SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X

ANTHONY SENECA,

Plaintiff,

-against-

EMIL CANGRO and CARLO CANGRO,

Defendants.

----------X

Index No. 152031/2017

ATTORNEY AFFIRMATION SUPPORTING MOTION TO DISMISS ACTION

Michael V. Gervasi, an attorney duly admitted to the practice of law in the State of New York, affirms the following to be true under penalties of perjury:

1. I am a partner with the Law Firm of **Scamardella, Gervasi, Thomson & Kasegrande, P.C.,** attorneys for **Emil Cangro** (**"E. Cangro"**) and **Carlo Cangro** (**"C. Cangro"**) (collectively "**Defendants**"). As such, I am fully familiar with the facts and circumstances of this case.

2. I submit this affirmation *supporting* **Defendants'** instant motion seeking the dismissal of the Complaint; and for such other and further relief as this Court deems just and proper, including but not limited to the costs and reasonable attorneys' fees related to this action.

RELEVANT FACTS & PROCEDURAL POSTURE

A. Relevant Facts

3. **Plaintiff** is the uncle of **Defendants.** *See* Exhibit A (Affs).

4. **Plaintiff** and **Defendants** are co-owners of three (3) family businesses, to wit:

   (i) C. Seneca Construction, Inc. (**"C. Seneca"**);
   (ii) Clove Road Development, LLC (**"Clove"**); and
   (iii) Flagg Place Development, LLC (**"Flagg"**) (collectively "**Companies**"). *See* Exhibit A (Affs).

5. **Defendants** own a collective twenty-five percent (25%) of the respective **Companies.** *See* Exhibit A (Affs).

6. On May 24, 2016, **Defendants,** through their former legal counsel, commenced three (3) separate actions in the Supreme Court, Richmond County, seeking to dissolve the **Companies,** under Index Numbers 85036/2016, 85037/2016, and 85039/2016, respectively (collectively "**Initial Actions**"), by electronically filing Verified Petitions. *See* Exhibit B (e-filed document list)[1].

7. On May 31, 2016, **Defendants,** again through their former legal counsel, interposed Amended Petitions in the **Initial Actions.** Exhibit B (e-filed document list).

8. At issue here, on September 12, 2016, **Defendants'** former legal counsel interposed Second Amended Petitions ("**Subject Petitions**") in the **Initial Actions.** Exhibit B (e-filed document list); *see also* Exhibit C (Subject Petitions). **Plaintiffs** object to certain alleged statements in the **Subject Petitions.** *See, generally,* Complaint.

9. On August 11, 2017, this firm, after substituting in as **Defendants'** counsel, withdrew the **Subject Petitions**, on consent of opposing counsel, and discontinued the **Initial Actions** without prejudice. *See* Exhibit D (Withdrawal Orders).

10. On February 15, 2018, **Plaintiffs**, through this firm, re-commenced three (3) separate actions in the Supreme Court, Richmond County, seeking to dissolve the **Companies,** under Index Numbers 85034/2018, 85035/2018, and 85036/2018, respectively (collectively "**Current Dissolution Action**"), by electronically filing Verified Petitions. *See* Exhibit E (e-filed document list)[2]. Discovery is pending in the **Current Dissolution Action.**

B. Procedural Posture

11. On September 8, 2017, **Plaintiff** commenced the instant action by electronically filing a

[1] Towards conserving judicial resources and avoiding duplicative and voluminous submissions to the court; **Defendants** annex a copy of the **Initial Actions'** e-filed document list, as Exhibit B, in lieu of the various filings, to evidence the filing of the various Petitions and the respective dates of the filings.

[2] Again, towards conserving judicial resources and avoiding duplicative and voluminous submissions to the court; **Defendants** annex a copy of the **Current Dissolution Action's** e-filed document list, as Exhibit E, to evidence the filing of the various Petitions and the respective dates of the filings in *that* action.

Summons and Verified Complaint with the Supreme Court, Richmond County. *See* Exhibit F (Complaint).

12. On September 27, 2017, **Plaintiff** filed an Amended Verified Complaint with the Supreme Court, Richmond County. *See* Exhibit F (Complaint).

13. On July 6, 2018, **Plaintiff** interposed a motion seeking a default judgment. *See* Exhibit G (e-filed document list).

14. On July 16, 2018, **Defendants** interposed a Verified Answer with Affirmative Defenses to the Amended Complaint. *See* Exhibit G (e-filed document list); *see also* Exhibit H (Answer).

15. On July 31, 2018, counsel for the parties stipulated, *inter alia,* to withdraw **Plaintiff's** motion seeking a default judgment against **Defendants.** *See* Exhibit G (e-file document list).

16. **Defendants** now move to dismiss the Complaint in its entirety.

STANDARD OF REVIEW

17. CPLR § 3211 (a) (7) allows for the dismissal of a claim where, "the pleading fails to state a cause of action" N.Y. C.P.L.R. § 3211 (a) (7) (McKinney 2018). When "a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." *Sokol v. Leader*, 74 A.D.3d 1180, 1180-81 (2d Dep't, 2010). However, when evidentiary material submitted by a defendant is used to consider a motion to dismiss under CPLR § 3211 (a) (7), the standard becomes "whether the proponent of the pleading *has* a cause of action, not whether he has stated one." *Id* at 1181-82 (emphasis added); *quoting, Guggenhimer v. Ginzburg,* 43 N.Y.2d 268, 275 (1977); *see also, Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 682-83(2d Dep't. 2012). Therefore, **Defendants** must establish that New York does not recognize the legal theories **Plaintiff's** Complaint asserts against **Defendant.**

ANALYSIS

I. THIS COURT SHOULD DISMISS ALL OF PLAINTIFF'S DEFAMATION CLAIMS BECAUSE STATEMENTS IN LEGAL PROCEEDINGS ARE ABSOLUTELY PRIVILEGED AND CANNOT BE THE PREDICATE FOR DEFAMATION CLAIMS

18. This court should dismiss **Plaintiff's** defamation claims because those claims are impermissibly based upon privileged statements. To "prove a claim for defamation, the plaintiff must show: (1) a false statement that is (2) published to a third party (3) *without privilege or authorization* and (4) that plaintiff is caused harm, unless the statement is one of the types of publications actionable regardless of harm." *Cardali v. Slater,* 56 Misc.3d 1003, 1008 (N.Y. Co. Sup. Ct. 2017) (emphasis added); *citing Dillion v. City of New York,* 261 A.D.2d 34, 38 (1st Dep't 1999); *see also Levin v. Epshteyn,* 43 Misc.3d 1211 (A) (Kings Co. Sup. Ct. 2012) (same); Exhibit F, ¶ 37 (Complaint) (alleging **Defendants'** statements are "without privilege or authority"). It is *well* "established that "[s]tatements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are *absolutely privileged*, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be resolved in the proceeding." *Levin,* 43 Misc.3d 1211 (A) (emphasis added); *quoting Kilkenny v. Law Off. of Cushner & Garvey, LLP*, 76 A.D.3d 512, 513 (2d Dep't 2010); *see also Toker v. Pollak*, 44 N.Y.2d 211, 219 (1978); *Martirano v. Frost*, 25 N.Y.2d 505, 507 (1969); *Wiener v. Weintraub*, 22 N.Y.2d 330, 332 (1968); *Cullin v. Lynch*, 113 A.D.3d 586, 586 (2d Dep't 2014); *Sklover v. Sack*, 102 A.D.3d 855, 856 (2d Dep't 2013); *Wilson v. Erra*, 94 A.D.3d 756, 756-757 (2d Dep't 2012); *Matter of Gaeta v. Incorporated Vil. of Garden City*, 72 A.D.3d 683, 684 (2d Dep't 2010), *lv denied* 15 N.Y.3d 711 (2010); *Rabiea v. Stein*, 69 A.D.3d 700, 700 (2d Dep't 2010); *Rufeh v Schwartz*, 50 A.D.3d 1002, 1004 (2d Dep't 2008); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 171 (1st Dep't 2007); *Sinrod v. Stone*, 20 A.D.3d 560, 561 (2d Dep't 2005). Therefore, to dismiss **Plaintiff's** instant Complaint, **Defendants** must show that they made their alleged statements in the

context of a judicial proceeding and the statements are pertinent to that proceeding.

19. Dismissal of the Complaint is warranted because **Defendants** made their alleged statements[3] within a judicial proceeding and the statements are pertinent to that proceeding. First, **Plaintiff** affirmatively pleads that **Defendants'** subject statements were contained in **Defendants'** 2016 Petitions that commenced the **Initial Actions.** *See* Exhibit E (Complaint), ¶ 10, 11, 12, 15, 19, 23, 24, 29, 33, 37, 42; *see also Gutierrez,* 136 A.D.3d at 976 (noting, regarding a motion to dismiss, courts must accept the facts alleged in a complaint as true) (additional citations omitted). Indeed, **Plaintiff** specifically alleges that **Defendants** made the subject statements "in support of the commencement" of the **Initial Actions** and in "the verified petitions filed with the Court in support of the aforementioned lawsuits." Exhibit E (Complaint), ¶ 11. Therefore, it is uncontested that **Defendants'** alleged statements were made within the context of a judicial proceeding.

20. Second, **Defendants'** statements are pertinent to the **Initial Actions.** The "'pertinence of a statement made in the course of judicial proceedings is a question of law for the court;'" and "'[i]n answering that question, any doubts are to be resolved in favor of pertinence.'" *Levin,* 43 Misc.3d 1211 (A); *quoting Sexter*, 38 A.D.3d at 173 (additional citations omitted). To be actionable defamation, "a statement made in the course of judicial proceedings must be so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame.'" *Levin,* 43 Misc.3d 1211 (A); *quoting Sexter*, 38 A.D.3d at 173, *quoting Martirano*, 25 N.Y.2d at 508. Stated "otherwise, the possibly pertinent [for purposes of the judicial proceedings privilege] need be neither relevant nor material to the threshold degree required in other areas of the law,' and the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices to establish the offending statement's pertinence to the litigation.' *Levin,* 43

[3] **Plaintiff** alleges that **Defendants'** public ally called him a "thief" on September 9, 2016. Exhibit F (Complaint), ¶¶ 15, 19, 24, 29, 33. However, the word 'thief" does not appear in the **Subject Petitions.** *See, generally,* Exhibit C (Subject Petitions).

Misc.3d 1211 (A); *quoting Sexter*, 38 A.D.3d at 173 (also stating pertinence "is determined by an extremely liberal test"). Therefore, **Defendants** need only establish the *slightest* relevance of their Complaints' allegations to enjoy the absolute privilege; with all inferences and doubts resolving towards a pertinence finding.

21. **Defendants** alleged statements directly relate to **Defendants'** legal claims of **Plaintiff's** breach of fiduciary duties. Here, **Defendants'** statements articulate **Plaintiff's** alleged corporate misconduct – and the enumerated misconduct correspond with breaches of specific fiduciary duties that **Plaintiff** owed, *inter alia,* to **Defendants.** *See* Exhibit E (Complaint), ¶ 14; *see also* Exhibit C (Subject Petitions) (Index No. 85036/2016 ¶¶ 27-29, 35-36; Index No. 85037/2016 ¶¶ 29-32, 37-38; Index No. 85039/2016 ¶¶ 18-24, 26). The relation between **Defendants'** subject statements and the lawsuit is confirmed by the **Subject Petitions'** recital of legal authority for **Defendants'** claims of **Plaintiff's** misconduct identified *in the statements* about which **Defendants'** now complain. *See* Exhibit C (Subject Petitions) (Index No. 85036/2016 ¶¶ 14, 15, 17-19, 27-28; Index No. 85037/2016 ¶¶ 16-17, 19-20, 28-33, 48; Index No. 85039/2016 ¶¶ 17-19, 24, 30); *see also, generally,* Exhibit F (Complaint). Far from being wholly divorced from the then-judicial proceeding, *see Sexter*, 38 A.D.3d at 173, **Defendants'** allegations describe **Plaintiff's** misconduct at issue in that proceeding. Therefore, **Defendants** alleged statements are pertinent to **Defendants'** legal claim in that proceeding and are insulated from defamation claims.

22. Finally, **Plaintiff's** allegations of **Defendants'** malice, although denied by **Defendants,** is irrelevant. *See, e.g.,* Exhibit E (Complaint), ¶¶ 12, 37. An "'offending statement pertinent to the proceeding in which it was made is absolutely privileged, regardless of any malice, bad faith, recklessness or lack of due care with which it was spoken or written, and regardless of its truth or falsity.'" *Levin,* 43 Misc.3d 1211 (A); *quoting Sexter*, 38 A.D.3d at 172; *see also Pandozy v. Tobey*, 2007 WL 3010333, 1 [S.D.N.Y Oct 11, 2007] (even "[m]alice and bad faith simply do not destroy the

privilege if the statements meet the minimal standard for pertinence"), *affd* 335 Fed Appx. 89 (2d Cir. 2009). Therefore, **Defendants** motives – if any – for the subject statements are irrelevant and this court should dismiss each of **Plaintiff's** defamation claims.

II. PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM IS IMPROPERLY BASED UPON DEFENDANTS' FORMER PLEADINGS

23. This court should dismiss **Plaintiff's** IIED claim because it is impermissibly based upon statements **Defendants** made in the context of litigation. A "claim for intentional infliction of emotional distress based upon allegations involving statements and actions in the context of adversarial litigation must be dismissed." *Yalkowsky v. Century Apts. Assocs.,* 215 A.D.2d 214, 215 (2d Dep't 1995); *citing Lazich v. Vittoria & Parker,* 189 A.D.2d 753, 754 (2d Dep't 1993); *see also Stone,* 245 A.D.2d at 285. Here, **Plaintiff's** IIED claim is undoubtedly predicated upon **Defendants'** statements – indeed, upon **Defendants'** formal *pleadings* – in the **Initial Action.** *See* Exhibit E (Complaint), ¶ 10, 11, 12, 15, 19, 23, 24, 29, 33, 37, 42; *see also Gutierrez,* 136 A.D.3d at 976 (noting, regarding a motion to dismiss, courts must accept the facts alleged in a complaint as true) (additional citations omitted). Therefore, this court should dismiss **Plaintiff's** IIED claim in its entirety.

III. PLAINTIFF'S MALICIOUS PROSECUTION CLAIM DOES NOT LIE AGAINST DEFENDANTS

24. **Plaintiff** cannot assert a malicious prosecution claim in the absence of a former criminal prosecution of **Plaintiff.** The "elements of the tort of malicious prosecution are: (1) the commencement or continuation of *a criminal proceeding* by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice." *Torres v. Jones*, 26 N.Y.3d 742 (emphasis added), 760 (2016), *quoting Broughton v. State of New York,* 37 N.Y.2d 451, 456 (1975), *see also Smith–Hunter v. Harvey,* 95 N.Y.2d 191, 195, (2000); *Thaule v. Krekeler,* 81 N.Y. 428, 433 (1880). Here, **Plaintiff** fails to allege any criminal

prosecution of **Plaintiff.** *See, generally,* Exhibit E (Complaint). Indeed, **Plaintiff** has *not* been charged with any crime. Therefore, **Plaintiff** failed to plead a claim for malicious prosecution and, in any event, such a claim is unsupported by the facts.

III. PLAINTIFF'S NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM FAILS BECAUSE PLAINTIFF, BY HIS COMPLAINT, DOES NOT FALL WITHIN ONE OF THE ENUMERATED CATEGORIES OF ALLEGEDLY INJURED PERSONS

25. The facts, as alleged by **Plaintiff,** render **Plaintiff** ineligible to maintain a *negligent* infliction of emotional distress ("NIED") claim. In "its most recent discussion of [NIED], the Court of Appeals' stated a "'breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness.'" *Taggart v. Costabile,* 131 A.D.3d 243, 254 (2d Dep't 2015); *quoting Ornstein v. New York City Health & Hosps. Corp.,* 10 N.Y.3d 1, 6 (2008). The element of "some guarantee of genuineness" "may be satisfied where the particular type of negligence is recognized as providing" the requisite "assurance of genuineness." *Taggart,* 131 A.D.3d at 253 (citations omitted). In *Taggart,* the Second Department noted that the Court of Appeals "identified three distinct lines of cases involving recovery for negligent infliction of emotional harm" that serve to limit the scope of a permissible NIED claim. *Taggart,* 131 A.D.3d at 253; *citing Kennedy v. McKesson Co.,* 58 N.Y.2d 500, 504–506 (1983). The three circumstances are: (1) defendant's breach of a direct duty to the plaintiff which results in the plaintiff's being unreasonably placed in fear of physical harm; (2) where the plaintiff witnesses an injury to a member of the plaintiff's immediate family while in the zone of danger created by the defendant; or (3) Special circumstances, such as mishandling of the dead body of a relative or negligent delivery of a false message of death. *See Taggart,* 131 A.D.3d at 252 (additional citations omitted); *see also* 30 N.Y. Prac. New York Elements of an Action § 12:2 (Westlaw 2018). Therefore, **Plaintiff** must plead – and ultimately prove – that on of the recognized

circumstances exits to support a NIED claim.

26. The facts, as alleged by **Plaintiff,** do not support a NIED claim. First, **Plaintiff** does not allege – nor *could* **Plaintiff** *plausibly* allege – that **Defendants'** allegations of corporate misconduct in the **Initial Actions** "unreasonably" placed **Plaintiff** "in fear of *physical* harm." *Taggart,* 131 A.D.3d at 252 (emphasis added); *see also* Exhibit E (Complaint), ¶¶ 45-48. Next, **Plaintiff** did not witness an injury to a member of his immediate family while "in the zone of danger" – eliminating the second circumstance that supports a NIED claim. *Taggart,* 131 A.D.3d at 252 (emphasis added); *see also* Exhibit E (Complaint), ¶¶ 45-48. Finally, no "special circumstances," like the mishandling of a corpse or delivering a false death notice, applies. *Id.; see also* Exhibit E (Complaint), ¶¶ 45-48. Given "the particular type of negligence" that the law recognizes "as providing an assurance of genuineness" is lacking, *see Taggart,* 131 A.D.3d at 253, **Plaintiff's** NIED is impermissible. Therefore, this court should dismiss **Plaintiff's** NIED claim in its entirety.

CONCLUSION

27. For the foregoing reasons, this court should dismiss **Plaintiff's** Complaint in its entirety and award **Defendants'** such other and further relief as this court deems just and proper, including but not limited to costs and attorneys' fees.

Dated: August 2, 2018
Staten Island, New York

Scamardella, Gervasi, Thomson & Kasegrande, P.C.
By: Michael V. Gervasi
Attorneys for defendants **Emil Cangro** and **Carlo Cangro**
1010 Forest Avenue
Staten Island, New York 10310-2415
(718) 442-0900

TO: **Barry, McTiernan & Wedinger, Esq.**
Laurel A. Wedinger, Esq.
Attorneys for plaintiff **Anthony Seneca**
265 Joline Avenue, Suite A
Staten Island, New York 10307
(718) 317-9000