION</p>
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NATURE OF THIS PROCEEDING

1. In this hybrid special proceeding and action, Petitioner Nissim Kassab (“Nissim”), through his undersigned counsel, submits this verified petition for judicial dissolution of Mall 92-30 Associates LLC (“Mall”), pursuant to N.Y. Limited Liability Company Law (“LLCL”) § 702. He also asserts direct claims against Respondent Avraham Kasab (“Avraham”) for continuous and ongoing breaches of the Operating Agreement of Mall and of a separate written agreement between the parties concerning the management of both Mall and Corner 160 Associates, Inc. (“Corner”), as well as direct claims for accounting and a constructive trust. Nissim further asserts a derivative claim against Avraham on behalf of Corner and Mall for continuous and ongoing breaches of Avraham’s fiduciary duties to Mall and Corner, as well as derivative claims for unjust enrichment and constructive trust.

BRIEF PROCEDURAL HISTORY

2. Avraham and Nissim are brothers who jointly own a corporation (Corner) and an LLC (Mall). Avraham owns 75% and Nissim 25% in each entity. Corner and Mall own,

respectively, two and one unimproved adjacent land lots in Jamaica, Queens, all three of which have been used in the recent five years as a combined parking lot. As of March 2013, Avraham has entirely and wrongfully excluded Nissim from the business of both entities and has been in complete unilateral control of both Corner and Mall.

3. In May 2013, Nissim filed a hybrid special proceeding and action in this Court, *Nissim Kassab v. Avraham Kasab et al.*, Index No. 711061/2015 (the “Prior Dissolution Action”)¹ seeking, *inter alia*, dissolution of Corner and Mall. By an order dated March 12, 2014 on a motion to dismiss, Justice Orin R. Kitzes (now retired) held that: (a) Nissim’s original petition failed to state a cause of action for dissolution of Mall under LLCL 702, but (b) the claim for dissolution of Corner should proceed to trial.² Following discovery and other procedural developments, an eight-day bench trial was held before the Honorable Timothy J. Dufficy in March-May of 2017. On August 3, 2017, the Court entered the Bench Trial Order and Judgment and Declaration (the “Judgment”), a true copy of which is attached hereto as Exhibit 1.³ The Judgment represents the culmination of four years of litigation, including interlocutory appeals followed by a lengthy trial

¹ The previous index number of the Prior Dissolution Action was 04428/2013; it was changed at the time of conversion to the ECF filing system in 2015.

² That order was affirmed by the Appellate Division, Second Department. The petition was subsequently amended and there were further motions, orders and appeals that need not be recited here. In particular, Avraham asserted counterclaims against Nissim in the Prior Dissolution Action, all of which were dismissed. Avraham also filed a separate action against Nissim asserting monetary claims under two promissory notes, Index No. 711073/2015 (the “Notes Action”), which was consolidated with the Prior Dissolution Action for trial purposes.

³ Attached as Exhibit 2 hereto is a true excerpt from the trial transcripts, which are cited in this Petition in the format “Tr. ____.” Attached as Exhibit 3 hereto is a true copy set of selected trial exhibits; for convenience of reference, these trial exhibits retain their original numbers under which they were admitted into evidence and cited in the transcript; in this Petition, they are cited in the format “Tr. Ex. ____.” For efficiency, the voluminous photographs forming part of Tr. Exs. 30-32 have been omitted from this Petition.

on the merits, and extensive post-trial submissions; it contains a thorough analysis of the evidence and applies the governing law to the facts.⁴

4. In particular, the Court found sufficient grounds for dissolution of Corner “under both common law and BCL §1104-a,” – and ruled that “liquidation of the corporation is the only feasible means whereby the petitioner’s rights will be protected and he may reasonably expect to obtain a fair return on his investment.” (Judgment at 18, 20). Pursuant to BCL §1118(a), the Trial Court exercised its discretion to give Avraham an option to buy out Nissim’s 25% shares of Corner within 90 days of entry of the Judgment for the appraised price of \$3,170,173 plus “pre-judgment interest, from the date of May 7, 2013, at the statutory rate of nine (9) percent,” failing which “Corner shall be dissolved,” and its assets sold and “distributed to each party in conformity with their interests as shareholders. . .” (*Id.* at 21, 25).

5. By an order dated October 27, 2017, and entered on November 13, 2017, the Court denied Avraham’s motion for post-trial relief under CPLR 4404, and granted Nissim’s cross-motion in part by an upward adjustment of the buyout value of Corner, adding \$168,230 on account of Nissim’s 25% share of the shareholder loans to Corner that existed at the time of the appraisal, with the resulting buyout value of Nissim’s shares of Corner as of May 7, 2013 being adjusted to the total of \$3,338,403 before interest. A true copy of that Order is attached hereto as Exhibit 4.

6. The Court also found in the Judgment, based on the evidence, that the parking lot “business is operated as a single entity on all three of the lots, owned by Corner and Mall . . .” (Judgment at 6). Noting that Mall’s “property comprises part of the parking lot” but that it “ha[d]

⁴ “Justice Dufficy’s 26-page post-trial decision is of the sort we don’t see often enough in New York business divorce cases, providing a thorough description of the case’s complex procedural history followed by detailed findings of fact, a highly useful summary of the expert testimony on valuation, and a thorough analysis of governing law and its application to the facts, all in service of a creative remedy promoting an economically sensible separation of the brothers’ business interests.” (Peter Mahler, <https://www.nybusinessdivorce.com/2017/08/articles/summer-shorts/summer-shorts-three-must-read-decisions/>, accessed on November 15, 2017).

no power to dissolve Mall,” the Court gave Avraham “the option of purchasing Nissim’s share in Mall” within the same 90 days at the appraised price of \$1,666,457, plus interest from the same date of May 7, 2013 at the same rate of 9% per annum. (Judgment at 21 and n.2).

7. To date, Avraham has not taken any steps or given any notice of his intention to purchase Nissim’s shares in Corner or Mall under the terms of the buyout options granted to him in the Judgment. Avraham has filed a notice of appeal from the Judgment, but has not yet perfected his appeal. His motion seeking a stay of enforcement of certain aspects of the Judgment pending appeal has been fully submitted to the Appellate Division, Second Department as of November 8, 2017, and is currently pending.

8. Nissim is filing this new petition for dissolution of Mall and other relief based on the new evidence that came to light in the Prior Dissolution Action (including evidence of facts and events that post-date the dismissal of Nissim’s prior dissolution claim as to Mall), and the Court’s findings in the Judgment grounded in this new evidence. In particular, the Trial Court has expressly found, based on the evidence, that the parking lot “business is operated **as a single entity on all three of the lots, owned by Corner and Mall**, and goes by the name of Safe Parking.” (Judgment at 6, emphasis added). In making that finding, the Court noted that only “Mall [and not Corner] is licensed by New York City to operate a parking lot” – but also that “[t]here is no access from the street directly to the property of Mall;” that the cars are parked “on all three of the lots;” and that the combined “property can accommodate 130 or 140 cars.” (Judgment at 6).⁵ Accordingly, the Court’s finding that Avraham “under-reported the number of vehicles utilizing the parking lot, and consequently, the amount of income the lot produced” (Judgment at 11)

⁵ Indeed, the new parking lot attendant Vincent Cole, who was hired by Avraham without consulting Nissim (Judgment at 10), while serving the entire Safe Parking area including the two lots owned by Corner and the lot owned by Mall, did not even know for which entity he worked, but rather simply knew that he was “working for Albert” (a/k/a Avraham) as a parking lot attendant. (7/26/16 Cole Deposition Tr. at 16-19 (Exhibit 5 hereto)).

concerns the **combined parking lot business of Corner and Mall**. So do the other facts and findings concerning the parking lot business, given Avraham's choice to operate it "as a single entity" on the property of both Corner and Mall. (Judgment at 6).

9. As set forth below, the evidence that came to light in the Prior Dissolution Action and the Court's findings in the Judgment are more than sufficient for judicial dissolution of Mall pursuant to LLCL §702, as well as for a judicial finding that Avraham has been engaged in continuous and ongoing breaches of both his fiduciary and contractual duties with respect to both Mall and Corner.

FACTS ESTABLISHED AS A MATTER OF LAW

10. The facts set forth in Paragraphs 11 through 48 below have been determined by this Court based on the trial evidence in the Prior Dissolution Action and set forth in the Judgment. As a result, these facts have been established as a matter of law by virtue of the doctrines of *res judicata*, collateral estoppel, and other rules and principles of preclusion, and Avraham cannot contest them in this proceeding.

11. "Mall was formed in 2001." (Judgment at 6).

12. "Mall has an operating agreement, dated March 13, 2001, signed by both brothers," *i.e.* Avraham and Nissim. "The agreement lists the brothers as the two members of Mall, along with their respective percentage of ownership (Avraham 75% and Nissim 25%)." (Judgment at 6).

13. "Section 5 of the Operating Agreement provides that 'the business and affairs of the Company shall be managed by the Members.'" (Judgment at 6).

14. "Nissim invested 25% in Mall, and Avraham invested 75% of the funds in Mall." (Judgment at 6).

15. "Mall purchased a lot adjacent to the two lots owned by Corner." (Judgment at 6).

16. As a result, “Mall owns Lot 24 of the same block” as the two lots owned by Corner – that is, Block 10101. (Judgment at 5).

17. “When the properties were purchased, there were two buildings on the land owned by Corner and Mall. [I]n or about 2010, the brothers decided to demolish the buildings, and within the next two years they were demolished. Hence, there are no buildings in the land owned by either Corner or Mall.” (Judgment at 6).

18. “To fund the demolition, both brothers made investments into the business in approximate proportion to their ownership interest.” (Judgment at 6).

19. “Following the demolition of the buildings, the brothers operated a parking lot, as well as a flea market, on the three lots.” (Judgment at 6).

20. “Nissim took the primary role managing the properties on a day-to-day basis.” (Judgment at 6).

21. “The business is operated as a single entity on all three of the lots, owned by Corner and Mall, and goes by the name of Safe Parking.” (Judgment at 6).

22. “Mall is licensed by New York City to operate a parking lot.” (Judgment at 6).

23. “There is no access from the street directly to the property of Mall.” (Judgment at 6).

24. “The parking lot and the flea market are the only sources of income for Corner and Mall.” (Judgment at 6).

25. “The parking lot is a cash business. As it accepts cash only, no credit or debit cards are accepted as payment for parking.” (Judgment at 6).

26. “The parking lot is open five days a week, all year round except for snow days.” (Judgment at 6).

27. “The flea market operates on weekends during good weather, primarily during spring, summer and fall, and is also a cash business only.” (Judgment at 6).

28. “The property can accommodate 130 to 140 cars.” (Judgment at 6).

29. “The parties entered into an agreement, dated August 27, 2012, under which Avraham was to make distributions ... of 40% of the net income from Corner and Mall, after operating expenses to Nissim, with Avraham receiving the balance. The agreement reflected the work that Nissim had done managing the property over the years.” (Judgment at 8).

30. “[O]n March 4, 2013, Avraham told Nissim to get out of the office trailer in the parking lot. . . Nissim left the business at that point and did not return when Avraham was present.” (Judgment at 9).

31. “Avraham [has] failed to keep Nissim involved in major decisions concerning the business of Corner and Mall.” (Judgment at 10).

32. In particular, in considering various “options for the disposition of real estate holdings” of Corner and Mall, Avraham demonstrated “intractability” and engaged in “despotic decision-making practices.” (Judgment at 10).

33. “On or about November 16, 2015, Nissim received an offer from a potential buyer to purchase the three lots owned by Corner and Mall for \$28 million. He received that offer through a real-estate broker who found his name in the New York City Building Department records. He communicated this offer to Avraham through his attorneys. Avraham received this offer, did not consult Nissim about it, and unilaterally rejected the offer.” (Judgment at 10).

34. “There was also an offer from the owner of a neighboring property to lease a small portion, about 10%, of the property owned by Corner for about a year at \$60,000 per month in order to house a crane and other construction equipment. On or about October 21, 2015, Nissim

communicated the offer through his attorneys to Avraham, attaching a draft Licensing Agreement. Again, Avraham never discussed the deal with Nissim. Because Avraham delayed in responding to the offer, and the deal was time sensitive, the deal was lost.” (Judgment at 10).

35. “Several months later, in April, 2016, the same adjacent property owner contacted Nissim with a similar offer to rent a small part of Corner’s property for a few months, at \$50,000 per month, to finish the construction project on his own property. Nissim’s attorneys once again conveyed the offer to Avraham’s attorneys and requested that Avraham either negotiate the deal directly with the property owner or authorize Nissim to do so. Avraham never discussed the offer with Nissim and unilaterally decided not to pursue the deal. The Court d[id] not credit Avraham’s testimony regarding his reasons for not pursuing the deal with the adjacent property owner.” (Judgment at 10).

36. Avraham hired “a new parking lot attendant and new accountant . . . for the business without consulting Nissim.” (Judgment at 10).

37. Avraham’s failure to communicate with Nissim about “major decisions concerning the business of Corner and Mall” was Avraham’s choice: “[t]he Court d[id] not credit Avraham’s claim that he could not communicate with Nissim because he could not find him.” (Judgment at 10).

38. Avraham has “engaged in looting, waste, and diversion of corporate assets.” (Judgment at 20).

39. Specifically, “Avraham understated the amounts of gross receivables from the parking business. . .” (Judgment at 20).

40. In particular, “Avraham under-reported the amount of cars that were being parked in the parking lot, and thereby breached his fiduciary duty to Nissim as a shareholder to faithfully record the proceeds of the parking-lot business.” (Judgment at 15).

41. Overall, Avraham has diverted “significant sums of unreported cash” from the brothers’ joint business. (Judgment at 15).

42. In addition to having “under-reported receipts” from the cash business, Avraham has also “used corporate funds to pay for his defense in the [Prior Dissolution Action], for which he was held in contempt.” (Judgment at 18; *see also id.* at 4-5, describing the contempt finding and its affirmation on appeal).

43. “The brothers have demonstrated an inability to agree on the direction of the corporation, and an inability to make a steady, growing profit from the parking business.” (Judgment at 20).

44. “Avraham has taken an intractable and pedantic stance where his brother is involved, insisting that things be done his way or not at all . . .” (Judgment at 20).

45. “[T]his business will continue on its [present immutable course with the current ownership in place.” (Judgment at 20).

46. “The real estate market in Jamaica is at a peak at the present time due to an economic resurgence in the area.” (Judgment at 20).

47. “Stagnation or maintenance of the *status quo* will ill-satisfy the expectations of the minority investor . . . To continue to permit the *status quo* to exist, particularly given the upturn in the Jamaica economy and associated property values in the area, would serve neither of the litigants in this matter. Further opportunities may be lost, and these two individuals, whose basic

philosophies of how to handle their business [are] vastly different, would accomplish nothing but continue their personal disagreements and battles.” (Judgment at 20).

48. Accordingly, dissolution of the business is “the only feasible means whereby the petitioner’s rights will be protected and he may reasonably expect to obtain a fair return on his investment. The dissolution of the real-estate holding company and the sale of its real-estate . . . appears to be the only way to permit the minority shareholder to effectuate his investment expectations.” (Judgment at 20).

FACTUAL BACKGROUND

A. The Parties’ Jointly Owned Companies and Joint Business

49. Nissim and Avraham are brothers. They are the only two shareholders of Corner and the only two members of Mall. It is undisputed that Nissim owns 25% of Corner and 25% of Mall, and Avraham owns the remaining 75% of each entity. (Judgment at 5-6; 3/20/17 Tr. at 47:24-48:14; 57:20-58:3; 58:14-16; 3/21/17 Tr. at 177:5-11).

50. Both Corner and Mall are real estate holding companies. Together, they own three adjacent unimproved parcels of land in Jamaica, Queens. Specifically, Corner owns Lots 79 and 150 of Block 10101, and Mall owns Lot 24 of the same Block. (Judgment at 5-6; 3/20/17 Tr. at 61:16-19; 3/21/17 Tr. at 177:12-178:16; Tr. Ex. 14).

51. In the past, Avraham and Nissim jointly owned other businesses, such as retail operations, including a store named Alexis, which used to occupy Lot 79 owned by Corner. They had several other stores together as well. The brothers trusted each other, operated their businesses together as partners and managed everything jointly; they divided their profits and split them without regard for the formal percentages of ownership in each entity that they owned. (Judgment at 7; 3/21/17 Tr. at 188:13-190:23; 3/31/17 Tr. at 599:2-15).

52. Based on decades of experience and verbal assurances from Avraham, Nissim expected that his joint business with Avraham would always be based on the principles of joint management and consensus. (3/29/17 Tr. at 497:12-22; 1/7/16 Avraham Deposition Tr. at 88:2-25).

Formation of Corner

53. Corner was incorporated in 1992. Corner has no shareholders agreement and no bylaws. (Judgment at 5; 3/20/17 Tr. at 63:4-18; 3/21/17 Tr. at 178:22-179:7; Tr. Ex. 15).

54. Avraham and Nissim jointly decided to incorporate Corner and to purchase the first property lot in Corner's name. They made the purchase with their joint money, as a joint investment. Indeed, at that time the two brothers did not segregate their money, regardless of in whose possession or in whose name the money was kept. (Judgment at 5; 3/21/17 Tr. at 179:8-180:7; 3/29/17 Tr. at 456:5-10).

55. Although to incorporate Corner was a joint decision and the brothers made their investment together, and although Avraham at the time considered himself "the real owner" of the company, Corner was originally incorporated only in Nissim's name. This was done at Avraham's request because Avraham had marital problems with his wife Tina and wanted to hide his interest in Corner from her, so that she could not make a claim on it in the event of a divorce. (Judgment at 5-6; 3/20/17 Tr. at 41:20-42:9; 52:6-8; 3/21/17 Tr. at 180:8-16).

56. To maintain his ultimate control of Corner, however, Avraham prepared an Option Agreement, which he asked Nissim to sign. The Option Agreement gave Avraham the right to buy 75% of the stock in Corner for \$25,000 at any time in the next 10 years. Nissim signed this agreement because he trusted his brother. Eventually Avraham did exercise the option and became

a 75% shareholder of Corner. (Judgment at 5-6; 3/20/17 Tr. at 57:7-19; 3/21/17 Tr. at 180:21-182:22; Tr. Ex. 16).

57. Avraham's exercise of the option did not affect the day-to-day management of Corner, which continued to be managed just as it was managed before, *i.e.* jointly by the two brothers. (3/21/17 Tr. at 182:23-183:8).

Formation of Mall

58. Mall was formed in 2001. The original members of Mall were Avraham and Nissim; Avraham owned 75% and Nissim owned 25%. That proportion has never changed. (Judgment at 6; 3/20/17 Tr. at 57:24-58:3; 58:14-16; 3/21/17 Tr. at 184:2-7).

59. The investment into Mall was also at the same percentage as into Corner: Nissim invested 25% and Avraham invested 75% of the funds. (Judgment at 6; 3/21/17 Tr. at 184:8-12).

60. Just as with Corner, Mall was founded for the purpose of purchasing a piece of real property – in this case, a lot adjacent to the two lots owned by Corner. It was Nissim's idea to purchase this property. He approached Avraham with this deal but, as usual, it was a joint decision of the two brothers to purchase the property. (Judgment at 6; 3/21/17 Tr. at 184:13-185:18).

61. Mall has a written Operating Agreement dated March 13, 2001 and signed by both Avraham and Nissim (Tr. Ex. 17). Section 4 of the Operating Agreement lists the two Members of Mall and their respective percentage of ownership: Avraham (75%) and Nissim (25%). Section 5 of the Operating Agreement provides: "The business and affairs of the Company shall be managed by the Members." Consistent with the apparent plain meaning and intent of this provision, Avraham and Nissim managed the company together. (Judgment at 6; 3/20/17 Tr. at 73:6-16; 3/21/17 Tr. at 185:23-186:25). Indeed, Avraham expressly admitted that, as a 25%

shareholder and member of both Corner and Mall, Nissim “is entitled . . . to participate in management” of the companies. (Tr. Ex. 29, ¶50).

Demolition of Existing Buildings

62. When the properties were purchased, there were two buildings on the land owned by Corner and Mall. In about 2010, the brothers decided to demolish the buildings, and within the next two years they were demolished. Currently, there are no buildings on the land owned by either Corner or Mall. The land has since been used as a single parking lot, and partially also as a flea market. (Judgment at 6; 3/21/17 Tr. at 187:12-24; 3/31/17 Tr. at 594:16-597:4).

63. To fund the demolition project, both brothers made investments into the business in approximate proportion to their ownership shares. (Judgment at 6). In Avraham’s words, the brothers “estimated the cost of demolition, paving, new signage, and a new attendant booth was \$500,000.” (Tr. Ex. 26, ¶30). Nissim invested \$125,000 (which is 25% of the total estimate) in 2011, including \$100,000 by a check dated March 28, 2011 payable to Mall, the funds for which were derived from Nissim’s share of sale proceeds of a house in Brooklyn. (Judgment at 6; 3/29/17 Tr. at 448:1-10; 489:1-8; 3/31/17 Tr. at 628:4-630:14; Tr. Ex. 55). Avraham’s investments in 2011-2012, according to his own summaries, totaled \$375,000, including \$170,000 into Mall and \$205,000 into Corner. (3/31/17 Tr. at 575:3-577:15; Tr. Exs. I and J).

64. In a January 17, 2013 email to Nissim, Avraham admitted that both brothers had invested significant funds into Corner and Mall, stating: “**we** invested almost 2.4m in **our** lots. . .” (Tr. Ex. 10, emphasis added). Still, despite all of the brothers’ joint investments and joint work for many years in many businesses, including Corner and Mall in particular, Avraham somehow considered himself the “real owner” of both companies, and thought of Nissim’s 25% ownership

in Corner and Mall as a “gift” that he gave Nissim. (1/7/16 Avraham Deposition Tr. at 63:11-15; 82:5-8; 104:7-16 (Exhibit 6 hereto)).

B. The August 2012 Agreement and Nissim’s Management Role

65. On August 27, 2012, Avraham and Nissim signed a written agreement (Tr. Ex. 1, the “August 2012 Agreement”). That Agreement provided in Section 1: “All distributions of net income (after operating expenses) from Corner 160 Associates, Inc. and Mall 92-30 Associates, LLC shall be made by Albert as follows: (a) to Nissim 25% on account of his interest plus 15% for management services, and (b) balance to Albert.” (Tr. Ex. 1, §1; 3/21/17 Tr. at 205:10-25). “Albert” is defined in the Agreement as “Avraham Kasab.” (Tr. Ex. 1).

66. In other words, Section 1 of the August 2012 Agreement provides that Nissim is entitled to 40% of the net income of both Corner and Mall, including 25% on account of his ownership interest and 15% on account of his management services for the two companies. (Judgment at 8; 3/20/17 Tr. at 78:7-25).

67. The reason that Avraham agreed to give Nissim an additional 15% of the net income on account of his management services was that Nissim did most of the actual work related to management of the property, including supervising demolition of the old buildings, managing the parking lot, dealing with contractors and vendors, and performing other services concerning the business. (3/21/17 Tr. at 206:1-7; 3/20/17 Tr. at 57:1-3; 79:1-3; 84:24-86:2; 87:6-23). As the Court found, the August 27, 2012 Agreement “reflected the work that Nissim had done managing the property over the years.” (Judgment at 8).

68. Specifically, with respect to the demolition project, Nissim met with the architects, the engineers, the fire department, representatives of the gas company and others to make various arrangements concerning demolition of the buildings. He also collected bids from various companies for the demolition. He went through the permit process and otherwise managed the

demolition process. (3/21/17 Tr. at 206:14-23; 3/20/17 Tr. at 86:3-25). As Avraham admitted, Nissim actively managed the project and “supervised the demolition like he was supposed to do.” (1/7/16 Avraham Deposition Tr. at 181:11-24; 183:23-24 (Exhibit 6 hereto)).

69. Once Nissim had completed the demolition project, he worked to convert the entire property into a single parking lot. The brothers discussed and agreed that Nissim would be in charge of various improvement projects intended to increase the profitability of the parking lot, including: paving the parking lot with asphalt, installing new and improved lighting, and installing an automated payment machine. (3/21/17 Tr. at 206:24-207:13).

70. After converting the property to a single parking lot, Nissim managed its daily operations as his full-time job. He worked there five days a week, sometimes even on weekends, 8-10 hours a day. (3/21/17 Tr. at 207:17-208:4). As the Court has found, “Nissim took the primary role managing the properties on a day-to-day basis.” (Judgment at 6).

71. Nissim also accomplished an important goal for the brothers’ business of reducing the real estate taxes for Corner and Mall after the demolition was done. To that end, he met with a city assessor and successfully handled the process of obtaining a significant reduction in real estate taxes. (3/21/17 Tr. at 208:5-209:3; 3/29/17 Tr. at 453:1-454:25).

72. Despite being ready, willing and able to continue managing Corner and Mall, and specifically to continue managing the parking lot as he had been, Nissim has been precluded from doing so since March 2013, when he was kicked out of the business by his brother Avraham, who ordered him to leave the property under threat that the police would be summoned. (3/21/17 Tr. at 209:8-17; 187:25-188:12; 236:12-238:21).

C. Avraham's Oppressive Campaign to Usurp Control of the Business

73. Both in their previous businesses and with respect to Corner and Mall, Avraham and Nissim had worked together as successful partners for many years. Most of the time, they agreed on management decisions. They were a team and accomplished a lot together. (3/20/17 Tr. at 96:21-22; 97:11-18; 98:21-25; 3/31/17 Tr. at 599:11-15; 602:9-25).

74. Eventually, however, Avraham wanted more control and decided to eliminate Nissim's role. Avraham thought that, as a majority owner of both Corner and Mall, he is entitled to make unilateral decisions about how these companies should be run, without any regard to Nissim's views. (3/20/17 Tr. at 65:25-66:3; 75:7-76:5; 87:1-5; 3/31/17 Tr. at 603:1-12).

75. Before 2010, both Avraham and Nissim had signature authority over the bank accounts of Corner and Mall. That changed in or about January 2011, when Avraham established new bank accounts for both companies. Nissim had no signature authority for these new accounts. (3/21/17 Tr. at 190:24-191:16; 3/29/17 Tr. at 449:11-16).

76. In or about January 2012, Avraham prepared, through his attorneys, a Shareholder Agreement for Corner and a new Operating Agreement for Mall (Tr. Exs. 18 and 20). These new agreements would have completely divested Nissim of any control over both companies.

77. In particular, under Section 3.3 of the Corner agreement, any major decisions for Corner, including dissolution of the company or selling its property, could be made by a supermajority of 66 $\frac{2}{3}$ % membership interest – which, of course, would always be available to Avraham and never to Nissim. (Tr. Ex. 18, §§ 3.3, 3.5). Under Avraham's new proposed agreement, Avraham was also appointed President, Treasurer and Secretary of Corner. (*Id.*, § 3.1).

78. Likewise, Avraham's new agreement for Mall would have made him both the Managing Member and President, with complete control over the company, and allowed him to

vote for any decisions unilaterally with his individual “quorum” of 66% membership interest. (Tr. Ex. 20, §§ 6.1.1; 6.1.2; 6.6.3).

79. Under these proposed agreements, Avraham would also have a right to buy Nissim out from either entity at any time at capped prices, while Nissim would not have a right to withdraw from either company. (Tr. Ex. 18, §§ 5.1, 6, 10.1; Tr. Ex. 20, §§ 6.4, 7.1, 8).

80. Avraham demanded that Nissim sign these new agreements for Corner and Mall. After consulting an attorney, Nissim refused to sign them. (3/21/17 Tr. at 191:17-195:1; 196:7-199:11; 3/29/17 Tr. at 475:9-14). Nissim discussed the content of these draft agreements with Avraham and tried to negotiate the terms. However, Avraham refused to change anything in the agreements and demanded that Nissim must sign them as they are. They had several conversations about it, but Avraham continued to demand that the agreements must be signed without any changes. (3/21/17 Tr. at 195:2-18; 199:12-21; 3/29/17 Tr. at 478:23-479:6).

81. In the August 2012 Agreement, Avraham and Nissim agreed “to enter into a formal shareholders agreement for [Corner] and a formal operating agreement for [Mall] within 6 months” from the date of execution. (Tr. Ex. 1, § 2).

82. However, instead of negotiating new terms for such agreements, in January 2013, Avraham, through his attorneys, again sent to Nissim the same draft Shareholder Agreement for Corner and draft Operating Agreement for Mall that he had sent in January 2012. They were exactly the same agreements that Nissim had previously rejected – and again, Avraham demanded that Nissim sign them without any changes. Just as before, Nissim rejected these agreements. (3/21/17 Tr. at 221:16-222:5; Tr. Exs. 18, 20; 3/29/17 Tr. at 475:15-476:1; 479:8-19).

83. Once Nissim refused to sign these agreements a second time, Avraham became very upset, agitated and angry. He started demanding that Nissim sign these agreements before

anything else happened in the business; in other words, Avraham was now refusing to even discuss any business issues or implement any plans for the business unless and until Nissim signed these agreements. (3/21/17 Tr. at 222:6-14).

84. In a January 15, 2013 email to Nissim, sent in response to Nissim's questions concerning various business projects, Avraham stated: "I can[']t talk or think of anything until[] I am in the driver seat, (meaning finalizing the agreement)." In other words, Avraham conveyed to Nissim a clear message that he, Avraham, wants to be the only "driver" in the business of Corner and Mall, and would not allow Nissim's further participation in the companies (including making or discussing any business plans) unless and until Nissim agreed that Avraham is the only person in control. (Tr. Ex. 6; 3/21/17 Tr. at 223:2-15; 224:2-17; 153:19-154:13).

85. Avraham repeated the same message in another email he sent Nissim on the same day, January 15, 2013: "The main thing is . . . control of the venture and management (we can have 1 driver only)." Nissim understood this email according to its plain meaning – *i.e.* that Avraham was demanding, in contrast to years of joint management by the brothers, that he have exclusive management control over the whole business venture, including Corner and Mall; that he wanted to be the only person in control, the only driver. (Tr. Ex. 7 and 3/21/17 Tr. at 225:6-22). At his deposition, Avraham was vague and evasive when questioned about the meaning of the phrase "one driver only," claiming that he had no view or understanding of who he was referring to in his own phrase the "one driver," was supposed to be. (9/15/16 Avraham Deposition Tr. at 82:10-83:2 (Exhibit 7 hereto)). At trial, Avraham abandoned that obvious lie and finally admitted that the "one driver" would be him, which meant that he would "have the final say" in the business. (3/21/17 Tr. at 156:2-157:1).

86. On January 21, 2013, Avraham sent Nissim another email which contained the following words: “Rethink all your moves . . . remember you don’t have much leverage at this time. . .” This was another way of reminding Nissim that, as a minority shareholder, he has no leverage, and so he must sign whatever agreements Avraham had prepared, and that Nissim has no choice but to give in to Avraham. (Tr. Ex. 8 and 3/21/17 Tr. at 226:2-227:10).

87. On January 24, 2013, Avraham sent Nissim yet another email conveying the same message by emphasizing that, as the majority owner, he has “all the right to set the tone” in the business. (Tr. Ex. 9).

88. Given that Nissim still refused to sign the draft agreements that Avraham insisted he should sign, Avraham took the next step in his oppressive campaign. Specifically, on February 4, 2013, Avraham’s then lawyer, David Pour, sent a letter to Nissim’s then lawyer, Victor Didia, in which he again recounted the proposed draft agreements that had been “forwarded . . . in early 2012 . . . for review and execution” and insisted that Nissim should sign them. (Tr. Ex. 19). He stated in this letter: “[P]lease be advised further that effective February 1, 2013, the Owners will not provide health insurance coverage to its members/shareholders.” In the same letter, he stated that if “adequate progress” is not made “toward finalization of said operating agreement and shareholder agreement” within a week, Avraham “would be forced to exercise other legal remedies available to him.” All this constituted a clear threat to Nissim that, if he didn’t comply with Avraham’s demands for control, (a) he would lose the medical insurance for his family, including his wife and five children, and (b) Avraham would take further unspecified steps to divest Nissim of control of the companies. At the time, medical insurance for Nissim and his whole family was paid from the business (just like medical insurance for Avraham and his family), and Nissim relied

on this medical insurance for his family's needs. (Judgment at 8; Tr. Ex. 19; 3/21/17 Tr. at 229:11-231:7).

89. On the same day, February 4, 2013, Avraham also sent a letter to Emblem Health, the insurance company that was providing medical insurance for both brothers and their families, and changed the contact and billing information for Mall (the company paying the insurance premiums) to Avraham's home address. In this letter to Emblem Health, Avraham referred to himself as not only the majority owner but also as "president of the company" – even though Mall never had a president and this was a non-existent title. (Tr. Ex. 22; 3/21/17 Tr. at 231:8-232:6; 3/20/17 Tr. at 64:3-66:6).

90. Once Nissim commenced the Prior Dissolution Action, the Court ordered that insurance benefits provided to Nissim by Corner and Mall be maintained and not terminated. (Ex. 21 at 2; Ex. 24 at 3). Based on the trial evidence, the Court found that Nissim's medical insurance was never actually terminated. (Judgment at 8-9). The issue, however, was not so much any actual interruption in coverage as Avraham's threats and announcement of such, which was clearly made in his attorney's February 4, 2013 letter (Tr. Ex. 19) and constituted an important move in Avraham's campaign to force Nissim to give up his rights.

D. Avraham Kicks Nissim Out of the Business

91. On March 4, 2013, Nissim was sitting in the trailer office (*i.e.* a small trailer located on the property that the brothers used as their office for the parking lot) when Avraham walked in and started screaming and yelling at Nissim; at some point, Avraham opened the door of the trailer and told Nissim to get out. Initially, Nissim did not get out, so Avraham continued screaming and ordered the employee named Alfonso Thomas, the parking lot attendant who was present at the scene, to get Nissim out of there. Avraham told Thomas to get Nissim out or call the police to get

him out. Nissim was in shock and, after the threat was made to call the police, he left the office and drove away in his car. (3/21/17 Tr. at 236:12-238:21; 3/29/17 Tr. at 522:24-524:14).

92. As the Court found, “[o]n March 4, 2013, Avraham told Nissim to get out of the office trailer in the parking lot . . .” (Judgment at 9). Afterwards, Avraham never contacted Nissim to ask him to come back. Avraham never gave any indication to Nissim by any means that he expects or that he would even permit Nissim to come back to the office or to the joint business. (3/21/17 Tr. at 238:22-239:2).

93. Instead, three weeks later, on March 26, 2013, Avraham, through his lawyers, issued two Notices of Meeting (relating respectively to Corner and Mall) with an agenda of “[r]emoval of Nissim Kassab from any management position” and “[r]emoval of Nissim Kasab from the Corporate offices/trailer.” Identical words were used in relation to Corner and Mall. When Nissim received these notices, he was frightened, as he understood that Avraham was now attempting to formalize Nissim’s complete removal from the business. (Tr. Ex. 11 at 2-3 and 3/21/17 Tr. at 239:3-240:2).

94. Once Nissim received the Notices of Meeting (Tr. Ex. 11), he retained counsel. Upon Nissim’s counsel’s demands to withdraw the Notices of Meeting as illegal, they were formally withdrawn – and once Nissim commenced the Prior Dissolution Action, the Court enjoined Avraham from proceeding with any such meeting. However, as a practical matter, Avraham still accomplished the agenda spelled out in the Notices: Nissim has been removed both from the management and from the premises of the business. (Tr. Ex. 24 at 3; Tr. Ex. 21 at 2; 3/21/17 Tr. at 240:3-11).

95. When Nissim came back to the parking lot at some point not long after March 4, 2013, he spoke to Alfonso Thomas, the employee of the business and the parking lot attendant

who was there as an agent of the companies and of Avraham, authorized and instructed to exclude people (and specifically, Nissim) from the premises. Alfonso Thomas excluded Nissim from the property by telling Nissim that he was not welcome there. (3/21/17 Tr. at 240:12-244:16).

96. At his deposition, Avraham was evasive when questioned about Nissim's last day at the office, and stated that he could not recall whether he had told Nissim not to come back to the premises. (9/15/16 Avraham Deposition at 56:3-57:17 (Exhibit 7 hereto)). At trial, Avraham testified that Nissim simply quit on his own (3/31/17 Tr. at 580:4-24) – which makes no sense and is completely inconsistent with the Notices of Meeting Avraham caused to be issued three weeks later with an agenda seeking Nissim's removal from the premises and from any management position. These Notices demonstrate that Avraham's behavior toward Nissim pursued precisely the same goal as the agenda spelled out in the Notices – to remove Nissim from the business. (Tr. Ex. 11).

E. Nissim Has Been Excluded from the Business for Four and a Half Years

97. Having been kicked out of the office by Avraham in March 2013 and prevented from coming back, Nissim was completely excluded from the business. Since March 2013, Nissim has played no actual role in Corner or Mall and has no say in the business. He has no access to the revenue or profits. He has not received any financial distributions from Corner or Mall. He has not been allowed to participate in any meetings about the business of Corner or Mall, and has not been consulted in any way about Corner or Mall. Avraham has been running these companies alone and has not been communicating with Nissim about their business. (3/21/17 Tr. at 159:13-17; 166:18-21; 167:11-14; 187:25-188:12; 245:4-22; 1/7/16 Avraham Deposition Tr. at 232:3-233:2 (Exhibit 6 hereto)).

98. Under the August 2012 Agreement, Nissim was entitled to receive 40% of the net profits of Corner and Mall. (Tr. Ex. 1, § 1). However, with Avraham in complete control, Nissim

has not been receiving any financial distributions since March 2013 from either Corner or Mall. (3/21/17 Tr. at 165:1-8; 3/20/17 Tr. at 84:14-20; 1/7/16 Avraham Deposition Tr. at 279:5-7 (Exhibit 6 hereto)).⁶

99. In his affidavit filed at the beginning of the Prior Dissolution Action, dated September 16, 2013, Avraham promised the Court that he would “keep Nissim involved in major decisions” concerning the business of Corner and Mall and “keep him informed as to the business activities of the Entities” until the litigation was over. (Tr. Ex. 29, ¶50; 3/21/17 Tr. at 174:14-175:3). Based on the evidence adduced at trial, the Court concluded that Avraham had breached that promise: “Avraham failed to keep Nissim involved in major decisions concerning the business of Corner and Mall.” (Judgment at 10). Avraham’s “despotic decision-making practices” (*id.*) are particularly apparent with regard to the events and decisions subsequent to dismissal of Nissim’s original claim for dissolution of Mall in March 2014.

F. Avraham’s “Despotic Decision-Making Practices” Since March 2014

100. On or about November 16, 2015, Nissim received an offer from a potential buyer to purchase the three lots owned by Corner and Mall together for \$28 million (Tr. Ex. 13). That offer was made to Nissim through a real estate broker who found his name in the Building Department records. The offer called for an important decision to be made for Corner and Mall, because it concerned potential disposal of the entire assets of these companies, offering to buy them at a price higher than the current market value. Nissim communicated this offer to Avraham through his attorneys. Avraham received this offer, did not consult Nissim about it, and

⁶ The Court noted that “the companies provided health insurance for Nissim and his family, paying the \$2,000 monthly premium for the insurance.” (Judgment at 8). But the August 2012 Agreement does not mention medical insurance. Nissim testified that the brothers never discussed the possibility that medical insurance may count as distributions under the August 2012 Agreement (3/21/17 Tr. at 234:1-8), and no document in the record addressed such a possibility.

unilaterally rejected the offer. (Judgment at 10; 3/21/17 Tr. at 169:7-170:9; 172:3-10; 249:14-250:22; 254:9-13).⁷

101. There was also an offer from the owner of a neighboring property, Mr. Laboz, to lease a small part (about 10%) of the property owned by Corner for about 1 year at \$60,000 per month in order to place a crane and other equipment there in connection with a certain construction project. This offer also called for an important decision for Corner, as accepting it would have brought substantial profit to the company with minimal or no disruption to its existing parking lot business. On or about October 21, 2015, Nissim communicated the offer through his attorneys to Avraham, attaching a draft Licensing Agreement, but again Avraham never discussed it with Nissim. Because Avraham delayed in responding to the offer, that time-sensitive deal was lost. (Judgment at 10; 3/21/17 Tr. at 254:14-255:16; Tr. Ex. 53; Tr. Ex. E; 3/29/17 Tr. at 539:4-540:1; 542:14-543:10).

102. Several months later, in April 2016, Mr. Laboz again contacted Nissim with a similar offer, to rent a small part of Corner's property for a few months at \$50,000 in order to finish his construction project on his own property. Nissim's attorneys once again conveyed the offer to Avraham's attorneys with a request to Avraham to either negotiate the deal directly with Mr. Laboz or to authorize Nissim to do so. Avraham never discussed the offer with Nissim and, again, unilaterally decided not to pursue the deal. (Judgment at 10; Tr. Ex. 54; 3/29/17 Tr. at 540:2-542:6).

103. Apart from these offers to sell or lease the property, Avraham unilaterally made several important changes in connection with the business of Corner and Mall. For instance,

⁷ As Avraham put it: "This is my property . . . We have no intention to sell the property. . . Me and the company, we don't want to sell." (1/7/16 Avraham Deposition Tr. at 243:15-16; 244:7; 245:17-246:8 (Exhibit 6 hereto)). When asked to clarify who he means by "we," Avraham explained: "Me, myself and I." (*Id.* at 244:8-11).

Avraham hired a new parking lot attendant to replace the retired Mr. Thomas, without ever consulting Nissim about hiring a new attendant or determining his salary. Indeed, Avraham never informed the new parking lot attendant, Vincent Cole, that Nissim is a co-owner of the parking lot business who is entitled to participate in its management; instead, Avraham conducted himself with Mr. Cole as the only owner. (Judgment at 10; 7/26/16 Cole Deposition at 26:5-27:24 (Exhibit 5 hereto)).

104. Likewise, Avraham has replaced Mr. Charles Harari, who was the accountant for Corner and Mall, with a new accountant named Robert Edelstein, whom Nissim has never met, and again Nissim was not consulted on this replacement or on hiring the new accountant. (Judgment at 10; 3/21/17 Tr. at 160:1-161:16; 255:17-256:12). Avraham unilaterally retained Mr. Edelstein as the new accountant for Corner and Mall at about the same time as he retained him as his personal accountant. (7/21/16 Edelstein Deposition at 16:11-18:3 (Exhibit 8 hereto)). Mr. Edelstein also takes his instructions concerning Corner and Mall exclusively from Avraham, and has never communicated with Nissim. (*Id.* at 22:13-25). As Mr. Edelstein understood, Nissim was not “present in the business.” (*Id.* at 36:4-5).

105. Nor has Avraham ever approached Nissim in these past years in connection with any business projects that the brothers had planned for the property of Corner and Mall while Nissim was still there: not about the paving of the parking lot; not about the improved lighting for the parking lot; and not about installation of an automated payment machine. Avraham has also changed parking rates without consulting with Nissim. In other words, Avraham has kept Nissim completely out of any decision-making for Corner and Mall. (3/21/17 Tr. at 256:13-23; 3/21/17 Tr. at 161:17-162:13; 167:11-14).⁸

⁸ The Court “d[id] not credit Avraham’s claim that he could not communicate with Nissim because he could not find him.” (Judgment at 10). Indeed, since Avraham had kicked him out of the business, Nissim changed neither his

G. The Current Status of the Parking Business of Corner and Mall

106. In the years since Nissim has been kicked out of the business, the property has not been paved with asphalt, the lighting has not been improved, and no automated payment machine has been installed. In other words, the parking lot is largely in the same shape as when Nissim was kicked out of the business. (3/21/17 Tr. at 211:12-212:4; 214:18-24).

107. The reason that none of the improvement projects for the property that the brothers had been discussing ever materialized while Nissim was still involved is that Avraham would not even discuss their implementation unless and until Nissim signed the draft Shareholder Agreement for Corner and the draft Operating Agreement for Mall that Avraham had prepared through his lawyers. Avraham refused to make any specific plans for the property unless Nissim signed those agreements. In other words, he insisted that Nissim had to sign these agreements or he would bring to a halt any planned improvements and the increased profits associated with them. (3/21/17 Tr. at 212:5-14; 153:19-154:13; Tr. Ex. 6). That is exactly what happened.

108. While Nissim was still managing the business, he received multiple offers from contractors and vendors for these improvement projects and forwarded such offers to Avraham. However, Avraham's general reaction was that he would not finalize or even consider any of these projects before Nissim signed the agreements as demanded by Avraham. (3/21/17 Tr. at 212:15-213:11).

109. Implementing the improvement projects would have increased the profitability of the business: the asphalt pavement would have made parking easier; improved lighting would make it possible for customers to park after hours; the existence of an automated payment machine would have expanded the hours of operation of the parking lot. As a result, the revenues could

residence address, nor his home phone number, nor his cell phone number – not to mention that Avraham could have always contacted Nissim through his litigation counsel at any time. (3/21/17 Tr. at 204:17-25).

have been increased dramatically, which the brothers actually discussed while Nissim was still involved in the business. (3/21/17 Tr. at 209:18-211:11).

110. The parking lot is located in a retail area with vibrant commercial development and a lot of ongoing activities, so customers would park after hours if such parking were available, with better lighting and an automated payment machine. (3/21/17 Tr. at 215:3-12).

111. New York City requires a license to operate a parking lot. Mall has such a license but Corner does not. (Judgment at 6; 3/20/17 Tr. at 100:25-101:4; 101:8-9; 3/21/17 Tr. at 246:24-247:18).

112. The parking business owned by Corner and Mall is operated as a single business on all of the three lots owned by Corner and Mall (namely, lots 24, 150 and 79), and goes by the name of Safe Parking. Cars are parked all over the three lots. (Judgment at 6; 3/20/17 Tr. at 32:13-15; 33:3-19; 101:5-7; 103:4-6; 3/21/17 Tr. at 215:13-19).

113. There is no access from the street directly to the property of Mall (lot 24). Mall's lot is on Union Hall Street, but there is no curb cut allowing car access directly from the street. Instead, cars have to pass through the property of Corner in order to get to the parking area on the property of Mall. (Judgment at 6; 3/21/17 Tr. at 215:20-216:9).

114. There is a sign at Safe Parking designating the maximum capacity of the parking lot at 50 cars. (3/20/17 Tr. at 103:9-11; 3/21/17 Tr. at 216:10-15; 3/22/17 Tr. at 285:13-22).

115. However, the actual number of cars regularly parked on the parking lot is much higher. The property can easily accommodate 130 or 140 cars, or even more. (Judgment at 6; 3/21/17 Tr. at 216:16-21; 3/22/17 Tr. at 293:16-23; Tr. Exs. 30-32, 38).

116. The parking lot is open 5 days a week, all year round except snow days. (Judgment at 6; 3/20/17 Tr. at 37:2-7; 3/21/17 Tr. at 219:5-6).

117. There are two flat rates the parking lot charges short-term parking customers: all day parking is \$11, while parking for less than two hours is about \$8. (Tr. Ex. 30 at 2; 7/26/16 Cole Deposition at 20:24-21:21 (Ex. 5 hereto); Tr. Exs. 40-41). There is also a monthly rate of \$150. (Tr. Exs. 38-39).

118. The parking lot and the flea market are the only sources of income for Corner and Mall, and the revenue derived from the parking lot and the flea market by Corner and Mall is all kept together and is not segregated. Avraham is in control of the revenue and chooses how to deposit the money derived from the parking lot and the flea market. (Judgment at 6; 3/21/17 Tr. at 246:4-22).

119. The parking lot is a cash business: it accepts only cash as payment from customers; it does not accept credit cards, checks or any other form of payment. The cash collected by the parking lot attendant is accumulated in a jar during each day the parking lot is open and is collected by Avraham (or occasionally his wife) at the end of the day. (Judgment at 6; 7/26/16 Cole Deposition at 20:12-22; 22:17-25:5; 28:7-15 (Ex. 5 hereto)).

H. Avraham's Under-Reporting of the Companies' Revenue

120. An investigator named John Downey, a former police officer, conducted surveillance of the parking lot at the property owned by Corner and Mall on three specific dates – March 1, 2017, March 6, 2017 and March 7, 2017. He observed the parking lot for about 12 hours each day. His observation results are reflected in his written reports for each of these dates. (Judgment at 11; Tr. Exs. 30-32; 3/22/17 Tr. at 280:12-25).

121. On the first day of his surveillance, March 1, 2017, the investigator observed that the parking lot was essentially empty at 8:00 a.m. in the morning, when it was opened by an employee. The investigator then kept count of the number of vehicles that entered the parking lot throughout the day until the parking lot closed at about 7:00 p.m. He noted that 62 vehicles entered

the lot between 8:00 a.m. and 10:30 a.m.; then he observed that an additional 40 vehicles entered the lot between 10:30 a.m. and 5:00 p.m. that day. He also observed that, of the approximately 102 vehicles that entered the parking lot during the day, about 20 remained in the lot for less than 2 hours, and the rest stayed more than 2 hours. (Tr. Ex. 30 at 1-2; 3/22/17 Tr. at 282:11-287:2).

122. The signs at the parking lot indicated that the rate for less than 2 hours was \$8, while the rate for staying more than 2 hours (all day parking, in other words) was \$11. (Tr. Ex. 30 at 2). There was also a sign at the parking lot that listed the parking license number and the maximum capacity of 50 cars. (3/22/17 Tr. at 285:13-22).

123. For the second day of his surveillance, March 6, 2017, the investigator again observed the parking lot for the whole day. He again counted the number of vehicles entering the lot. He noted that, between 8:24 a.m. and 9:37 a.m., 53 vehicles entered the lot, and by 11:40 a.m. the total number entered had reached 92 vehicles. He observed that between 11:40 a.m. and 5:41 p.m. an additional 36 vehicles entered the lot. The total number of vehicles that entered the lot that day was 128, of which approximately 23 remained in the lot for less than 2 hours, and the remaining 105 stayed for more than 2 hours. At some point, 92 vehicles were parked in the parking lot together, and at that point the parking lot was not full; indeed, the investigator estimated that it could still safely fit another 50 to 60 cars. (Tr. Ex. 31 at 1-2; 3/22/17 Tr. at 292:3-294:15).

124. On the third day of his surveillance, March 7, 2017, the investigator observed that 124 vehicles entered the parking lot throughout the day, including 103 vehicles that entered between 8:21 a.m. and 12:02 p.m., and then an additional 36 vehicles that entered after 12:02 p.m. until approximately 6:00 p.m. Of the 124 vehicles that entered the lot that day, about 23 left the lot within less than 2 hours, and the rest remained for more than 2 hours. At some point during this day, the investigator drove his own car through the lot, self-parked and was initially charged

\$11. When he returned within less than 2 hours and presented his receipt, he was refunded \$3 because he had stayed for less than 2 hours. (Tr. Ex. 32 at 1-2; 3/22/17 Tr. at 294:15-296:19).

125. To summarize, on each of the three random days chosen for surveillance in March 2017, the investigator observed more than 100 vehicles entering the lot during each particular day, and most of these vehicles – about 80% or more on average – stayed for more than 2 hours. (Exs. 30-32; 3/22/17 Tr. at 282:11-297:19).

126. The handwritten ledger of the parking lot for March 2017 shows, in the column entitled “total car[s] daily,” 76 cars for March 1; 82 cars for March 6; and 81 cars for March 7. (Tr. Ex. 38 at 13, March 2017). Avraham testified that the “total car[s] daily” column of the handwritten ledger reflects the total number of cars that entered the lot on each respective day. (3/31/17 Tr. at 641:9-642:3). However, the investigator’s reports, credited by the Court, show 102 cars on March 1, 2017; 128 cars on March 6, 2017; and 124 cars on March 7, 2017. (Judgment at 11; Exs. 30-32). As the Court noted, Avraham “offered no plausible explanation for the inconsistency between the investigator[’]s observations and the records he kept.” Judgment at 11.⁹

127. As the Court concluded, “[t]he foregoing evidence raises a strong inference that the respondent under-reported the number of vehicles utilizing the parking lot, and consequently, the amount of income the lot produced.” (Judgment at 11). Under-reporting the number of cars enables Avraham to under-report the income of Corner and Mall, thereby achieving the dual goal of underpaying taxes and avoiding distributions to Nissim.

⁹ Monthly parking customers cannot explain the discrepancy. As the Court noted, “[t]here was no accounting of how many of the vehicles were monthly customers.” (Judgment at 11). But the same page of the ledger shows a total of 6 monthly customers in March 2017. (Tr. Ex. 38 at 13). To account for the number of cars unreported in the ledger, each of these 6 monthly customers would have to have left and re-entered the parking lot 5-7 times within the 11-12 hours that the lot was open on each of the three specific days in question – which is implausible and inconsistent with the investigator’s observation that over 80% of the cars entering the lot stayed for more than 2 hours. (Tr. Exs. 30-32, 38).

128. The same inference arises with regard to the income and records related to the flea market. The general ledgers and the tax returns of Corner and Mall do not differentiate between the income derived from the parking lot and that derived from the flea market. As the Court put it: “There was evidence that the income from the flea market may have been under-reported as well since no accurate records existed or were produced at trial.” (Judgment at 11).

I. Avraham’s Other Manipulations of the Companies’ Accounting

129. Tax returns and general ledgers for Corner and Mall are prepared by the accountants on the basis of the bank statements for both companies that are delivered to them by Avraham on a monthly basis. (7/21/16 Edelstein Deposition at 27:17-28:4; 130:20-23 (Ex. 8 hereto)). Since the income of Corner and Mall is received entirely in cash, those bank statements only record the cash that Avraham decided to deposit.

130. The tax returns for Corner show net losses for the tax years 2013 and 2014, but show a net profit of \$63,988 for the tax year 2015. The K-1 form for Nissim included in the 2015 tax return shows a distribution of \$15,997 based on Nissim’s 25% ownership interest. (Tr. Exs. 27, 34-35 (Form 8825 and Schedule K-1)). However, as noted above, it is undisputed that no actual cash distribution was made to Nissim in any of those years, including 2015. (3/21/17 Tr. at 165:1-8; 3/20/17 Tr. at 84:14-20; 1/7/16 Avraham Deposition Tr. at 279:4-7 (Ex. 6 hereto)).

131. The tax returns for Mall show net losses for the tax years 2013 and 2015, but show a net profit of \$35,593 for the tax year 2014. The K-1 form for Nissim included in the 2014 tax return shows a distribution of \$8,898 based on Nissim’s 25% ownership interest. (Tr. Exs. 28, 36-37 (Form 8825 and Schedule K-1)). However, as noted above, it is undisputed that no actual cash distribution was made to Nissim in any of those years, including 2014. (3/21/17 Tr. at 165:1-8; 3/20/17 Tr. at 84:14-20; 1/7/16 Avraham Deposition Tr. at 279:4-7 (Ex. 6 hereto)).

132. According to Avraham, Mall is supposed to pay rent to Corner every year for the

parking space it occupies pursuant to a written lease agreement – which, however, was never produced in discovery or at trial. (3/21/17 Tr. at 134:20-135:16; 3/31/17 Tr. at 599:25-600:11). Nissim testified that he is not aware of any lease agreement between Corner and Mall. Avraham has never discussed with Nissim that there should be such a lease agreement or that Mall should be paying rent to Corner for the property owned by Corner. (3/21/17 Tr. at 205:1-9).

133. The tax returns for Corner and Mall reflect that Mall paid rent to Corner in each of 2013, 2014 and 2015. (7/21/16 Edelstein Deposition at 112:19-23; 125:15-19 (Ex. 8 hereto)). However, in each of 2013 and 2014 this rent payment was \$20,000, whereas in 2015 it dramatically increased to \$81,312. (Tr. Ex. 36, Statement 5; Tr. Ex. 37, Statement 5; Tr. Ex. 28, Statement 6). The evidence offers no explanation for this increase, other than Avraham's manipulation of accounting between the two companies: had the 2015 rent to Corner remained at the same \$20,000 level as it had been in the prior two years, Mall would have had a net profit of about \$60,000 in 2015; but as a result of the rent increase to \$81,312, Mall ended up with a \$92 loss. (Tr. Ex. 28, Form 8825, Lines 15-17).

134. Indeed, the general ledgers of Corner and Mall show numerous loans and other financial transactions between the two companies which have no apparent reason and which the companies' accountant could not explain. (7/21/16 Edelstein Deposition at 123:11-17; 125:23-126:13; 126:24-127:17 (Ex. 8 hereto); Tr. Exs. 46-51). This further supports an inference that Avraham manipulates the two companies' finances to suit his personal needs.

135. The 2013 and 2014 tax returns for Corner show "legal and other professional fees" of \$40,355 and \$12,020 respectively (Tr. Ex. 34-35 (Form 8825, Line 8)). That appears to be mostly the legal fees improperly paid from Corner's funds to Avraham's litigation counsel in the Prior Dissolution Action – which the Court found in its February 5, 2015 Decision and Order

(entered on February 13, 2015, a true copy of which is attached as Exhibit 9 hereto) to be in violation of its temporary restraining order issued at the outset of the case. (Judgment at 4-5). In a further Order dated April 15, 2015 (entered on April 20, 2015, a true copy of which is attached as Exhibit 10 hereto), the Court found Avraham in contempt for this violation, and ordered him to pay back to Corner the \$45,985.31 improperly paid to Avraham's litigation counsel from Corner's funds. No such payment, however, is reflected on the 2015 tax return for Corner, which shows \$5,000 of "legal and professional fees" and does not show any refunds of prior expenses in this category. (Tr. Ex. 27, Form 8825, Line 8). Nor have the 2013 or 2014 tax returns for Corner been amended. (3/29/17 Tr. at 433:6-9).

136. Most (if not all) of Avraham's investments into Corner and Mall since 2011 have been classified as shareholder loans. (3/31/17 Tr. at 628:7-14; 630:25-631:21). After having kicked Nissim out of the business in March 2013, Avraham continued to make such "loans" but did not discuss with Nissim whether the companies should take on this additional indebtedness. (*Id.* at 631:22-632:3). When it suited him, Avraham also partially repaid some loans to himself. For instance, Mall tax return for 2014 shows reduction in loans by members from \$660,675 to \$610,537 (Tr. Ex. 37, Schedule L, Line 19a), and Mall tax return for 2015 shows reduction in loans by members from \$610,537 to \$556,227 (Tr. Ex. 28, Schedule L, Line 19a). These records reflect Avraham's unauthorized payments to himself. (7/21/16 Edelstein Deposition at 113:18-25 (Ex. 8 hereto)).

137. Avraham testified that he has not taken any cash distributions from either Corner or Mall since March 2013. (3/31/17 Tr. at 616:5-19). This testimony is not credible – not only because K-1 Forms for Mall in 2014 and for Corner in 2015 show distributions to Avraham (Tr. Exs. 27, 37), but also because the evidence discussed above gives rise to a reasonable inference

that Avraham systematically fails to report about one-third of the income from the business and simply pockets that cash, and then takes payments from the entities in satisfaction of undocumented “loans.”

138. To date, Avraham remains in complete control of both Corner and Mall, including their management, income and finances. On information and belief, Avraham is still engaged in continuing and ongoing under-reporting of income, manipulation of accounting, and misappropriation of funds from both Corner and Mall.

DEMAND FOR RELIEF

First Demand for Relief: Dissolution of Mall Pursuant to LLCL 702

139. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

140. LLCL §702 provides: “On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.”

141. Here, Section 4 of the Operating Agreement of Mall (Tr. Ex. 17) lists the two Members of Mall (Avraham and Nissim), and Section 5 expressly provides: “The business and affairs of the Company shall be managed by the Members.” Consistent with the apparent plain meaning and intent of this provision, Avraham and Nissim managed the company together for many years. (Judgment at 6; 3/20/17 Tr. at 73:6-16; 3/21/17 Tr. at 185:23-186:25). Avraham also expressly admitted that, as a member of Mall, Nissim “is entitled . . . to participate in [its] management.” (Tr. Ex. 29, ¶50).

142. In addition, Section 1 of the August 2012 Agreement between Avraham and Nissim (Tr. Ex. 1) expressly provides for “management services” for Mall to be performed by Nissim, on

account of which Nissim is entitled to an additional 15% of Mall's net income (to supplement the 25% to which he is entitled on account of his ownership interest). The reason that Avraham agreed to give Nissim an additional 15% of the net income on account of his management services was that, for years, Nissim did most of the actual work related to management of Mall's property and business. (3/21/17 Tr. at 206:1-7; 3/20/17 Tr. at 57:1-3; 79:1-3; 84:24-86:2; 87:6-23). As the Court already found, the August 27, 2012 Agreement "reflected the work that Nissim had done managing the property over the years." (Judgment at 8).

143. As set forth above, since March 2013, Avraham has completely excluded Nissim from the business of Mall. For the past four and a half years, Nissim has played no actual role in Mall and has no say in the business, has no access to Mall's revenue or profits, and has not received any financial distributions from Mall. He has not been allowed to participate in any meetings about the business of Mall, and has not been consulted in any way about the business decisions for Mall. Avraham has been running Mall alone and has not been communicating with Nissim about its business. (3/21/17 Tr. at 159:13-17; 166:18-21; 167:11-14; 187:25-188:12; 245:4-22; 1/7/16 Avraham Deposition Tr. at 232:3-233:2 (Exhibit 6 hereto)).

144. In particular, since March 2014 (when Nissim's previous claim for dissolution of Mall was dismissed), Avraham has made numerous important decisions for Mall unilaterally, without consulting Nissim. That included, in particular, Avraham's unilateral rejection of a lucrative offer from a potential buyer of Mall's property, hiring a new Mall employee, and repayment of alleged loans to Avraham by Mall. As the Court found in the Prior Dissolution Action, "[t]he evidence indicates that Avraham failed to keep Nissim involved in major decisions concerning the business of Corner and Mall." (Judgment at 10). "Avraham's intractability and despotic decision-making practices" (*id.*) with regard to Mall are still ongoing.

145. Moreover, as the Court in the Prior Dissolution Action also found based on the evidence, Avraham has been continuously engaged in under-reporting and diversion of Mall's income for his own personal benefit, which constitutes looting and waste of the company's assets. (Judgment at 11, 15, 20). On information and belief, this conduct is ongoing as well.

146. The Court in the Prior Dissolution Action also made the following findings: "The brothers have demonstrated an inability to agree on the direction of the [joint business], and an inability to make a steady, growing profit from the parking business." (Judgment at 20). "Avraham has taken an intractable and pedantic stance where his brother is involved, insisting that things be done his way or not at all . . ." (*Id.*). "[T]his business will continue on its present immutable course with the current ownership in place." (*Id.*). "To continue to permit the *status quo* to exist, particularly given the upturn in the Jamaica economy and associated property values in the area, would serve neither of the litigants in this matter. Further opportunities may be lost, and these two individuals, whose basic philosophies of how to handle their business [are] vastly different, would accomplish nothing but continue their personal disagreements and battles." (*Id.*).

147. In these circumstances, "it is not reasonably practicable to carry on the business [of Mall] in conformity with . . . [its] operating agreement." LLCL §702. Accordingly, Nissim is entitled to dissolution of Mall under LLCL §702.

148. Petitioner therefore requests that the Court, summarily and without any need for discovery or trial, based on Court's findings in the Prior Dissolution Action and the evidence adduced herein, order dissolution of Mall pursuant to LLCL §702, appointment of a receiver to sell Mall's property and liquidate its assets, distribution of the proceeds of such sale and liquidation to the members of Mall pursuant to LLCL §704 and other applicable law, and application of any other appropriate remedies available under the LLCL as well as the common law and equity.

Second Demand for Relief: Breach of Contract (Direct Claim)

149. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

150. Section 4 of the Operating Agreement of Mall (Tr. Ex. 17) lists the two Members of Mall (Avraham and Nissim), and Section 5 expressly provides: “The business and affairs of the Company shall be managed by the Members.”

151. In addition, the August 2017 Agreement between Avraham and Nissim (Tr. Ex. 1) provides in Section 1: “All distributions of net income (after operating expenses) from Corner 160 Associates, Inc. and Mall 92-30 Associates, LLC shall be made by Albert as follows: (a) to Nissim 25% on account of his interest plus 15% for management services, and (b) balance to Albert.” (Tr. Ex. 1, §1; 3/21/17 Tr. at 205:10-25). “Albert” is defined in the Agreement as “Avraham Kasab.” (Tr. Ex. 1). In other words, Section 1 of the August 2012 Agreement provides that Avraham is obligated to distribute to Nissim 40% of the net income of both Corner and Mall, including 25% on account of Nissim’s ownership interest and 15% on account of his management services for the two companies. (Judgment at 8; 3/20/17 Tr. at 78:7-25).

152. By his conduct set forth above – including, without limitation, by excluding Nissim from the management of Corner and Mall and otherwise from the business of the two companies, by underreporting income of the two companies and manipulating their finances, and by failing to make any financial distributions to Nissim – Avraham has materially breached the August 2012 Agreement as well as the Operating Agreement of Mall. Avraham’s material breaches of these two agreements have been continuous and ongoing.

153. Avraham has also materially breached the covenants of good faith and fair dealing implied in the August 2012 Agreement as well as the Operating Agreement of Mall, by preventing Nissim from participating in the business and management of Corner and Mall, or from providing

any management services for these companies, and by under-reporting their income.

154. Avraham's continuous and ongoing material breaches of the August 2012 Agreement as well as of the Operating Agreement of Mall have directly caused Nissim damages and continue to cause him damages amounting to 40% of the actual net income of Corner and Mall, to which Nissim is entitled under the August 2012 Agreement.

155. Accordingly, Nissim is entitled to a judgment in his favor on his breach of contract claim in the amount of 40% of the actual net income of Corner and Mall, to be determined at a trial or hearing, as of March 4, 2013 (or as of another appropriate date taking into account the Court's findings in the Prior Dissolution Action) and up to the date of judgment.

Third Demand for Relief: Accounting (Direct Claim)

156. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

157. As a result of the parties' familial and business relationships (including their contractual relationships and their relationship as the majority and minority shareholders of Corner and members of Mall respectively), and the application of the principles of common law and equity, Avraham at all material times owed a continuing fiduciary duty to Nissim to account for the income and funds of Corner and Mall in his possession and under his control.

158. Avraham has breached that duty by failing to accurately account to Nissim for the actual income of Corner and Mall, by failing to distribute to Nissim 40% of the actual net income of Corner and Mall to which Nissim is entitled, and by misappropriating the funds he failed to distribute to Nissim.

159. Nissim has demanded and continues to demand from Avraham a proper accounting for the actual income of Corner and Mall and for the funds that Avraham has misappropriated as set forth above.

160. Avraham has failed to properly account to Nissim for the actual income of Corner and Mall and for the funds that Avraham has misappropriated.

161. Nissim has no adequate remedy at law and is entitled to the equitable remedy of accounting.

162. In the conduct alleged herein, Avraham acted intentionally, with malice and wanton or reckless disregard for Nissim's rights. Accordingly, Nissim should be awarded punitive damages as well.

Fourth Demand for Relief: Constructive Trust (Direct Claim)

163. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

164. As set forth above, as a result of the parties' familial and business relationships (including their contractual relationships and their relationship as the majority and minority shareholders of Corner and members of Mall respectively), and the application of the principles of common law and equity, Avraham at all material times owed a continuing fiduciary duty to Nissim.

165. Without limiting the generality of the foregoing, as a majority shareholder of Corner and majority member of Mall, Avraham is a fiduciary and holds a position of trust and confidence with respect to Nissim, the minority shareholder of Corner and minority member of Mall.

166. By reason of his position of trust and confidence, Avraham promised to act with the utmost good faith and loyalty with respect to conducting the management, operations and affairs of Corner and Mall, which included a duty not to abuse or violate such trust or to act in his own self-interest by, *inter alia*, misappropriating, wasting, and/or mismanaging the income and funds that he was obligated to distribute to Nissim.

167. At all material times, Avraham had complete control over the income and funds of

Corner and Mall, including the income and funds that he was obligated to distribute to Nissim – but which were, as set forth above, instead wasted, mismanaged, and/or misappropriated for Avraham’s own personal use and benefit.

168. By virtue of such misconduct, Avraham has breached his position of trust and confidence with, and his fiduciary duties to, Nissim.

169. As a direct and proximate result of such misconduct, Avraham inured to himself the benefit of the income and funds rightfully belonging to Nissim, and thereby unjustly enriched himself at Nissim’s expense.

170. Under the principles of common law and equity, the Court should deem that Avraham holds the funds that rightfully belong to Nissim (including 40% of the actual net income of Corner and Mall, to be determined at a trial or hearing, as of March 4, 2013, or as of another appropriate date taking into account the Court’s findings in the Prior Dissolution Action, and up to the date of judgment) in constructive trust for Nissim.

171. In the conduct alleged herein, Avraham acted intentionally, with malice and wanton or reckless disregard for Nissim’s rights. Accordingly, Nissim should be awarded punitive damages as well.

Fifth Demand for Relief: Breach of Fiduciary Duty (Derivative Claim)

172. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

173. At all relevant times, Avraham, as a majority shareholder of Corner and majority member of Mall, owed fiduciary duties to both Corner and Mall. Without limiting the generality of the foregoing, by reason of his position of trust and confidence as a controlling shareholder of Corner and controlling member of Mall, Avraham promised to act with the utmost good faith and loyalty with respect to conducting the management, operations and affairs of Corner and Mall,

which included a duty not to abuse or violate such trust or to act in his own self-interest by, *inter alia*, misappropriating, wasting, and/or mismanaging the income and funds of Corner and Mall.

174. As apparent from the Court's findings and from the evidence in the Prior Dissolution Action, Avraham: (a) is in complete control of both Corner and Mall, having excluded Nissim from the business of both companies; (b) operates Corner and Mall as a single business, without duly segregating their income; (c) systematically under-reports the income of Corner and Mall in the companies' books and records; (d) manipulates the companies' financial transactions and bookkeeping to minimize the net income reported on their tax returns; (e) is engaged in misappropriation and diversion of income and funds from Corner and Mall for his personal benefit.

175. By virtue of the foregoing acts as more fully set forth above, Avraham has breached (and, on information and belief, continues to breach) his fiduciary duties to Corner and Mall.

176. As a direct and proximate result of Avraham's continuous and ongoing breaches of fiduciary duty, Corner and Mall have sustained significant monetary losses.

177. Given that Avraham, the wrongdoer, is in complete control of Corner and Mall, and given more specifically all the facts and circumstances set forth above, it would be futile for Nissim to demand that the management of Corner and Mall take any action to rectify the improprieties that are the subject of this claim.

178. Therefore, Nissim, derivatively and on behalf of Corner and Mall, respectfully petitions this Court for a judgment awarding appropriate compensatory damages to Corner and Mall in an amount to be established at a trial or hearing.

179. In the conduct alleged herein, Avraham acted intentionally, with malice and wanton or reckless disregard for the rights and interests of Corner and Mall. Accordingly, Avraham should be liable for punitive damages as well.

180. Under BCL §626(e) and other applicable law, Nissim should also be awarded his reasonable expenses, including attorneys' fees, incurred in prosecuting this derivative claim.

Sixth Claim for Relief: Unjust Enrichment (Derivative Claim)

181. Petitioner realleges and restates all the preceding paragraphs of this Petition as if fully set forth herein.

182. By failing to accurately report the actual income of Corner and Mall and by misappropriating the income and funds of Corner and Mall as set forth above, Avraham has been and continues to be unjustly enriched at the expense of Corner and Mall.

183. It is against equity and good conscience to permit Avraham to retain the funds he misappropriated and wrongfully diverted from Corner and Mall.

184. Given that Avraham, the wrongdoer, is in complete control of Corner and Mall, and given more specifically all the facts and circumstances set forth above, it would be futile for Nissim to demand that the management of Corner and Mall take any action to rectify the improprieties that are the subject of this claim.

185. Therefore, Nissim, derivatively and on behalf of Corner and Mall, respectfully petitions this Court for a judgment awarding appropriate compensatory damages to Corner and Mall in an amount to be established at a trial or hearing.

186. In the conduct alleged herein, Avraham acted intentionally, with malice and wanton or reckless disregard for the rights and interests of Corner and Mall. Accordingly, Avraham should be liable for punitive damages as well.

187. Under BCL §626(e) and other applicable law, Nissim should also be awarded his reasonable expenses, including attorneys' fees, incurred in prosecuting this derivative claim.

Seventh Demand for Relief: Constructive Trust (Derivative Claim)

188. Petitioner realleges and restates all the preceding paragraphs of this Petition as if

fully set forth herein.

189. As set forth above, Avraham at all material times owed a continuing fiduciary duty to Corner and Mall. Without limiting the generality of the foregoing, as a majority shareholder of Corner and majority member of Mall, Avraham is a fiduciary and holds a position of trust and confidence with respect to Corner and Mall.

190. By reason of his position of trust and confidence, Avraham promised to act with the utmost good faith and loyalty with respect to conducting the management, operations and affairs of Corner and Mall, which included a duty not to abuse or violate such trust or to act in his own self-interest by, *inter alia*, misappropriating, wasting, and/or mismanaging the income and funds of Corner and Mall.

191. At all material times, Avraham had complete control over the income and funds of Corner and Mall.

192. As more fully set forth above, Avraham has been engaged and, upon information and belief, continues to engage in under-reporting, mismanagement, and/or misappropriation of the income and funds of Corner and Mall for his own personal use and benefit.

193. By virtue of such misconduct, Avraham has breached his position of trust and confidence with, and his fiduciary duties to, Corner and Mall.

194. As a direct and proximate result of such misconduct, Avraham inured to himself the benefit of the income and funds rightfully belonging to Corner and Mall, and thereby unjustly enriched himself at the expense of Corner and Mall.

195. Under the principles of common law and equity, the Court should deem that Avraham holds the funds he misappropriated and that rightfully belong to Corner and/or Mall in constructive trust for Corner and/or Mall.

196. Given that Avraham, the wrongdoer, is in complete control of Corner and Mall, and given more specifically all the facts and circumstances set forth above, it would be futile for Nissim to demand that the management of Corner and Mall take any action to rectify the improprieties that are the subject of this claim.

197. Therefore, Nissim, derivatively and on behalf of Corner and Mall, respectfully petitions this Court for a judgment deeming that Avraham holds the funds he misappropriated and that rightfully belong to Corner and/or Mall (the amount of which is to be determined at a trial or hearing) in constructive trust for Corner and/or Mall.

198. In the conduct alleged herein, Avraham acted intentionally, with malice and wanton or reckless disregard for the rights and interests of Corner and Mall. Accordingly, Avraham should be liable for punitive damages as well.

199. Under BCL §626(e) and other applicable law, Nissim should also be awarded his reasonable expenses, including attorneys' fees, incurred in prosecuting this derivative claim.

WHEREFORE, Petitioner Nissim Kassab requests judgment against Respondent Avraham Kasab on all of the Petitioner's Demands for Relief as follows:

(a) on the First Demand for Relief, summarily and without any need for discovery or trial, on the basis of the facts established in the Prior Dissolution Action and the evidence adduced herein, dissolving Mall under LLCL §702, appointing a receiver for Mall, and directing sale and liquidation of Mall's property and assets and distribution of the proceeds to the two members of Mall in proportion to their ownership interests;

(b) on the Second, Third and Fourth Demands for Relief (the Direct Claims), awarding Nissim his actual and consequential damages in an amount to be determined at a trial or hearing,

as well as punitive damages in an amount to be determined at a trial or hearing, an accounting, and constructive trust;

(c) on the Fifth, Sixth, and Seventh Demands for Relief (the Derivative Claims), awarding Corner and Mall their actual and consequential damages in an amount to be determined at a trial or hearing, as well as punitive damages in an amount to be determined at a trial or hearing, and constructive trust;

(d) to the extent that Corner and/or Mall are dissolved or to be dissolved at the time of judgment on this Petition, directing that the funds awarded to Corner and/or Mall as a result of the Derivative Claims be distributed to the two shareholders of Corner and/or members of Mall in proportion to their ownership interests;

(e) awarding Nissim his reasonable attorney's fees and costs of prosecuting this action, under BCL §626(e) and other applicable law; and (f) granting Nissim such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 20, 2017

Respectfully submitted,
SCHLAM STONE & DOLAN LLP



By:

Jonathan Mazer
Vitali S. Rosenfeld
26 Broadway, New York, New York 10004
Telephone No.: (212) 344-5400
Facsimile No.: (212) 344-7677
E-Mail: jmazer@schlamstone.com
E-Mail: vrosenfeld@schlamstone.com
Attorneys for Nissim Kassab

VERIFICATION

STATE OF NEW YORK)
)ss.
COUNTY OF KINGS)


NISSIM KASSAB, being duly sworn, deposes and says:

1. I am a 25 percent shareholder of Corner 160 Associates, Inc.
2. I am a 25 percent interest-holding member of Mall 92-30 Associates LLC.
3. I have reviewed the foregoing Petition for dissolution of Mall 92-30 Associates

LLC and other relief. The factual allegations in that Petition are true to my own knowledge, except as to matters therein stated on information and belief, and as to those matters, I believe them to be true.


NISSIM KASSAB

Sworn to before me this 20th day of November 2017



NOTARY PUBLIC

TUNIE JARADEH
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01JA6362867
Qualified in Kings County
Commission Expires August 7, 2021