SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of TESS HALEY WACHS, Holder of a 50% interest in COMIC STRIP PROMOTIONS INC., a New York Corporation, Petitioner, For the dissolution of COMIC STRIP PROMOTIONS INC., a New York Corporation, pursuant to § of the Business Corporatins LAW, - against - RICHARD TIENKEN, JEAN TIENKEN, and COMIC STRIP PROMOTIONS, INC., a New York Corporation Respondents.	Index No. 655933/2019 **AFFIDAVIT OF RICHARD TIENKEN IN OPPOSITION TO ORDER TO SHOW CAUSE AND IN SUPPORT OF NOTICE OF CROSS-MOTION TO DISMISS**

State of New York
SS:.
County of New York

RICHARD TIENKEN, BEING DULY SWORN, DEPOSES AND SAYS:

1. I am the president, director and 25% shareholder of Comic Strip Promotions, Inc., which operates the comedy nightclub, The Comic Strip, on Second Avenue at 81st Street in Manhattan (the "company" or the "club"). Until recently, I was a 50% shareholder, but on March 1, 2019, I transferred half of my shares, 25% of the company to my wife, Jean Tienken, who has had an active role in the company as a manager for the last seven years. I submit this affidavit in opposition to plaintiff Tess Wach's petition to dissolve the company and in support of my and Jean Tienken's cross-motion to dismiss the petition. As I explain below, Tess's motion should be denied because, based on my understanding of the law in this area as explained to me by my lawyer, the facts in this matter do not meet the requirements for dissolution.

2. First: I am the sole director of the company, and as the only director, I can cause the board to act. As such, the directors are not "divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained."

3. Second: while certainly Tess, on one hand, and Jean and I , on the other hand, have differences of opinion as to, for example, who should run the club (Tess apparently thinks *she* should), except for a few years when I was sick, I have managed the club since it opened in 1976 and neither Tess nor her late husband Robert "Bob" Wachs, from whom Tess inherited her shares in the company, have any experience running the club. Tess cannot establish that "the shareholders are so divided that the votes required for the election of directors cannot be obtained." This is because she has not asked for a vote of directors. The last shareholders' meeting was held on March 1, 2019 at the club. Tess called the meeting and distributed an agenda for that meeting. A copy of the email from her attorney containing the agenda is attached as Exhibit A. While "Appointment of Officers" is on the agenda, Tess did not ask for a vote to appoint directors. I do not believe that Tess can establish that the election of directors cannot be obtained without even proposing a vote for directors. Since then, I have tried to have more than one shareholders meeting that Tess has refused to attend, so we have not had a quorum.

4. Third, while the shareholders presently have differing opinions on issues, we are not so divided that dissolution would be beneficial to the shareholders. On the contrary, dissolution would be detrimental to every shareholder. First, the club has a great deal of legacy debt and no significant assets, but it does have income and a roadmap to becoming debt-free (or close to it).. It has no protectable intellectual property and no lease for its location (we have a month-to-month tenancy). Its assets consist of only of the furniture and fixtures. These items would raise a negligible amount of money at auction. Finally, since Bob's death, I am the sole

personal guarantor of certain of the company's debts. Thus, dissolution would not help *any* shareholder and would affirmatively hurt me financially.

5. Regarding intellectual property, the comedians who perform at the Comic Strip own the rights to their own performances and the club is not even the sole owner of -- and as such cannot restrict the use of -- the name "Comic Strip." For example, in the late 1980's and early 1990's, the Fox broadcasting network had a television show called Comic Strip Live, which had no relation to our club [*see* https://en.wikipedia.org/wiki/Comic_Strip_Live_(TV_series)]; there is a Comic Strip comedy club in El Paso, Texas that has existed since 1986, [*see* www.laff2nite.com]; another Comic Strip in Edmonton, Canada [*see* https://wem.thecomicstrip.ca/]; and even a "Comic Strip Café" at the Universal Studios amusement park in Florida [*see* https://www.universalorlando.com/web/en/us/things-to-do/dining/comic-strip-cafe]. In this regard, when we learned about this about three years ago, when we were told about the Comic Strip Café, we consulted an attorney, who advised us that we could not restrict the use of our brand because it had been in use by too many other businesses for many years. As such, I have been told by counsel that there is little or no value to the company's intellectual property.

6. The club's physical assets will not bring much money either. The club's property consists of items like about 200 chairs, 60 tables, (all of them serviceable but years old). My understanding is items like this would bring pennies on the dollar at auction.

7. Presently, and Tess is aware of this, the Club has debts that exceed the value of the company. Most of this debt was accrued in the early part of this decade when Bob tried to take a greater role in the company. As a result of Bob's decisions, the company took on a great deal of debt to get through those troubled years. Presently, the company has approximately $500,000 in debt, which accrued more than nine years ago and which we have been paying down

at a rate of about $100,000 per year (more in 2019). Tess is aware of this since all of this was addressed in the arbitration brought by Tess (and which I address below in this affidavit). The major debts are owed to the following entities in the following amounts: the Dorathea Eberhart L.P., the company's landlord, is owned approximately $400,000 for past rent that was not paid in in the early part of this decade. The company currently pays its monthly rent, but has not yet started to pay the arrears. The company owes Frontline Funding approximately $30,000, and pays $1,019 per month. This debt, though rolled over a number of times, dates back to before Tess was a shareholder and was incurred by Bob and me. I am a personal guarantor of the debt, as was Bob Wachs before his death, but Tess is not a guarantor of any of the company's debts. The company owes Quarterspot Funding approximately $5,500, and pays $745 per day toward this debt, and the final payment is scheduled to be paid on Wednesday, December 4, 2019. This debt is significant in that initially exceeded $100,000.00 and had been rolled over a number of times, but we committed to paying down debt and have been doing so successfully. The company repaid Quarterspot funding over $100,000 in 2019 and, as noted, this debt will be paid in full within two weeks. The company owes Citicard and American Express a total of just over $70,000.00. This debt dates back was incurred unbeknownst to either Bob Wachs or me by our former original partner John McGowan, who has since died, but had kept these debts hidden from us when he was alive. The point of listing these debts is to demonstrate that they exceed the value of the company's assets; that dissolving the company would not be beneficial to any shareholder; and aside from not being beneficial, dissolution would be particularly detrimental to me, the sole surviving personal guarantor and not to Tess (or even my wife, Jean).

8. The other reason the dissolution would not be beneficial to the shareholders is that it would interfere with the monetary benefit that our management will eventually provide to the shareholders, including Tess. As noted above, the company has been paying $745 per weekday

– approximately $14,900 per month to Quarterspot Funding. We purposely have paid this debt aggressively, working through austerity to pay the debt down (and to pay the legal fees incurred by Tess's repeated lawsuits and arbitration proceedings) to provide the business a greater level of financial flexibility in the future. Tess is aware of this, because it was discussed at the last shareholders meeting on March 1, 2019. While there are clearly other debts that must be paid, our goal is to become more than barely operationally profitable so we may have invest in growth and improvements and make distributions to the shareholders, including Tess. If the company is dissolved, however, we will not have reached the point of being able to make distributions, will not be able to pay the company's debts and will also leave only me personally liable for the personally guaranteed debts. Dissolution would not be beneficial to the shareholders.

9. While as set forth above, Tess's motion does not meet the requirements of dissolution, some background is still necessary. As I noted above, Tess inherited her shares from my former partner, her husband, Bob Wachs. As noted, Bob had not been involved in managing the club until about 2010, when he took a greater role and attempted to produce musical theater productions at the club. That completely failed and caused the club to incur a lot of debt and nearly go out of business. After Bob's death in December 2013, we attempted to be welcoming Tess. We gave Tess the $150,000 in life insurance the club held on his life. Immediately after Bob's death, however, without explanation, Tess sent an acquaintance to remove all of Bob's personal memorabilia that had been on display in the club alongside mine.

10. We did not hear from Tess until November 2016, when Tess brought an arbitration proceeding and suddenly started coming into the club. In the arbitration proceeding she accused me, Jean and Tommy of stealing from the company. Tess's allegations were not true. We have not stolen, and Tess was unable to establish any aspect of her case. A copy of the Arbitration Award is attached to Tess's Petition.

11. When Tess started showing up at the club, she said she wanted us to show her how things worked. Despite the arbitration, we were still willing to do so. We hoped she would see that we were not stealing from the company. It soon became clear, however, that Tess was there to try to gather evidence for the arbitration. Once the deadline for the submission of evidence passed, she stopped coming to the club. And as I noted above, the arbitrator's decision makes clear that we were not found to have taken anything from the company. As such, Tess's actions have not interfered with the orderly operation of the club

12. More recently, in 2018, Tess brought a derivative action allegedly on behalf of the company. There she made the same allegations of theft, claiming that I was looting the company into bankruptcy. She obtained TRO *ex parte* on unsupported false allegations, and again failed to establish any of her claims. The TRO was vacated and Tess's request for a preliminary injunction was denied. A copy of the October 25, 2018 Order of Justice Debra A. James in *Wachs v. Tienken et al.*, 654337/2018 (the "Derivative Action"), is annexed hereto as Exhibit C. That action was then stayed in lieu of arbitration, but Tess did not arbitrate and instead brought this action.

13. Although in her petition, at ¶15, Tess claims that the shareholders have been unable to agree on the election of officers, my understanding is that the election of *officers* is not a ground for dissolution. Even if it was, however, at the last shareholders' meeting, Tess did not propose the election of officers except to state that she wanted to be appointed co-president and would accept no other position. I offered to vote for her for vice-president and Tess rejected my offer and rejected any other officer position except co-president. I have been manager of the club since it opened, have been president since the company was formed and do not believe that Tess's request was reasonable.

14. Tess's allegation at ¶18(a) that cash receipts goes unrecorded is also untrue. She made this same allegation in the arbitration and the Derivative Action, and could not prove it in either instance because her claims are simply false. All sales and any cash received are recorded each day in a book and each quarter a sales report is sent to Tess. At the last shareholders meeting, we showed our procedure in detail to Tess's lawyer. A copy of a page from our book of daily sales is annexed hereto as Exhibit D. These are the same pages we submitted in opposition to Tess motion for a preliminary injunction in the Derivative Action.

15. In ¶18(b), Tess claims to be barred from the club. As noted above, this untrue and has no basis in reality. I cannot even consider that this is some sort of misunderstanding. It is simply a baseless lie.

16. In ¶18(c), Tess claims to be denied access to records. This is also untrue. Tess has been repeatedly told that she may come most any day upon reasonable advance notice to inspect the books and records. The last shareholder meeting included Tess reviewing them. In addition, Tess also has real-time online access to the company's bank account and the company's point of sale system. A copy of an email from Tess's lawyer, in which she acknowledged that Tess had access to our bank records is annexed hereto as Exhibit E.

17. In 18(d) Tess lies about our not having controls or an accountant. The company's accountant is Michael DiMaggio, of 3339 Francis Lewis Blvd., Flushing, NY 11358. I have asked Tess on numerous occasions to contact him so he could answer her questions about the company and because as a shareholder, she must be properly reflected on the company's tax filings. Tess refuses to contact Mr. DiMaggio to provide him her social security number. A copy of my attorney's email requesting that she contact the accountant is annexed hereto as Exhibit F. Mr. DiMaggio receives all the company's sales information, and the company's income tax and sales tax filings are up to date.

18. Finally, Tess claims that we have never responded to her offer to buy her out. This is a complete lie. Tess demanded $200,000 for her share of the company. Which is way more than the company is worth. I countered that demand through my lawyer with an offer of $50,000, which better reflects the financial state of the company. When Tess said (through her attorney) that she would not under any circumstances go below $150,000, I had my lawyer inform them that this number has too high and that, since Tess had decided to be non-negotiable, I would not bid any higher. As noted, Tess would not further compromise from $150,000 and as such no further negotiations took place. A copy of my attorney's email requesting that Tess contact the accountant also references the buyout offer (*see* Exhibit F).

19. To sum up my opposition and the grounds for dismissal as they have been explained to me, Tess cannot meet the requirements for a dissolution action. First, the directors are not divided; there is one director and I have no trouble taking corporate action. Second, there has been no director's vote called, so an inability to elect directors cannot be a basis for dissolution. Tess called the last meeting and it was not even on her agenda, so she cannot establish that the votes required to elect directors cannot be obtained. Third, while there is certainly dissension, dissolution would not benefit the shareholders. The company has no lease, no valuable intellectual property or fixtures and its debt would exceed any price obtained at auction. In contrast, however, we are working the debt down and are moving toward the day where we can make profit distributions, which will benefit the shareholders. Tess has been obstructive, and we do not get along, but I recognize that she is a shareholder and have tried to live up to my obligations to her and my friendship with her late husband. I will continue to do so.

WHEREFORE, for all the foregoing reasons, I respectfully request that the Court deny Tess Wach's motion and dismiss this proceeding in its entirety.

Richard Tienken

Sworn to before me this
26th day of November 2019

Notary Public

Bryan A. McKenna
Notary Public - State of New York
Reg. No. 02MC5027173 - Qualified in Nassau County
My Commission Expires on May 2, 2022