To Be Argued By:
Leroy Wilson, Jr.

Bronx County Clerk's Index Nos. 17384/07, 300513/10 and 83796/10

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Index No. 17384/07

In the Matter of the Application of

HUGH W. CAMPBELL, as the Preliminary Executor of the Estate of EMMA C. BRISBANE,

Petitioner-Appellant,

against

For the Judicial Dissolution of

MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Respondent-Respondent.

(Additional Caption on the Reverse)

BRIEF FOR PETITIONER/PLAINTIFF-APPELLANT

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Index No. 300513/10

HUGH W. CAMPBELL as the Executor of the Estate of EMMA C. BRISBANE,

Plaintiff-Appellant,

against

JEFFREY D. BUSS, ESQ. and JAMES H. ALSTON, JR.,

Defendants-Respondents.

Index No. 83796/10

JAMES H. ALSTON, JR., and MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Third-Party Plaintiffs,

against

HUGH W. CAMPBELL, Individually,

Third-Party Defendant.

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QUESTIONS PRESENTED

1) Did the lower court err in granting Respondents-Defendants' motion for summary judgment and thereby dismissed Appellant-Plaintiff's petition for involuntary dissolution of McCall's Bronxwood Funeral Home, Inc. under BCL §1104-a where:

(a) the court erroneously construed the 1998 Stockholders' Agreement to dictate that Emma Brisbane's Estate sell her shares and that the Agreement provided a procedure and mechanism for a fair return on Brisbane's investment even though the express language of the Agreement did NOT mandate the sale of the Brisbane Shares and did NOT provide a procedure and mechanism for the sale of Brisbane's corporate shares either under 1998 Stockholders' Agreement or in the event of a judicial dissolution?

(b) the court failed to consider Appellant-Petitioner's *prima facie* evidence of undisputed material facts and disputed issues of material facts concerning Respondents-Defendants' illegal, fraudulent and oppressive conduct against shareholder Emma Brisbane and against her Estate?

(c) there is no adequate alternative remedy to protect the rights and interests of Appellant-Petitioner, and where there are disputed issues of material fact regarding the fair value of Emma Brisbane's corporate shares?

(d) there has been a co mplete deterioration of relati onship between the shareholders to warrant involuntary dissolution?

2) Did the lower court err in failing to hold an evidentiary hearing g iven the parties' conflicting assertions regarding value of the corporate shares?

Hugh W. Campbell, as Executor of the Estate of Emma C. Brisbane ("Appellant") appeals from the decision and order of the Supreme Court of Bronx County, dated December 21, 2016 (the "Decision") which granted Respondents Jeffrey D. Buss, Esq. ("Buss") and James H. Alston, Jr. ("Alston Jr." collectively referred to hereafter together with Buss as the "Respondents") summary judgment and dismissed Appellant's petition for judicial dissolution of McCall's Bronxwood Funeral Home, Inc. ("MBFH" or "Company") under Business Corporation Law §1104-a.

PRELIMINARY STATEMENT

At the heart of the underlying appeal is a consolidation of three actions derived from and part of Appellant's Dissolution Action (hereafter defined) that seeks to balance the equities so that Emma Brisbane's ("Ms. Brisbane") heirs are not swindled out of their inheritance by the bad acts of Ms. Brisbane's co-shareholder Alston Jr. following Ms. Brisbane's death.

Ms. Brisbane spent her life building MBFH into a lucrative local business. Alston Jr. conveniently inherited his shares from his father, Alston Sr., and promptly looted and stole from the company's assets. For over a decade, Alston Jr. misappropriated funds from MBFH's corporate assets, made unauthorized cash withdrawals from both MBFH's bank accounts and safe, mismanaged the business by regularly failing to file federal and state tax returns and other financial statements, and otherwise engaged in offensive conduct

against his fellow shareholder and officer, Ms. Brisbane. Alston Jr.'s collection of bad acts are well-documented and largely undisputed by Respondents.

After discovering a long list of Alston Jr.'s illegal, fraudulent, deceptive and bad-faith acts, Ms. Brisbane sought to protect her assets and the beneficiaries to her Last Will and Testament from Alston Jr. by negotiating and drafting the 1998 Agreement (hereafter defined). The 1998 Agreement intentionally omitted and otherwise revised a buy-back provision that was included in previous stockholder agreements with the original shareholders which permitted MBFH to exercise an automatic option to repurchase the shares of a deceased shareholder. Ms. Brisbane and Alston, Jr., through their respective attorneys, drafted the 1998 Agreement so that the automatic option to repurchase no longer existed. Rather, the provision in the 1998 Agreement allowed either shareholder's heirs and beneficiaries, including Ms. Brisbane's, to hold on to MBFH's shares and only sell them IF the heirs/beneficiaries truly intended to sell, and demonstrated such intent through an affirmative act of providing a notice of intent to sell to MBFH.[1]

Throughout these proceedings, Alston Jr. and his attorney Buss have managed to twist what is otherwise a clear and unambiguous agreement to

[1] The Honorable Court should take notice that during the course of the drafting of the Shareholder's Agreements, James Alston, Jr. was an attorney duly admitted to practice law before the courts of the State of New York; having being admitted in the First Department on March 28, 1966. Additionally, Alston, Jr. was also employed as the Administrator of the MBFH.

suit their own greed. Respondents improperly introduced past stockholder agreements and parsed out phrases from a decree in the Probate Action (hereafter defined) to point and shout, "Look, look, what is written in the 1998 Agreement should be disregarded because that's not what we meant! Ms. Brisbane meant something else than what is written in the 1998 Agreement!" Sadly, Ms. Brisbane is deceased. And unfortunately, her efforts during her lifetime to negotiate and draft a contract that would be secure from misconstruction, was, in fact, misconstrued and twisted far away from the actual words written and intended in the agreement. Appellant and Ms. Brisbane's beneficiaries have been denied their rights and the fruits of Ms. Brisbane's efforts by the lower court's Decision.

The lower court erred in granting summary judgment to Respondents and dismissing Appellant's Dissolution Action because:

- the lower court ignored the established law of contract construction by reviewing extrinsic evidence outside the four corners of the 1998 Agreement despite the clear, complete and unambiguous language of the 1998 Agreement. The lower court's review of this extrinsic evidence completely altered Brisbane and Alston Jr.'s true intent, as such intent was written and agreed to at the time the Agreement was executed and before Ms. Brisbane's death;

- the lower court failed to consider the extensive factual findings of Alston Jr.'s illegal, fraudulent and oppressive conduct, as well as the deteriorated state of the parties' relationship when it forced an entirely self-serving valuation of the Brisbane Shares as calculated solely by Alston Jr. Alston Jr.'s valuation was unverified by a neutral third-party, were calculated based on unverified statements, and made using disputed methods set forth in a contested provision in the 1998 Agreement, and entirely ignored the authenticated findings of a third-party accounting firm's valuation report submitted by Appellant, thereby depriving Appellant of their right to equity and fairness in the action; and

- the lower court erred in failing to order a valuation hearing to determine the fair value of the Brisbane Shares in light of the parties' conflicting assertions and where Justice Barbone's two active court orders had previously expressly ordered a valuation hearing.

Based on the foregoing, and as will be set forth in detail below, the lower court's decision and order dated December 21, 2016 must be reversed.

NATURE OF CASE:
STATEMENT OF FACTS

The MBFH Shares and Stockholders Agreement

McCall's Bronxwood Funeral Home ("MBFH") was established around January 1966 by James H. Alston, Sr. and Herbert McCall. (R. 21, ¶9).

By an Agreement made April 22, 1981, Herbert McCall ("McCall"), James H. Alston Sr. ("Alston Sr.") and Emma Brisbane ("Brisbane") were elected to be the only members of the Board of Directors of MBFH and assigned the following roles: McCall was elected President, Alston Sr. became Vice President and Brisbane became Secretary and Treasurer. (R. 330-340). McCall died on June 21, 1985. (R. 342). Alston Jr. acted as the Administrator of MBFH since the early 1980s until the death of Emma Brisbane. (R. 21, Lns 6-10). Lionel Lewis, CPA acted as the accountant of MBFH from in or about 1982. (R. 673, Pg. 32, Lns 6-8).

Pursuant to the terms of the 1986 Agreement and 1987 Stockholder's Agreement (collectively referred to hereafter with the 1981 Agreement and the Stockholder Agreement dated December 31, 1993 as the "Past Stockholder Agreements"), Alston Sr. and Ms. Brisbane became the surviving stockholders after MBFH purchased back McCall's shares of the corporate stock. (R. 342-344). Each owned 50% of the outstanding shares of stock of MBFH. (R. 342-344). Alston Sr. assumed the role of President/Treasurer and Brisbane became Vice President/Secretary. (R. 342-344). Alston Sr. died on March 11, 1995. (R. 49).

After the death of Alston, Sr., Brisbane became the sole officer of MBFH, and its sole surviving shareholder. (R. 49).

Pursuant to the 1993 Agreement between Alston, Sr. and Ms. Brisbane, MBFH exercised its rights to purchase the shares of Alston, Sr. (R. 391).

Thereafter, MBFH and Ms. Brisbane entered into an agreement wherein Alston, Jr. would acquire a 50% interest in MBFH. (R. 49). Alston, Jr. represented that he was the sole distributee of Alston, Sr., and that he was authorized to use the Estate of Alston, Sr.'s interest in the MBFH to secure his 50% interest. (R. 49). Consequently, after extensive negotiations, the 1998 Stockholders Agreement was executed between Brisbane and Alston, Jr. (R. 49-67).

The Agreement, inter alia, gave Brisbane 50% interest in MBFH (the "Brisbane Shares") and Alston Jr. 50% interest in MBFH. (R. 49). The Agreement also, inter alia, contains a provision that permits either shareholder to dispose of their respective shares of stock in the corporation in their will or trust in the event of either's death. (R. 54). Specifically, ¶8 of the Agreement states as follows:

> 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 transfer shall be accordance with Paragraph 7 above.

(R. 54).

Unlike the Past Stockholder Agreements between Brisbane and prior shareholders, the 1998 Agreement did NOT give the surviving shareholder and MBFH the automatic right to purchase the deceased shareholder's shares.[2] (R. 330-389, 54). Rather, the 1998 Agreement permitted the decedent to dispose of his/her shares either by will or trust to the shareholder's legatee/beneficiary by blood or marriage. (R. 54). If such legatee/trustee beneficiary wished to sell or transfer their shares of stock, they were allowed to do so in accordance with conditions set forth in ¶7 of the Agreement. (R. 54).

Paragraph 7 of the Agreement stated the conditions that must be met before the decedent shareholder's legatee/beneficiary could sell or transfer their shares of stock. (R. 52). Specifically, ¶7 of the Agreement states as follows:

[2] The 1998 Stockholder's Agreement was the ONLY agreement between Brisbane and Alston, Jr. Alston, Jr. was not a party to the other mentioned Agreements.

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.

(R. 52).

In sum, ¶7 expressly states the following preconditions for sale of the shares stock: (1) "if" either shareholder "desires" to sell their respective shares he or she must first give notice of this intent to sell to MBFH and to the other stockholders; and (2) such notice of intent must contain an offer to sell. (R. 52). Contrary to the language in ¶8, the use of the phrase "shall be obliged" makes the giving of the notice of intent to sell a requirement and a condition precedent to the selling of the shares. (R. 52, 54). Only after an intent to sell was conveyed to MBFH by written notice of intent, could a right to purchase the offered shares be triggered in MBFH, and MBFH could then purchase the selling shares within 30 days after receipt of the notice of intent to sell. (R. 52).

It is undisputed that neither Brisbane's Estate nor any of her legatee/trustee beneficiaries ever expressed an intent to sell the Brisbane Shares, and no one ever gave written notice of an intent to sell the Brisbane Shares as was required under the Agreement.

Deterioration of Relationship and Alston Jr.'s Culpable Conduct

From in or about 1995, after Alston, Sr. death, Brisbane noticed irregularities in MBFH's accounting records and financials. (R. 915, 917-927). Brisbane retained Ian Nelson, a certified public accountant to review MBFH's books and records. (R. 1183, ¶4). Ms. Brisbane suspected that Alston Sr. had not kept proper books of the corporation and that he was stealing from the company in concert with Alston Jr. (R. 1183, ¶4). Mr. Nelson reviewed, among other things, MBFH's tax returns, bank accounts, identified all sources of income, bank statements, W-2s, and internal financial statements. (R. 1204-1207). Mr. Nelson's review revealed severe discrepancies, unverifiable transactions and unaccounted cash receipts, including but not limited to approximately $1,569,000 in cash that were missing and unaccounted for in any of the documents. (R. 1184, 1187 ¶6,10). Among other things, Mr. Nelson found:

- Enormous discrepancy between earnings Alston Jr. reported on the tax returns and what he determined using existing contracts, interviews with

prospective clients and the "Director's Assistant Software" program for software funeral homes;

- Closing balances on the 1995 tax returns that were not verifiable and pertained to inventory that were overstated accounts payable and receivables;
- Cash from burials or chapel rentals that were never deposited into MBFH's bank account;
- Alston Jr. frequently removed cash from MBFH's safe and amounts that were removed were never verified or accounted for;
- Pages were frequently removed from the receipt books so cash collections were not accurate or verifiable;
- Alston Jr. withheld bank statements used to reconcile bank accounts;
- At least 25% of MBFH's annual receipts were in cash and they were never recorded in MBFH's bank account;
- Tax returns and other financial filings were frequently delinquent resulting in penalties and interests from the IRS and the New York State Department of Taxation and Finance;
- Alston Jr. regularly misrepresented MBFH's financial state and the number of cases processed during board meetings;
- Alston Jr. consistently paid himself significantly more, usually double Brisbane's pay, consistently over Brisbane's objections. Specifically,

from 1990 to 1994 Alston Jr. was paid $1,007,000 while Brisbane was paid only $475,000.00 even though Brisbane was a 50% shareholder and Alston Jr. was not a shareholder at that time;

- Significant penalties and fees were paid to both the federal and state tax agencies;
- Significant penalties were paid to settle claims by the New York State Department of Taxation and Finance due to payroll irregularities;
- Company funds were used to pay penalties and fees to the New York State Commissioner of Taxation and Finance to pay off judgment liens against Alston Jr. personally and his family for delinquent tax filings;
- Approximately $1,569,000.00 in cash was and still is unaccounted for to date.

(R. 1199-1201, 1204-1207).

In addition to Mr. Nelson's findings, Lionel Lewis who is MBFH's CPA, testified at his Examination Before Trial March 14, 2012 that he served as the accountant for the funeral home for approximately 30 years. (R. 673, Pg. 32, Lns. 6-8). He further testified that as of 2002, Alston Jr. had a secret bank account called the Tripp 1st Funeral Home Investment account from which he made numerous large sum withdrawals from 1995 through 2005 without Ms. Brisbane's knowledge or consent. (R. 688, Pg. 109 Ln 11, Pg. 110 Lns 10-11; R. 1200).

It was discovered that Alston Jr. withdrew a total of at least $737,131.22 from the Tripp 1st Funeral Home Investment Account #3Y9-025951 from 1996 to 2005. (R.900-903).

Lionel Lewis also testified that Alston did not disclose the existence of the Tripp accounts to him until 2007.[3]

In light of Mr. Nelson's findings, in January 2002 Brisbane authorized Mr. Nelson to conduct a detailed review of all cash receipts for calendar years 2001 and 2002. (R. 1206). However, not only did Alston Jr. failed to cooperate, but he actively withheld bank statements and financial statements and otherwise attempted to disrupt Mr. Nelson's review. (R. 1206). Ultimately, in January 2003 Alston Jr. attempted to forcibly remove records from Mr. Nelson's office and threatened that there was a conflict of interest that prevented Mr. Nelson from continuing his work and terminated the relationship. (R. 1206).

Alston Jr.'s deceptive practices, lack of cooperation, lack of transparency and hostile conduct towards Brisbane were not limited to Mr. Nelson but had been an ongoing problem since early 1995. (R. 915, 917-927). Indeed, from 1995 through Ms. Brisbane's death, Alston Jr. failed to respond to

[3] Between July 11, 1996 June 2005 Alston, Jr. withdrew a total of $737,131.22 from the Tripp 1st Funeral Home Investment Account # 3Y9-025951 over these 9 years, which he had opened secretly and did not disclose to Lionel Lewis, the McCall's Bronxwood Funeral Home's 30 year Accountant, until 2007. (R. 688-689)

Ms. Brisbane's countless requests, through her attorney Hugh Campbell, for review of tax returns, income and expenditure statements and financial statements that accounted for total account receivables. (R. 917-927). Although Ms. Brisbane regularly pushed for the implementation of monthly accounting reporting procedures and repeatedly requested MBFH hire a certified public accountant to certify the accuracy of MBFH's reportings, Alston Jr. refused. Alston Jr. simply stated that "unnecessary accounting procedures" were a "waste" of the corporation's assets. (R. 921). However, MBFH suffered serious and repeated penalties and late fees paid to the federal and state taxing authorities. (R. 921-923). Moreover, MBFH did not post any increased revenues during the time of Alston Jr.'s tenure as MBFH's CEO and COO and therefore Ms. Brisbane did not receive any increases in her officer's draw, let alone compensation for cost of living increases despite repeated requests. (R. 923).

The company's need for an accountant to review and audit the finances of the corporation became so dire that Ms. Brisbane offered to pay the cost of the accountant personally. (R. 923). Between the death of Alston Sr. in 1995 and the execution of the 1998 Agreement, in 1998 Ms. Brisbane hired the services of Ian Nelson, CPA to audit the books and finances of the funeral home. (R. 1183). Notwithstanding the fact Lionel Lewis was the accountant for the funeral home for over thirty years, Mr. Lewis did not help to alleviate the

issues surrounding Alston Jr.'s lack of transparency or accounting discrepancies[4]. (R. 1202).

Brisbane's Will and the Probate Proceeding

On August 31, 2005, Ms. Brisbane died. (R190, ¶ 5; R. 674, Page 36, Lines 8-12). Ms. Brisbane's Last Will and Testament (the "Will") was duly admitted to probate in the Westchester County Surrogate's Court before Justice Anthony A. Scarpino, Jr. on July 26, 2007 under index number 3083/2005(G). (the "Probate Action"). (R. 159). The Will named Hugh W. Campbell, Brisbane's attorney as successor trustee of Brisbane's named trust and Executor of the Will.[5] (R. 152-158). The Will devised and bequeathed to a number of her heirs and beneficiaries, including her Trust, of which Richard Brisbane and Virginia Brisbane are beneficiaries and are parties to the Probate Action (hereafter defined). (R. 152-158).

[4] Mr. Lewis testified that he maintained data from the filing of his clients' tax returns – including MBFH – on his computer for many years but, coincidentally, lost ALL of this data in 2010 when his three-year-old grandson was "playing around with my computer." (R. 672, Pg. 27, Lns 16-25 and R. 672, Pg. 28, Lns 2-10). Mr. Lewis claimed that he never kept any back up of any his clients' tax data or even paper copies of such data, and that the ONLY place such data was maintained was on his computer – which was now gone forever due to his grandson's "playing around."

Forensic Review and Valuation of the Brisbane Shares

During the tenure of the underlying proceeding and in connection with the dissolution action, Appellant retained a third-party forensic accountant, Citrin Cooperman & Company LLP ("Citrin Cooperman"), since September 17, 2007 to review MBFH's books and records, and to value the Brisbane Shares. (R. 985-980). Like Mr. Nelson, Citrin Cooperman also found significant and serious discrepancies in the tax returns and financial documents of MBFH during their review. (R. 993- 996). In relevant part, Citrin Cooperman found:

- Although Alston Jr. provided tax returns for the years 2000 through 2007, the returns were questionable because a 2003 form was used to prepare a 2005 tax return with the year 2003 which was printed in the upper right-hand corner of the form was hand changed to read 2005;
- Tax returns for years 2003 through 2005 were never filed even though Alston Jr. represented to Citrin Cooperman that the returns were filed. When Citrin Cooperman requested copies of filed tax returns from the IRS, IRS responded to the request by stating that it had no record of tax returns for the tax years 2003 through 2005;
- MBFH's revenue were not recorded in the electronic QuickBooks files provided by Alston Jr. Although work papers were requested from

[5] A hearing was held on June 25, 2007 whereby the parties to the Probate Action agreed by stipulation, which was so ordered by the Court, that inter alia, Mr. Campbell as the

Lionel Lewis, MBFH's CPA, Lewis stated, that he did not have any work papers which support the information on the tax returns that were filed for the years 2001 and 2004. Lewis also testified that when he prepares the tax returns for MBFH, Alston Jr. usually informs him of the assets orally, which he then uses to prepare the returns. (R. 686; Pg. 103, Lns 6-25; and Pg 104, Lns 2-20).

- Although MBFH collects advances for pre-planning services, Alston Jr. failed to provide any information on the amount of the pre-planning services and such transactions were not recorded in QuickBook files and not recorded in any balance sheet; and
- They were unable to complete an analysis for July 12, 2007 because they never received a real estate appraisal from Alston Jr.

(R. 993-996).

By valuation report sworn to on April 12, 2013, Citrin Cooperman valued the Brisbane Shares at $1,256,000.00 as of August 30, 2005. (R. 986-991).

executor of the Brisbane Will shall bring an action under the Business Corporation Law to dissolve MBFH before the Bronx County Supreme Court. (R. 932-936).

NATURE OF CASE:
PROCEDURAL HISTORY

The Probate Proceeding

By petition dated July 31, 2007, Ms. Brisbane's grandson Richard Brisbane III filed a petition seeking validity, construction and effect of the Will. (R. 159).

Specifically, the petition sought the following: (i) to determine that Article Third of the Will, is of no force and effect, or alternatively, that Article Third be constructed as referring to decedent's grandson Richard Brisbane III and not to decedent's son Richard Brisbane, Jr. who predeceased Ms. Brisbane; (ii) to determine that Article Eight of the Will permits the distribution of the remainder of the proceeds from MBFH, after funding a certain charitable trust, directly to the Emma C. Brisbane Trust, an inter *vivos* trust created by instrument dated August 25, 1988; and (iii) to award petitioner's counsel reasonable legal fees and actual disbursements incurred in prosecuting this application. (R. 159-160). Virginia Brisbane, who is Brisbane's granddaughter and a beneficiary under the Will also joined the probate proceedings and commenced multiple accounting proceedings and motions from 2007 to date objecting to the estate's position. (R. 159-160).

In connection with Richard Brisbane III's petition, the Surrogate's Court issued a Decree dated June 11, 2008 (the "June 11, 2008 Decree")

whereby the Surrogate's Court ordered, inter alia, that: (i) Article Third of the Will was not an effective revocation or amendment of the inter vivos Emma C. Brisbane Trust and that the Trust proceeds be distributed in accordance with the Trust instrument; (ii) Article Eight of the 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 $200,000.00 of proceeds to fund a charitable trust; and (iii) request for attorneys' fees was denied. (R. 161).

The BCL §1104-a Dissolution Proceeding

On July 13, 2007, Appellant as the Executor of Emma Brisbane's Will, filed a petition for involuntary dissolution under BCL §1104-a ("Dissolution Action") citing as bases, inter alia, Alston Jr.'s years of mismanagement of MBFH, waste, diverting of corporate assets for non-corporate purpose, lack of return on Brisbane's reasonable expectation of growth of the company and Alston Jr.'s lack of transparency of MBFH's loss and profits and failure of Alston Jr. to allow access to the books and records of MBFH. (R. 68-78). In response, Respondents filed a motion to dismiss the Dissolution Action under CPLR 3211, arguing among other things that a cause of action for an accounting is time barred and for an order compelling petitioner to sell the Brisbane Shares.

By decision and order dated June 18, 2008, Justice Barone, before whom the action was assigned, held that there were factual issues that must be determined before a decision could be rendered and converted Respondent's motion to dismiss to one for summary judgment. (R. 86-87, ¶10). Citing authority that a hearing is generally required when there is some contested issue determinative of a BCL §1106, 1107, Justice Barone ordered a full evidentiary hearing to determine the factual issues (the "June 18, 2008 Order") [6]. In furtherance of the hearing, on September 22, 2008, the Court appointed Mr. John D'Alessandro as referee to supervise discovery of the Dissolution Action. (R.87, ¶11).

Respondents' Unauthorized Attempt to Purchase the Brisbane Shares

In direct contravention of the Court's June 18, 2008 Order, by letter dated August 28, 2009, Alston Jr. notified Appellant that, MBFH "hereby elects to purchase the entire interest of the Estate of Ms. Brisbane in McCall's Bronxwood Home. (R. 951-953). The Estate's shares of stock shall be delivered and transferred to McCall's on the 30th day of September, 2009, at 10:00a, at the office of the Corporation." (R. 951). The letter also annexed a calculation of what Respondents claimed the Brisbane Shares were worth – $393,048.00. (R. 953). The calculation was self-serving, unsupported by any documentation, or verified by a third-party accountant. In fact, based upon the

[6] We respectfully request the Court to take judicial notice of Justice Barone's June 18, 2008

examination before trial testimony of Alston, Jr. and Lewis, no accountant reviewed or verified the calculations. At his examinations before trial, Alston, Jr. testified that Lewis, MBFH's accountant, gave him the numbers to make the calculations. (R. 592-593 [Pages 154-158]). At his examination before trial, Lewis denied that he gave Alston, Jr. the figures, and in fact testified that he had no discussions with Alston, Jr. regarding Alston, Jr's preparation or calculation of the purported buy-out figures. (R. 688-689 [Pages 112-113]). The letter itself notifying Appellant of the "closing" was unilateral, unsolicited, unauthorized, and in direct contravention to the 1998 Agreement and the Court's June 18, 2008 Order that denied Respondent's request to purchase the Brisbane Shares and ordered an evaluation hearing specifically to determine the value of the Brisbane Shares. (R. 86-87, ¶ 10). Therefore, Appellant did not appear at Alston Jr.'s unauthorized "closing" on September 30, 2009.

Nonetheless and disregarding Appellant's letter rejecting the unilateral "offer" of payment, Respondents went ahead with the "closing." Based on a transcript dated September 30, 2009, the only persons in attendance outside of the court reporter were Respondents Alston Jr. and his attorney Buss. (R. 162-178). Incredibly, Respondents stated on the record that they were "tendering payment" for the Brisbane Shares and claimed that Appellant ignored the offer. (R. 166). Respondents stated a tender of $393,048.00 to

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and July 30, 2010 decision and orders, which is referenced in Respondent's motion papers.

purchase all of the Brisbane Shares. (R. 166). Appellant has at all times rejected the tender, and objected to the entire transfer proceeding as unauthorized, improper, contrary to the stockholder's agreement and in bad, as is evidenced by the instant court actions by the appellant.

The July 30, 2010 Order

As a result of Respondent's bad-faith attempt to usurp the Brisbane Shares without Court authorization, Appellant served a Summons and Verified Complaint dated January 21, 2010 to Respondent for, inter alia, violation of Judiciary Law §487 and bad faith. (the "2010 Action"). (R. 84-104). On March 5, 2010, Respondents served a Verified Answer with Counterclaims, and on March 18, 2010 Appellant served Verified Reply to Countercla ims. (R. 106-124, 126-128). Subsequently, Respondents filed a Third-Party Summons and Complaint dated March 10, 2010 ("Third-Party Action"). (R. 130). By the Court's December 21, 2016 decision and order, the Third-Party Action was severed and is not part of the underlying appeal. By Notice of Motion dated April 2, 2010, Appellant moved to consolidate the three actions. Respondents sought a joint trial of all three actions rather than a consolidation.

The Court held a hearing on July 30, 2010 and held, among other things, that due to the "many thorny issues arising out of this litigation that an initial hearing should be held to determine the fair value of the stock of the corporation." (the July 30, 2010 Order). (R. 86-87, ¶ 10-12). The Court granted

Appellant's motion for consolidation of the three actions under Index No.17384/07; noted that a JHO was never appointed to conduct a full evidentiary hearing in compliance with the Court's June 18, 2008 Order and held that the Court itself would conduct the hearing. (R. 86-87, ¶ 10-12). The scheduled the conference for the hearing for August 23, 2010. Unfortunately, the parties did not receive notice of the new hearing date until September 1, 2010 – after the scheduled hearing date.

Since that time, the underlying action was assigned and reassigned to at least three different Justices before it was ultimately reassigned to Justice Elizabeth Taylor. Although an evidentiary hearing was not held during this time, Justice Barone's June 18, 2008 Order and the July 30, 2010 Orders were never vacated and remained in force. In reliance on the fact that an evidentiary hearing will be held in accordance with Justice Barone's rulings, Appellant filed a Note of Issue on January 18, 2013. (R. 145). Immediately thereafter, on March 18, 2013 Respondents moved for, inter alia, summary judgment dismissing the Dissolution Action and sought a judicial declaration that the September 30, 2009 unauthorized "tender" of $393,048.00 accomplished the purchase of the Brisbane Shares. (R. 17).

Appellant filed opposing papers on April 29, 2013. (R. 485). By decision dated December 21, 2016, the Court granted Respondents' motion for summary judgment and thereby dismissed the Dissolution Action without a

hearing on the Shares' value, dismissed the 2010 Action, and severed the Third-Party Action (the "SJM Decision"). (R. 8-16). The Court declined to hold that Respondents' tender of $393,048.00 effectively purchased the Brisbane Shares. (R. 16).

Notice of Entry of the SJM Decision was served on January 4, 2017 and Notice of Appeal was filed on February 3, 2017. (R. 5-6). In addition, Appellant served and filed a Notice of Motion to Renew and Reargue dated January 30, 2017.

ARGUMENT

POINT I

THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING SUMMARY JUDGMENT AND DISMISSING THE INVOLUNTARY DISSOLUTION PETITION

A. The Applicable Standard of Review and the Lower Court's Failure to Adhere to the Established Law

It is a well-established that summary judgment is a drastic remedy that should only be awarded where there is no triable issue of fact. Millerton Agway Coop., Inc. v. Briarcliff Farms, Inc., 17 N.Y.2d 57, 61, 215 N.E.2d 341, 343 (1966). The party seeking summary judgment must make a *prima facie* showing of entitlement as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 325, 501 N.E.2d 572, 574 (1986).

The failure to do so requires denial of the motion regardless of the insufficiency of the opposing papers. Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643 (1985).

The lower court erred in granting Respondents' motion for summary judgment to dismiss the petition for involuntary dissolution under BCL §1104-a. Respondents failed to establish that there were no material issues of fact in dispute and failed to refute through admissible evidence *any* of the evidence of illegal, fraudulent and oppressive conduct submitted by Appellant. Rather, Respondents' entire basis for summary judgment rests on their interpretation of the 1998 Stockholder's Agreement – the differing interpretation of which is at the very heart of the underlying action. As a matter of law, the lower court improperly adopted Respondents' version of how the Agreement should be interpreted rather than reading the Agreement as it was written – within its four corners.

Moreover, it is unclear whether the court acknowledged or disregarded Appellant's *prima facie* showing of Alston Jr.'s pattern of systemic bad acts. Indeed, in its SJM Decision, although the lower court recognized that Appellant has submitted various financial documents, business records and deposition testimony that demonstrated Alston Jr.'s illegal, fraudulent and oppressive conduct, as well as his conduct of looting and wasting corporate assets, the lower court simply began the analysis at BCL §1104-a(b), again,

adopting Respondents' incorrect interpretation of how the Brisbane Shares should be valued under the Agreement. If the lower court recognized that Appellant has indeed made a *prima facie* showing of illegal, fraudulent, oppressive, looting and wasteful conduct by Alston Jr., the court should have also reviewed whether the relationship between the parties have deteriorated so much as to compel dissolution.

As the lower court correctly noted, there are voluminous pages of deposition transcripts, prior orders, third-party evaluation reports, affidavits, correspondences, and agreements, among others. It is undisputed that there are many disputed material facts, and little of these disputed material facts have been adjudicated or resolved. Additionally, the lower court ignored the prior Decisions and Orders of Justice John A. Barone, wherein he opined that there were various triable issues of fact, which would preclude summary judgment. (R. 86-87, ¶ 10). The lower court also ignored the fact that Respondents failed to meet its burden for the granting of Summary Judgment, by failing to come forward with undisputed evidence in admissible form as to how they arrived at the sum of $393,048.00 to purchase Brisbane's shares. In light of this, the lower court's granting of summary judgment and wholesale adoption of Respondents' arguments without supporting law or evidence, deprives Appellant (and in effect the beneficiaries of the Brisbane Estate) a right to trial

on the disputed material issues of fact and unjustifiably renders moot the years of litigation and cost that Appellant has endured.

B. The Lower Court Misconstrued the 1998 Stockholder's Agreement as a Matter of Law

(1) The Agreement is Clear On Its Face

It is well-settled law that a contract is to be construed according to the parties' intent which is generally discerned from the four corners of the document itself. MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002).

The Agreement is clear on its face that MBFH does not have an automatic right to purchase the Brisbane Shares. The Agreement states that in the event of a shareholder's death, the MBFH's shares may be disposed by way of their will or trust. (R. 54). Furthermore, the Agreement unambiguously states that should the shareholder's legatee/trustee/beneficiary "wishes to sell or transfer their shares of stocks," then such sale or transfer shall happen according to ¶7 of the Agreement. (R. 54). Specifically, Paragraph 8 of the Agreement states as follows:

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 transfer shall be accordance with Paragraph 7 above.

(R. 54)

Paragraph 8(b) does not mandate the sale of the Shares but merely permits the sale of the Shares. Indeed, the Agreement uses the phrase "in the event" to unambiguously state that the sale of the Shares is simply an option and not a directive. (R. 54). Likewise, the phrase "wishes to sell or transfer" further clarifies that the sale of the Shares is an option to exercise should the intent to sell arise. (R. 54). Moreover, the use of the phrase "shall be permitted" in Paragraph 8 creates the voluntary authority to sell the Shares "in the event" the option to sell the Shares is exercised and is not a requirement to sell. (R. 54).

(2) Appellant Never Gave Notice of an Intent to Sell

Paragraph 7 of the Agreement is a conditional provision that articulates the conditions that must be met in the event the "legatee/trustee beneficiary" of the Shares exercises the option to sell the Shares and the method by which the "legatee/trustee beneficiary" must convey the intent to sell. (R. 52). Specifically, Paragraph 7 states:

> 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.

(R. 52).

A condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." (Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 690, 660 NE 2d 415, (1995)

[internal citations omitted]. The Courts have held that the use of terms such as "if," "unless" and "until" constitutes "unmistakable language of condition." Id. at 691. Express conditions must be literally performed; substantial performance will not suffice.

Paragraph 7 expressly states the following conditions: (1) "if" either shareholder "desires" to sell their respective shares he or she "shall be obliged," i.e., must, first give notice of this intent to MBFH and to the other stockholders; and (2) such notice must contain an offer to sell. (R. 52). Contrary to the language in ¶8, the use of the phrase "shall be obliged" makes the giving of the notice of intent to sell a requirement and a condition precedent to sell the Shares. (R. 54). MBFH's right to purchase the selling shares is triggered only after both conditions are met, and MBFH then has the right to elect to purchase the shares within 30 days after receipt of such notice of intent to sell. (R. 52, 54).

Contrary to the lower court's decision, the Beneficiaries acting by and through Appellant, the Executor of the Will, never intended to sell the Shares. In fact, it is an undisputed fact that Appellant never intended to sell the Shares and that Appellant never conveyed the intent to sell because it never gave the required notice of the intent to sell as was required under the terms of the Agreement. In fact, the Respondent never acknowledged receiving such a notice of intent to sell.

Therefore, the lower court erred when it held that MBFH had a right to purchase the Shares even though Appellant never gave notice of intent to sell the Shares which was a condition precedent to trigger a right to purchase by MBFH. It was also error for the lower court to hold that Appellant intended to sell the Shares when it never conveyed its intent to sell the Shares by giving notice with an offer of sale as required under ¶7.

(3) The Lower Court Erred in Allowing Extrinsic Evidence

As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement. W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157,163, 565 N.Y.S.2 d 440, 443 (1990); Rodo litz v. Neptune Paper Prods., Inc., 22 N.Y.2d 383, 386, 239 N.E.2d 628, 630 (1968) ("the rule is well settled that a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract.").

In the case at hand, the lower court erred when it supplemented the terms of the otherwise complete, clear and unambiguous terms of the Agreement by extrinsic evidence especially where one of the parties to the Agreement is deceased and cannot participate. The lower court erred in giving weight to the Surrogate's Court's June 11, 2008 Decree, and to the terms of the

Past Stockholder Agreements between different parties, to determine the intent of the parties to the 1998 Agreement at the time it was executed.

The Surrogate's Court's June 11, 2008 Decree did NOT opine on the issue of whether Ms. Brisbane intended to sell the Brisbane Shares as set forth in the Agreement. Rather, the issue before the Surrogate's Court was whether Article 8 of the Will permitted distribution directly to the Emma C. Brisbane Trust after the first $200,000.00 of the proceeds were used to fund the Emma C. Brisbane Foundation charitable trust. (R. 159-161). The issue the Court considered is clearly stated on the first page of the Decree. (R. 159). Reading the Decree in its entirety clarifies that the only issue before the Surrogate's Court concerned distribution rights and the order of distribution – not an interpretation of Ms. Brisbane's intent as written in the 1998 Stockholder's Agreement regarding the sale of the Brisbane Shares. The issue before the Surrogate's Court was the interpretation of Brisbane's Last Will and Testament and NOT the 1998 Stockholder's Agreement.

Furthermore, it was erroneous for the lower court to have reviewed the terms of all of the Past Stockholder Agreements between the different shareholders since 1981 as part of her analysis to determine whether MBFH had a right to purchase the Brisbane Shares at the time of Ms. Brisbane's death in 2005. That said prior agreements were not properly before the Honorable Court in as much as they were not authenticated, and as such were not in admissible

form. The only operative and controlling agreement between Ms. Brisbane and Alston Jr. is the 1998 Agreement. As set forth above, unlike the Past Stockholder Agreements, MBFH did not have an automatic right to purchase the Brisbane Shares under the 1998 Agreement. ¶¶7 and 8 unambiguously states that if the Beneficiaries "wishes" to sell or transfer the Brisbane Shares they will be permitted to do so only after they gave MBFH notice of intent with an offer of sale. (R. 54). The fact that this provision concerning Stock Purchase Upon Death is starkly different than prior provisions on the same topic in the Past Stockholder Agreements clearly shows Ms. Brisbane and Alston Jr.'s intent to revise the 1998 Agreement so that MBFH does NOT have an automatic right to purchase the Brisbane Shares. To determine otherwise devoids the provision and the 1998 Agreement of its true intent and what is unambiguously written.

Based on the overwhelming evidence of financial misstatement and self-dealing, Ms. Brisbane had already become suspicious of Alston Sr. and Alston Jr.'s bad-faith dealings of MBFH and other oppressive conduct. (R. 1183, ¶4). Therefore, it is not unreasonable that Ms. Brisbane would have negotiated and drafted the 1998 Stockholder's Agreement differently than the Past Stockholder Agreements in order to eliminate MBFH's automatic purchase right. Ms. Brisbane put in safeguards to ensure that the sale of the Brisbane Shares would only occur IF her Beneficiaries intended to sell them, and to

require that affirmative steps be taken – i. e., the giving of a not ice of intent to sell with an offer of sale – before MBFH's right to purchase could be triggered.

In addition, the Agreement contains a merger clause. ¶19 provides:

> 19. Entire Agreement
>
> This instrument constitutes the entire Agreement between the parties; there are no terms , obligations, covenants, or condit ions other than those c ontained herein. T his Agreement may not be extended, terminated, amended, al tered, modified or changed in any way, except by a signed written consent by the parties hereto.

(R. 63)

It is well-establi shed that where a contr act contains a mer ger clause, a court is obl iged to require full application of the parole evidence rule in order to bar the introduction of extrin sic evidence to var y or contradict the terms of the writing. Prim ex Int'l Corp . v. Wal-Mart Stores , 89 N.Y. 2d 594, 599, 679 N.E.2d 624, 657 (1997). Based on the forego ing, it was clear error for the lower court to have reviewed the terms of the Past Stockholder Agreements and the June 11, 2008 Decree to alter the terms of the otherwise complete, clear and unambiguous Agreement.

(4) Valuation of the Brisbane Shares under ¶9 is Improper

As set forth above, Appellant never conveyed the requisite intent with an offer of sale to have triggered MBFH's right to purchase the Brisbane Shares. See Point II(B)(1)-(3) above. Therefore, an analysis of the value of the Brisbane Shares under ¶9 in inappropriate because ¶9 pertain the calculation of MBFH's shares in the event the company purchases those Shares. (R. 54).

Assuming *arguendo* that an analysis under the "totality of circumstances" under BCL §1104-a(b) is necessary, valuation of the Brisbane Shares put forth by Respondents is unreliable and unsupported by a neutral third-party accountant. Moreover, contrary to the lower court's holding in footnote 4, Appellant has always disagreed with Respondent's valuation amount of $393,048.00. (R. 15). The lower court's holding that Appellant will "obtain a fair return on Brisbane's investment under paragraphs seven, eight and nine of the 1998 agreement" is erroneous because the holding is based on a misconstruction of the 1998 Agreement as well as the intent of the parties to the 1998 Agreement at the time the 1998 Agreement was executed. (R. 15). Moreover, the Court's wholesale adoption of an amount of $393,048.00 put forth by Appellant's adversaries as the "fair" value of the Brisbane Shares over the objection of Appellant and the valuation of $1,256,000.00 submitted by Appellant's third-party forensic accounting firm of Citrin Cooperman cannot be reasonably be deemed "fair." In support of their motion for Summary Judgment,

the Respondents failed to come forth with any undisputed evidence in admissible form to substantiate their claim that $393,048.00 is fair value of Appellant's share.

It is submitted that such a valuation requires expert analysis and opinion. Additionally, the experts should be required to articulate the basis of their opinion and the documents/information they utilized to arrive at their opinion. Unlike the professional expert valuation submitted by Appellant, there was no such valuation by the Respondents, as such, their arbitrary and conclusory valuation must be rejected.

C. Appellant Sets Forth a *Prima Facie* Case of Illegal, Fraudulent and Oppressive Conduct

Pursuant to Section (a) of BCL §1104-a, the Court may order a judicial dissolution of a closed corporation on a petition by shareholder(s) of twenty percent or more of all outstanding corporate shares, if one or more of the following grounds are established:

> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward s the complaining shareholders; (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

Business Corporation Law §1104-a

Courts have held that "oppressive conduct" within the meaning of BCL §1104-a(1) may be defined either as "a violation by the majority of their reasonable expectations" or as "conduct which fair-minded people would find objectionable." Gimpel v. Bolstein, 125 Misc. 2d 45, 50-51, 477 N.Y.S.2d 1014, 1018 (Queens County. Sup. Ct. 1984) citing Topper v. Park Sheraton Pharmacy, Inc., 107 Misc. 2d 25, 433 N.Y.S.2d 359 (N. Y. Cty. Sup. Ct. 1980); Mardikos v. Arger, 116 Misc. 2d 1028, 457 N.Y.S.2d 371 (Kings Cty. Sup. Ct. 1982). In general, the "conduct based" definition is used where the corporation has been in existence for a period of time, and the "reasonable expectation" definition is used when it is necessary to examine the spoken and unspoken understanding upon which the founders relied upon when they entered into the venture. See Gimpel v. Bolstein at 51. Similarly, given that MBFH is not in the early stages of its business, it is appropriate to apply the "conduct based" definition here.

The record is replete with countless undisputed evidence of Alston Jr.'s bad acts. (R. 993-996; 1183-1201; 1204-1207). Indeed, since at least 1995, and later after he assumed Alston Sr.'s shares, Alston Jr. has engaged in a pattern of bad acts that would constitute "oppressive conduct." Id. Most of these bad acts are at their worst arguably criminal or fraudulent, and at their best in bad-faith and deceptive.

Both Ian Nelson and Citrin Cooperman who are certified public accountants and forensic accountant have revealed that Alston Jr. has made irregular tax filings to the IRS. (R. 993; 1184). Citrin Cooperman found that Alston Jr. altered the tax document for year 2003. (R. 993). It also found that although Alston Jr. represented that he filed taxes from 2003 through 2005, a verification with the IRS revealed that Alston Jr. did not file tax returns from 2003 through 2005 and had misrepresented to Citrin Cooperman. (R. 993). Furthermore, both Mr. Nelson and Citrin Cooperman found that revenue was being under-recorded, and payment for pre-planning services were not being reported properly. (R. 993-996; 1184-1201; 1204-1207) Mr. Nelson further attested that employee hours were consistently understated. (R. 993-996; 1184-1201; 1204-1207).

Mr. Nelson attested that based on his review of MBFH's books and records, he believed Alston Jr. was appropriating corporate funds for his own personal benefit and that he did so knowingly with the intent to deceive Brisbane. (R. 1205-1206). He attested that Alston Jr. made cash withdrawals from the MBFH safe without authorization or knowledge from Brisbane. (R. 1205-1206). Pages were frequently removed from the receipt books so cash collections were not accurate or verifiable, and Alston Jr. withheld bank statements used to reconcile bank accounts. (R. 1205-1206). Nelson also found that at least 25% of MBFH's annual receipts were in cash and they were never

recorded in MBFH's bank account. (R. 1205-1206). In all, Nelson attested that at least $1,569,000.00 in cash receipts have never been accounted for to date. (R. 1206).

Throughout his tenure, Alston Jr. misrepresented MBFH's financial state, including yearly revenue to Ms. Brisbane. For many years, Alston Jr. also refused to hire an independent certified accountant/auditor and ignored Brisbane's repeated request for disclosure of tax filings and financial statements. (R. 915, 917-927). He regularly paid himself a salary that was double that of Brisbane and refused to increase her salary to adjust for cost of living. (R. 917-927). Moreover, Alston Jr. mismanaged and wasted MBFH's corporate assets by regularly filing tax returns and corporate filings late thereby incurring significant penalties and interest, and by paying penalties to settle claims for payroll irregularities. (R. 917-927).

As can be seen from a series of letters from Brisbane's Attorneys to Alston, Jr. ranging from November 9, 1998 through July 14, 2005, there was an ongoing issue regarding the true income, assets and finances of MBFH. There was also an ongoing refusal on the part of Alston, Jr. (who was also employed as the administrator of (MBFH) since the early 1980s to address the discrepancies and retain an independent Certified Accountant to resolve the issues. Notably, in July 2005, (the month before Brisbane's death) the ongoing issues regarding the discrepancies in the income and expenditures for certain

prior years were still being addressed. (R. 917-927). This continued bad behavior by Alston, Jr. makes his valuation of the business, based on the disputed figures that Brisbane and her CPA questioned prior to her death, makes Alston, Jr's valuation more suspicious and unreliable.

This collection of demonstrated bad acts by Alston Jr. sufficiently satisfies what "fair-minded people would find objectionable." Gimpel v. Bolstein, 125 Misc. 2d at 50-51. Respondents' oppressive conduct is largely unrefuted by any admissible evidence. Based on the foregoing, it is clear that the lower court erred when it granted Respondents' summary judgment and dismissed the Dissolution Action because Appellant has set forth a *prima facie* case of illegal, fraudulent and oppressive conduct to warrant dissolution under BCL §1104-a.[7]

D. <u>There is no Alternative, Adequate Remedy</u>

The lower court erred when it found that the Respondents have established a remedy other than dissolution because such "remedy" is merely a force-down of a valuation calculated and created by Respondents and unsupported by any neutral accounting.

[7] The illegal, fraudulent and oppressive conducts outlined herein further substantiates the Appellant's arguments in B. (4) above that the valuation submitted by the Respondents is flawed and unreliable, and should be rejected.

As set forth in Point I(B) above, the lower court erred in the construction of the Agreement. The Agreement does not provide a provision by which the Brisbane Shares can be calculated because the sale of the Brisbane Shares did not occur during her lifetime, and because none of the Beneficiaries have elected to sell the Brisbane Shares. Rather, to the contrary, as demonstrated by the filing of the Dissolution Action Appellant, on behalf of Brisbane's Beneficiaries, has elected NOT to sell the shares and instead seek dissolution and a valuation of the Brisbane Shares upon dissolution. Therefore, the lower court's reliance on ¶9 of the Agreement to provide "alternative remedy" is erroneous.

In addition, Appellant has submitted a valuation report by a third-party forensic accountant Citrin Cooperman which has valued the Brisbane Shares at $1,256,000.00 (R. 986; 991). On the other hand, assuming *arguendo*, even if the Court were to consider Respondents' value of the Brisbane Shares at $393,048.00 – which it should not since the Agreement does not provide for it – Respondents have submitted no documentary evidence to support their valuation of the Brisbane Shares at $393,048.00 In fact, given that both Ian Nelson, a CPA, and Citrin Cooperman, a certified forensic accountant, have independently concluded that Alston Jr. has been less than forthcoming about MBFH's books and records, any valuation submission conducted by Respondents are not reliable.

The crux of the dispute between Appellant and Respondents concerns claims of fraud, conversion, misappropriation and deceit by Respondents concerning the financials of the Corporation which directly impacts the value of the Brisbane Shares. Therefore, the lower court's wholesale adoption of Respondents' self-serving and much contested calculation of the Brisbane Shares is contrary to established law, perverts the concept of equity and justice, and does little to protect the Brisbane Estate's rights and interests sufficiently to be deemed "adequate, alternative relief."

E. There Has Been a Complete Deterioration of Relationship

The Court of Appeals has held that although the courts have "broad latitude in fashioning alternative relief," "when fulfillment of the oppressed petitioner's expectations by those means is doubtful, such as when there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution." In re Kemp & Beatley, Inc., 64 N.Y.2d 63, 74, 473 N.E.2d 1173, 1180 (1984). See also, In re Imperatore, 128 A.D.2d 707, 709 (2d Dept. 1987) ("dissolution was warranted since the complete "deterioration in relations" between the petitioner and the majority shareholders made it unlikely that the petitioner's reasonable expectations could be fulfilled by an alternative remedy.").

As set forth in Point I (B) and (C) above, the alternative remedy ordered by the lower court is disputed, unfounded in law and contract, is unjust

and highly inequitable to Appellant and the Beneficiaries. Moreover, as has been demonstrated throughout these proceedings, the relationship between Appellant (as well as the Beneficiaries) and Respondents are irreparable. Based on all of the findings by Citrin Cooperman, Ian Nelson and the testimonies by Alston Jr. himself as well as his accountant Lionel Lewis, it is unlikely that Respondents would be able to fulfill any of Appellant's reasonable expectations by an alternative remedy.

The ultimate evidence of parties' deteriorated relationship is Respondents' bad-faith attempt to purchase the Brisbane Shares during the pendency of the dissolution action and a court-ordered valuation hearing. By its June 18, 2008 Order and the July 30, 2010 Order, the Court (Barone, J.) had denied Respondents' motion to dismiss and their request to purchase the Brisbane Shares, and expressly ordered an evidentiary hearing to "determine the fair value of the shares and underlying business of McCalls Bronxwood Funeral Home, Inc." (R. 86-87, ¶10-12). At that time, the Barone Court recognized that there were many questions of fact that needed to be resolved and therefore ordered that discovery be conducted and a valuation hearing be scheduled. (R.86-87, ¶10-12).

Irrespective of this clear mandate from the Court, on September 30, 2009 – just two months after the Court issued the July 30, 2010 Order that directed the parties submit to an evidentiary hearing – Respondents attempted to

circumvent the evidentiary hearing, disregard the Court's order, and deprive Appellant of their day in court by unilaterally scheduling a "closing" at which Respondents "tendered" a sum of $393,048.00 to purchase all of the Brisbane Shares. (R. 162-178). Although Appellant has since then denounced and rejected the "tender" as well as Respondents' underhanded and highly improper conduct, Respondents continue to attempt a cram-down of their baseless valuation of the Brisbane Shares on Appellant.

Respondents' actions were unquestionably in bad-faith and arguably in contempt of both the Court's June 18, 2008 Order and the July 30, 2010 Order. The value of the Brisbane Shares is at the heart of the Dissolution Action. The Court recognized this and had twice ordered evidentiary hearings to determine the fair value of the Shares as well as the business. (R. 86-87 ¶10-12). Respondents' actions fly in the face of deference that should be afforded to the Court as well as to the parties. In particular, Jeffrey Buss, Esq. who is a respondent in this action as well as an attorney should have known better.

Indeed, Respondents' insistence on the legitimacy of the unauthorized and improper "tender" of payment, as well as their self-serving calculation – unsupported by any proper valuation report or analysis – should demonstrate that the parties cannot continue their relationship, that there is no longer any trust or respect between the parties, and that any and all action by

Respondents will be clouded by suspicion of bad-faith, underhandedness and deceit as demonstrated by their September 30, 2009 conduct.

POINT II

THE LOWER COURT ERRED IN FAILING TO HOLD AN EVIDENTIARY HEARING

A. An Evidentiary Hearing Should Have Been Held Given the Parties Conflicting Assertions Concerning Valuation

It has been held that where shareholders make conflicting allegations concerning allegations regarding the dissolution of the corporation, the court must direct an evidentiary hearing. Application for Dissolution of Whitehall Art Co., 6 A.D.2d 399, 400, 178 N.Y.S.2d 388, 340 (1st Dept. 1958); In re Fancy Windows & Doors Mfg. Corp., 244 A.D.2d 484, 664 N.Y.S.2d 113 (2d Dept. 1997). See also, In re Kemp & Beatley, Inc., 64 N.Y.2d 63, 473 N.E.2d 1173 (1984).

The lower court erred when it adopted in whole-sale Respondents' self-serving and unverified valuation of the Brisbane Shares. The value of the Brisbane Shares has been at the heart of the Dissolution Action, if not the entire Consolidated Actions. Suffice it to say, Appellant and Respondents do not agree and have different calculations concerning the value of the Brisbane Shares. The value of the Brisbane Shares as of the date of her death, August 30, 2005, were valued at $1,256,000.00 by Citrin Cooperman, a forensic accountant

and CPA firm. (R. 986, 991). Respondents' self-calculation of the value of the Brisbane Shares is $393,048. 00. In light of the parties' vastly conf licting assertions, an evidentiary hearing should have been held.

B. The Doctrine of Law of the Case Prescribes that Justice Barone's Prior Orders Directing an Evidentiary Hearing Should Be Followed

The doctrine of law of the case addresses the potentially preclusive effect of judicial determinations made in t he course of a singl e litigation before final judgment. People v. Evans, 94 N.Y.2d 499, 727 N.E.2d 1232 (2000). The l aw of the case has been aptly characteri zed as "a kind of intra-action res judicata" (Siegel, New York Practice § 448, at 723 [3d ed.]) and is "designed to el iminate the i nefficiency and disorder that would fo llow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case. Id. at 504.

In the case at hand, Just ice John A. Barone had twice ordered a valuation hearing to determine the value of the Brisbane Shares, first in its June 18, 2008 Order and again explicitly by his July 30, 2010 Order. (R. 86-87, ¶10-12.). Although Appellant subm itted the valuation report of the forensic accounting firm of Citrin Cooperman, an evidenti ary hearing to determine the fair value of the B risbane Shares as directed by the Court was never held. T his has been a near 10-year litigation where the case was assigned and reassigned to several different justices before ultimately being assigned to Justice Taylor. Therefore, it was an ad ministrative oversight that the heari ng was never held.

However, neither the June 18, 2008 Order or the July 30, 2010 Order were ever vacated. Therefore, the directives of both Orders are still in effect and are the law of this case which should be followed.

Based on the foregoing, the lower court erred when it granted Respondents' summary judgment and dismissed the Dissolution Action without an evidentiary hearing when the parties have vastly conflicting assertions concerning the value of the Brisbane Shares, and where an evidentiary hearing was in fact previously ordered.

CONCLUSION

Based on the foregoing and the evidence in the Record, Appellant Hugh W. Campbell, as the Executor of the Estate of Emma C. Brisbane, respectfully requests the Court reverse the Supreme Court's Decision/Order dated December 21, 2016 granting Respondents' motion for summary judgment and dismissing Appellant's petition for dissolution of McCall's Bronxwood Funeral Home, Inc. under Business Corporation Law §1104-a, and dismissing Appellant's Jud. Law §487 2010 Action, and his request for attorneys fees and costs; and returning the Dissolution Action to the Supreme Court so that an evidentiary hearing may be held to determine the fair value of the Brisbane Shares, and a for a trial in the Jud. Law §487 2010 Action.

Dated: New York, New York
May 23, 2018

R espectfully submitted,

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