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ORIGINAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-12

Application of Hugh W. Campbell, as the Preliminary Executor of the Estate of Emma C. Brisbane, Petitioner(s), - against - For the Judicial Dissolution of McCall's Bronxwood Funeral Home, Inc., Respondent.	Index No. 17384/07
Hugh W. Campbell as the Executor of the Estate of Emma C. Brisbane, Plaintiff, -against- Jeffrey D. Buss, Esq. and James H. Alston, Jr., Defendants.	Index No. 300513/2010
James H. Alston, Jr., and McCall's Bronxwood Funeral Home, Inc., Third-Party Plaintiffs, -against- Hugh W. Campbell, Individually, Third-Party-Defendant.	Index No. 83796/2010

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,
Smith, Buss & Jacobs, LLP
733 Yonkers Avenue, Second Floor
Yonkers New York 10704

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PRELIMINARY STATEMENT

This petition seeks the extraordinary, and utterly unwarranted, dissolution of a thriving Bronx business, contrary to a contractual agreement between the parties, contrary to the Business Corporation Law provisions describing when dissolution should be granted, and contrary to the public interest of the Bronx community that McCall's Funeral Home has served for nearly fifty (50) years. It is a naked attempt to circumvent the terms of the contract between the parties, pursuant to which McCall's Funeral Home is entitled to buy back Petitioner's shares for $393,048.00.

McCall's tendered the required amount to Petitioner, who refused to accept it. He simply wants more money, and seeks to dissolve the corporation, throw employees and the other stockholders out of work, and sell the corporation's property and assets in order to get it. This is not permitted by the contract between the parties and is not authorized under Business Corporation Law § 1104-a, under which the Petition was filed.

Despite four years of expansive discovery, hundreds of demands, and multiple inspections of Respondents' premises, computer systems, and documents, Petitioner has been utterly unable to uncover evidence sufficient to overcome the Stockholders' Agreement. Instead, discovery has demonstrated that Petitioner Hugh W. Campbell commenced and prosecuted this action as part of a premeditated scheme to churn and dissipate the estate of Emma Brisbane to his own personal benefit, and to the detriment of her heirs. Mr. Campbell concedes that he drafted both Ms. Brisbane's will and the 1998 Stockholders' Agreement. He now contends that the two documents are contradictory,

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and has used that alleged contradiction to spawn more than five years of contested proceedings in both this Court and the Surrogates' Court, and to seek the dissolution of a thriving Bronx business. The bill for this unnecessary and abusive litigation is paid not by Mr. Campbell, but by Ms. Brisbane's heirs. If the Court does not now put an end to it, these fruitless actions will undoubtedly continue until Ms. Brisbane's estate is entirely dissipated.

A plain reading of the Stockholders' Agreement and the Last Will and Testament of Emma Brisbane demonstrates that the documents are not contradictory. Read together, they demonstrate beyond a doubt that: (1) Ms. Brisbane and/or her Estate have demonstrated a "wish to sell or transfer the shares"; (2) the shares are therefore required to be offered to the Corporation at the price provided in the Stockholders' Agreement; and (3) the Corporation wishes to exercise its option to purchase the shares. If there were any doubt at all of the Estate's "wish to sell or transfer the shares," they were laid to rest five years ago with the Surrogate's Court Decree of June 11, 2008 that the decedent intended the sale of the Estate's interest in the Corporation

Further, the circumstances surrounding execution of the 1998 Stockholders' Agreement demonstrate that it represents a full and fair return to the Petitioner, and that dissolution is therefore not the only means by which a full return may be achieved. This is because the circumstances alleged in the Petition were before Ms.Brisbane when she negotiated and entered the 1998 Stockholders' Agreement. She accepted property now worth millions of dollars in partial performance of that Agreement. Her estate may not now renege and seek dissolution of the Corporation in order to avoid the terms of the Agreement.

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Finally, Petitioner's claims against James Alston, Jr. and his attorney arising out of the tender of $393,048.00 to the estate are simply frivolous. Petitioner does not and cannot demonstrate any harm from the offer of $393,048.00. What is clear is that both the dissolution action and the action against Alston and Buss are without basis in law or fact, and that an award of attorneys' fees and disbursements to Respondents is therefore appropriate.

Accordingly, Respondent respectfully requests that the Court dismiss the Petition in Index No. 17384/07 and the Complaint in Index No. 300513/2010, and direct that the September 2009 tender of $393,048 effectively accomplished the purchase of the Estate's shares by the Corporation at that time. Further, Respondent respectfully requests that it be awarded its fees and costs in connection with the defense of this action.

FACTS

This action arises out of the ownership and operation of a thriving Bronx business, the "McCall's Bronxwood Funeral Home, Inc." (the "Funeral Home"). The Funeral Home has been in continuous operation for more than 50 years, having repeatedly survived and continued beyond the lives of its founders, continuing to support the Bronx families that have come to rely upon its services.

Pursuant to a 1981 Stockholders' Agreement among founding stockholders Herbert T. McCall, Emma Brisbane and James H. Alston, Sr., each individual would own an equal one-third (1/3) interest in the Corporation. See Exhibit N. At that time, James Alston, Jr. (hereinafter "Defendant" or "Mr. Alston") was named Administrator of the Corporation. He has remained in that capacity for more than 30 years.

Included in the 1981 Stockholders' Agreement was a provision entitled "STOCK PURCHASE UPON DEATH". This provision established in pertinent part that upon the death of McCall, Alston Sr., or Brisbane, the Corporation shall purchase from the decedent's personal representatives all of the shares of capital stock of the Corporation owned by the decedent. See Exhibit N.

Mr. McCall died in 1985. In his will, he left his shares in the Bronxwood Funeral Home to Emma Brisbane. No judicial dissolution took place. Instead, in accordance with the express terms and requirement of paragraphs seven, nine, ten and eleven of the 1981 Stockholders' Agreement, Ms. Brisbane entered into a written agreement to sell the decedent's stock interest to the Corporation. See Exhibit O. Hugh W. Campbell, the Petitioner in this dissolution action, represented Ms. Brisbane in that transaction. See Exhibit O.

In 1987, the Corporation entered into a new Stockholders' Agreement evidencing the fact that the remaining shareholders were Emma Brisbane and James H. Alston Sr. See Exhibit "P" – November 2, 1987 Stockholders' Agreement). The 1987 Agreement was drafted by Mr. Campbell and contained a similar provision providing for the voluntary purchase of a decedent's interest by either the Corporation or the remaining shareholder, [Exhibit P, Paragraph 7, entitled "Right of Corporation to Purchase Shares upon Death of Stockholder"].

In 1993, the parties entered into an updated, third version of a Shareholders' Agreement. That Agreement, like the two preceding agreements, was primarily drafted by Mr. Campbell and contained similar provisions providing for the voluntary repurchase of a decedent's interest in the Corporation, [Exhibit "Q", 1993 Stockholder's Agreement,

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paragraphs 8, 9, and 10]. Then, in 1995, James H. Alston, Sr., Respondent's father, passed away, devising his fifty percent interest in the Corporation to his son, James H. Alston, Jr. At that time, Emma Brisbane stated that she intended to buy James H. Alston, Sr.'s interest in the Corporation in accordance with the terms of the 1993 Stockholders' Agreement, (See Exhibit "R" – letter dated September 22, 1995 from Emma Brisbane to James H. Alston).

However, in a subsequent conversation, Ms. Brisbane stated that in lieu of purchasing James H. Alston, Sr.'s shares she would consider allowing Mr. Alston to continue as Administrator and as the owner of the fifty percent interest in the Corporation. She suggested that Mr. Alston write to her attorney, Mr. Campbell, to accomplish this result. The result was the 1998 Stockholder's Agreement.

The 1998 Stockholder's Agreement was created between Mr. Alston, Ms. Brisbane and McCall's. (Exhibit "A"). The 1998 agreement, similar to the 1981 agreement, the 1987 agreement and the 1993 agreement, contains provisions governing the sale or transfer of stock upon the death of a shareholder. Specifically, paragraph eight, entitled "STOCK PURCHASE UPON DEATH" provides that:

> (a) Either stockholder shall be permitted to dispose of their shares in the corporation, in their will or trust, provided the legatee/beneficiary of said shares is a relative of decedent by blood or marriage, or trustee of said relative. In the event of the death of either stockholder, the personal representative(s) of the deceased stockholder shall immediately, upon issuance and receipt of Letters Testamentary or Letters of Administration, deliver to McCall's and to the remaining stockholder, a copy of such Letters.
>
> (b) In the event the above mentioned legatee/trustee/ beneficiary wishes to sell or transfer their shares of stocks, then said sale or transfer shall be in accordance with Paragraph 7 above.

Paragraph 7 of the 1998 Agreement provides:

> (a) If Alston, Jr. or Brisbane desires to sell his or her shares of stock (hereinafter referred to as "The Selling Stockholder") he or she shall be obliged to give notice of such intention to McCall's and to the other stockholder, which notice shall contain an offer to sell all of his or her shares of stock to McCall's, and McCall's shall have the right within thirty (30) days after receipt of such notice to make an election to purchase, and The Selling Stockholder shall sell all shares of McCall's owned by him or her at the purchase price determined pursuant to the terms set forth in this Agreement.

Read together, these provisions indisputably require that, if any shareholder, including an Estate "wishes to sell or transfer their shares of stocks" it must provide written notice of the intention to sell to both the Corporation and the other shareholder, and offer to sell all of the shares of stock to the Corporation at the price provided for in the Agreement. The Corporation and/or the remaining shareholder then have an exclusive right to purchase the shares.

The agreement provides in detail for the calculation of the price of the stock,[1] the manner and time period over which it must be paid,[2] any Estate's obligation to create an

[1] Paragraphs seven, eight, nine, and ten provide that the Corporation or the remaining shareholder may acquire the decedent's interest by making an initial payment of twenty-five percent of the value of the decedent's shares. The balance shall be payable over a seven and one-half year period, in ninety equal monthly installments, at the prime interest rate in effect on the date of death of the selling stockholder. Paragraph nine provides that the purchase price of the stock shall be determined by calculating the arithmetic average of the net income of McCall's for the five fiscal years immediately preceding the date of death of a selling shareholder or the date upon which the selling shareholder gives notice of its intention to sell, and by multiplying the quotient obtained thereby by four. The agreement further provides that one half of the value calculated pursuant to this formula shall be assigned to the value of each shareholder.

[2] Paragraph ten of the Shareholder's Agreement contains detailed provisions regarding the financing of the purchase price, the creation of a sinking fund, the calculation of a "Surplus" for the purpose of effectuating a purchase, the utilization of insurance proceeds, the recording of a mortgage, the treatment of a decedent's draw, the execution of promissory notes, the calculation of "Net Income" and the adjustment of the payment terms if the Corporation's Net Income should fall below a negotiated amount, a limitation on the issuance of additional shares, and a requirement that payment in full be made if the Corporation is sold during the pay out period, [Exhibit "I" - paragraph 10].

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escrow fund to cover tax liabilities,[3] and that disputes regarding the agreement are subject to binding arbitration.[4] See Exhibit A.

Ms. Brisbane died in 2005, naming Petitioner as executor of her estate. In her will, Ms. Brisbane appointed Petitioner as Executor of Ms. Brisbane's Estate, and required that the stock interest be converted to a monetary sum and split among various trusts, foundations and legatees. These provisions constitute a disposition of her interest in the funeral home, and demonstrate her wish to sell or transfer the stock as contemplated by the plain language of the Stockholders' Agreement. See Exhibit I. If there were any doubt, it was laid to rest with the Surrogate's Court's decision holding it:

> ORDERED ADJUDGED AND DECREED that the construction and effect of Article Eighth of the decedent's Last Will is that the decedent's intent was to permit her executor to distribute the proceeds from the sale of her interest in a certain funeral home directly to the Emma C. Brisbane Trust, after using the first $200,000 of proceeds to fund a charitable trust.

Exhibit J at 3.

In 2007, rather than give notice to the Corporation with an offer to sell the Estate's shares, as required by the Stockholders' Agreement, Petitioner instead filed a Petition for dissolution in this Court. Respondent answered, asserting affirmative defenses including that the 1998 Stockholders' Agreement controls and provides Petitioner with a full and fair return on Ms. Brisbane's investment.

In September 2009, notwithstanding Petitioner's failure to give the notice required by the Stockholders' Agreement, Respondent tendered the sum required by that Agreement to the Estate. In retaliation, Petitioner commenced a new action against

[3] Paragraph 11 of the 1998 Agreement establishes an "Escrow Fund" to be funded by the decedent's estate for the payment of potential tax liabilities which may be assessed during the three year period follow an election to purchase, [Exhibit "I" - paragraph 11].

[4] In addition, paragraph 20 of the 1998 Agreement provides that any dispute between the shareholders, or relating to any issue arising out of the Agreement, shall be resolved by binding arbitration.

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Defendants James Alston, Jr. and his attorney, Jeffrey D. Buss, personally, alleging that he had somehow been harmed by the offer, and claiming damages of triple the offer. This action, assigned Index Number 300513/2010, is plainly frivolous, as Petitioner can show no harm or damage resulting from the offer to purchase.

Finally, Respondents brought an action against Hugh W. Campbell, individually, to recover their attorneys' fees and for the damage wrought on the Corporation by the frivolous dissolution petition. That action is assigned Index Number 83796/2010.

ARGUMENT

STANDARD FOR SUMMARY JUDGMENT

Pursuant to CPLR § 3212, a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action(s) shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of the movant.

The proponent of a motion for summary judgment is required to make a prima facie showing of their entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 [1994]; Falah v. Stop & Shop Companies, Inc., 41 A.D.3d 638 [2d Dept 2007]; Paulin v. Needham, 28 A.D.3d 531 [2d Dept 2006].

Here, as demonstrated in detail below, there are no disputed issues of material fact, and Respondent and Defendants are entitled to judgment as a matter of law in these consolidated actions.

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I. THE DISSOLUTON PETITION SHOULD BE DISMISSED BECAUSE THE STOCKHOLDERS' AGREEMENT CONTROLS

This action is a naked attempt to avoid the consequences of the fully negotiated and partially performed 1998 Stockholders' Agreement pursuant to which the Estate is entitled to only $393,048 for its shares.

It is well settled in New York courts that written shareholders' agreements should be enforced even where there is a loss to the selling shareholders. Allen v. Biltmore Tissue Corp., 161 N.Y.S.2d 418 (1957). So long as the selling shareholder gets what he is entitled to receive under the shareholders' agreement, courts are reluctant to interfere with the implementation of the agreement, for such interference by the Court would open the door to costly and lengthy litigation and be disruptive of the settled principle that parties may contract among themselves to deal with future events in a predictable manner. Id.

Here, acting with full knowledge of the relevant circumstances, the parties entered the 1998 Stockholders' Agreement. Discovery made clear that the parties contracted with full knowledge of: (1) the manner in which James Alston, Jr. had managed and conducted the business of the Corporation since 1981; (2) the alleged financial improprieties presented as the basis for the Petition; (3) the probability of their own demise. This is unsurprising considering that the Corporation owns and operates a Funeral Home. Ms. Brisbane knew and understood the consequences of the agreement that she signed, and accepted the transfer of valuable real property in connection therewith in partial performance of the contract.

The Agreement provides clearly that if a stockholder, or his or her estate, wishes to sell or transfer shares, it must first offer them to the Corporation at the price provided by the Agreement.

> 7. DISPOSITION OF SHARES DURING LIFETIME
>
> (a) If Alston, Jr. or Brisbane desires to sell his or her shares of stock (hereinafter referred to as "The Selling Stockholder") he or she shall be obliged to give notice of such intention to McCall's and to the other stockholder, which notice shall contain an offer to sell all of his or her shares of stock to McCall's, and McCall's shall have the right within thirty (30) days after receipt of such notice to make an election to purchase, and The Selling Stockholder shall sell all shares of McCall's owned by him or her at the purchase price determined pursuant to the terms set forth in this Agreement.
>
> 8. STOCK PURCHASE UPON DEATH
>
> (a) Either stockholder shall be permitted to dispose of their shares in the corporation, in their will or trust, provided the legatee/beneficiary of said shares is a relative of decedent by blood or marriage, or trustee of said relative. In the event of the death of either stockholder, the personal representative(s) of the deceased stockholder shall immediately, upon issuance and receipt of Letters Testamentary or Letters of Administration, deliver to McCall's and to the remaining stockholder, a copy of such Letters.
>
> **(b) In the event the above mentioned legatee/trustee/ beneficiary wishes to sell or transfer their shares of stocks, then said sale or transfer shall be in accordance with Paragraph 7 above.**

Exhibit A.

Ms. Brisbane, and her estate, have demonstrated a wish to "sell or transfer" the shares. In her Last Will and Testament, Ms. Brisbane indicated her wish to sell or transfer the shares in order to fund various trusts. See Exhibit I. As held by the Surrogates' Court, such a sale is necessary to accomplish the intent of the Will. See Exhibit J.

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Upon such a "wish," paragraph 8b of the agreement (highlighted above) requires that the stockholder or her estate act according to paragraph 7(a) and offer the shares to the Corporation and permit it to exercise its option to purchase the shares "at the purchase price determined pursuant to the terms set forth in this Agreement." See Exhibit A.

Respondents have demonstrated, in no uncertain terms, that they would accept the required offer. See Exhibit K.

Rather than sell the shares at the price set by the Agreement, Petitioner instead filed the present Petition in a deliberate effort to bypass the Stockholders' Agreement that he drafted. Petitioner is well aware that the Will requires him to sell the shares and that this proceeding is commenced contrary to the intent of both the Will and the Agreement. Accordingly, Respondent respectfully requests that the Court compel Petitioner to comply with the terms of the Agreement.

II. THE STOCKHOLDERS' AGREEMENT AFFORDS PETITIONER A FAIR RETURN

Even if the Court is inclined to look beyond the Stockholders' Agreement, Petitioner cannot demonstrate entitlement to dissolution under BCL § 1104-a. The statute requires that the Court exercise discretion in deciding whether to award the "drastic" remedy authorized under this provision, and must consider certain delineated factors. See Gimpel v Bolstein, 125 Misc 2d 45, 49 [Sup Ct 1984]; Application of Topper, 107 Misc 2d 25, 28 [Sup Ct 1980] ("Despite a finding of 'oppressive' conduct, judicial dissolution of a thriving corporation is a matter of discretion and may not be undertaken lightly."). One such consideration is whether a Petitioner may obtain a fair return by means short of dissolution. BCL §1104-a (b) provides:

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(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.

NY BCL § 1104-a.

The Court must deny dissolution where an agreement between the parties provides the petitioner with a fair return on its investment. See Matter of Harris, 118 A.D.2d 646 [2d Dept 1986] (affirming denial of dissolution petition); DiPace v Figueroa, 223 AD2d 949, 951-52 [3d Dept 1996] ("There is every indication that Di Pace can obtain a fair return on her investment without resort to such a Draconian remedy—which would harm the other shareholders far more than it would benefit Di Pace—by selling her shares to Figueroa and Hoffman, who have signaled their willingness to update the price set by the parties' buy-out agreement and to purchase the shares in accordance therewith.").

The 1998 Stockholders' Agreement provides Petitioner here with a full and fair return on Ms. Brisbane's investment. This is plain because, during her life, Ms. Brisbane specifically, knowingly and voluntarily negotiated the terms of that agreement, with the assistance of Petitioner as her counsel. The 1998 Agreement is not one of adhesion, to which Ms. Brisbane was bound to agree with no input. Rather, it was aggressively negotiated by her counsel, and she had an equal, if not greater, bargaining position than McCall's and Alston (who was not yet a shareholder at that time). See Exhibits R, S.

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And she was no oppressed minority shareholder; she owned fifty percent (50%) of the stock in the Corporation, and was in a position to take it over entirely if she so chose upon the death of Alston, Sr. Ms. Brisbane would not have executed an agreement that did not afford her a fair return, and counsel would not have permitted her to do so.

In 1998, Ms. Brisbane, having been a stockholder in the Corporation since its founding in 1966, with full knowledge of her investment and the history and operation of the Corporation, including Mr. Alston, Jr.'s tenure as Administrator since 1981, agreed to the specific provisions of the 1998 Agreement. In exchange for the transfer of certain real property and the specific provisions of the 1998 Agreement, she would permit Mr. Alston to inherit his father's shares and a 50% interest. The real property, now worth several million dollars, was transferred to her prior to her sale of any shares.

Furthermore, at or about the same time she entered the Agreement, Ms. Brisbane drafted a Last Will and Testament that required the sale of the shares. She undoubtedly knew that such sale would be pursuant to the terms of the Agreement she had just reached with the Corporation and Mr. Alston, and planned accordingly for the orderly administration of her estate. Petitioner's commencement of this proceeding thwarts that intent. Petitioner has now kept the estate open for more than seven years, and has kept it embroiled in costly litigation in both this Court and the Surrogates' Court for at least five.

Ms. Brisbane has already obtained a partial return on her investment of a parcel of real property worth several million dollars. Petitioner is indisputably entitled to payment under the Stockholders' Agreement of $393,048 more. This is a full and fair return on her investment, as a matter of law. Accordingly, under Matter of Harris, 118 A.D.2d 646

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[2d Dept 1986] and DiPace v Figueroa, 223 AD2d 949, 951-52 [3d Dept 1996], the Court must dismiss the dissolution Petition.

III. ISSUES OF FACT REGARDING THE ALLEGATIONS OF FRAUD, OPPRESSION, WASTE OR LOOTING ARE NOT MATERIAL

As discussed in detail above, where an agreement between the parties provides the petitioner with a fair return on its investment, it is irrelevant whether the Petitioner can otherwise demonstrate entitlement to relief under BCL §1104-a. See Matter of Harris, 118 A.D.2d 646 [2d Dept 1986]; DiPace v Figueroa, 223 AD2d 949, 951-52 [3d Dept 1996]. As the Court explained in Harris:

> [T]he fact that the petitioner may have been able to demonstrate grounds for dissolution (Business Corporation Law §1104-a [a]), does not necessarily establish that the court abused its discretion in declining to order the involuntary dissolution of the respondent corporation . . . . A review of the record reveals that the petitioner may obtain a fair return on his investment pursuant to the buy-out provisions of the shareholder's agreement. Accordingly, under the circumstances of this case, nisi prius properly denied the dissolution petition.

Matter of Harris, 118 AD2d 646, 647 [2d Dept 1986].

Here, it is immaterial whether Petitioner is able to demonstrate entitlement to dissolution, because the 1998 Stockholders' Agreement is a feasible alternative to dissolution whereby the Petitioner "may reasonably expect to obtain a fair return on [Ms. Brisbane's] investment." NY BCL § 1104-a. Accordingly, any issues of fact Petitioner may raise surrounding the allegations in the Petition allegedly giving rise to a cause of action for dissolution are immaterial on this motion for summary judgment.

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IV. The Accounting Cause Of Action Is Barred By The Statute of Limitations

Petitioner's second cause of action seeks an accounting to determine whether or not payment in full was made of a mortgage recorded against the property on April 1, 1986. This claim is barred both by the statute of limitations and the doctrine of accord and satisfaction.

First, a proceeding to compel an accounting is governed by a six-year statute of limitations. NY CPLR §213(1); In re Meyer, 303 AD2d 682, 683 [2d Dept 2003]. Here, the subject mortgage provides that payment in full was due by March 1, 1996 (See Exhibit "L"). Thus, any claim that the mortgage was not paid should have been commenced within six years of March 1, 1996, or by March 1, 2002. Accordingly, the accounting claim is untimely and must be dismissed.

Second, where the parties agree to payment of a sum certain in satisfaction of a particular claim, and the payment is made and accepted, future assertion of the underlying claim is barred by the doctrine of accord and satisfaction. 19A N.Y. Jur. 2d Compromise, Accord, and Release § 1; Rein v. Wagner, 49 Misc. 2d 683, 268 N.Y.S.2d 659 (Sup. Ct. 1965) modified, 25 A.D.2d 356, 269 N.Y.S.2d 578 (1966) aff'd, 18 N.Y.2d 989, 224 N.E.2d 728 (1966)("An accord and satisfaction is an agreement between two parties under the terms of which an unresolved account is settled by some stipulated payment.").

The 1998 Stockholders' Agreement, signed after a lengthy and acrimonious dispute covering all extant disputes between the parties, constitutes an account stated as to any issues or disputes prior to that agreement. See Exhibits A, R, S. The parties

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entered the 1998 Stockholders' Agreement in full satisfaction of any and all outstanding claims that they may have had against each other.

IV. DEFENDANTS ALSTON AND BUSS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE COMPLAINT UNDER 300513/2010

Where a plaintiff has not been harmed, the Court lacks jurisdiction to hear his complaint, and must therefore dismiss it. Ovitz v Bloomberg L.P., 18 NY3d 753, 758 [2012] (affirming dismissal for lack of jurisdiction where plaintiff suffered no harm or damage). As the First Department has succinctly explained, "If there are no damages, there can be no cause of action." Zletz v Outten & Golden, LLP, 18 AD3d 322, 323 [1st Dept 2005].

Petitioner-Plaintiff's claim is unintelligible, but boils down to an assertion that he was somehow harmed by the offer of $393,048.00, which he refused. See Exhibit D. It is undisputed that no money changed hands. Absent an allegation of loss or damage, the Court must dismiss the claim for lack of jurisdiction.

To the extent Petitioner-Plaintiff's claim is premised on the Court's contempt power, Respondents respectfully submit that the record clearly demonstrates that the offer was made in good faith and in what counsel believed were its clients' best interests. Petitioner-Plaintiff's vituperative assertions to the contrary are entirely unjustified personal attacks that are undeserving of a detailed response.

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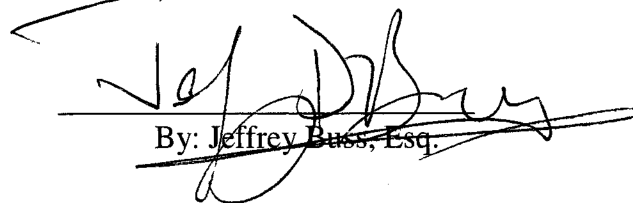
CONCLUSION

For the foregoing reasons, Respondent-Defendants are entitled to judgment as a matter of law. The Stockholders' Agreement controls here, as the documentary evidence and Petitioners' conduct plainly demonstrate a wish and intention to sell the Estate's shares. Further, the Stockholders' Agreement is a complete defense to the dissolution petition, because it affords Petitioner a full and fair return on Ms. Brisbane's investment in the Corporation. She simply would not have signed it otherwise. Finally, the action against Defendants Alston and Buss individually must be dismissed for lack of jurisdiction. Accordingly, Respondent-Defendants respectfully request that the Court dismiss the Petition in Index No. 17384/07 and the Complaint in Index No. 300513/2010, and direct that the September 2009 tender of $393,048 effectively accomplished the purchase of the Estate's shares by the Corporation at that time. Further, Respondent respectfully requests that it be awarded its fees and costs in connection with the defense of this action.

Dated: March 15, 2013
Yonkers, New York

SMITH, BUSS & JACOBS LLP



By: Jeffrey Buss, Esq.