*To be Argued by:*
JOSEPH S. NACCA
*(Time Requested: 15 Minutes)*

# New York Supreme Court
## Appellate Division – Fourth Department

**Docket Nos.:**
**CA 19-01847**
**CA 19-01849**

**Docket No. CA 19-01847**

In the Matter of the Application of

BRANDON M. BRADY,

*Petitioner-Respondent,*

for the Judicial Dissolution of Brady Farms, Inc.,

MYRON O. BRADY and MYRON C. BRADY,

*Respondents-Appellants.*

Index No.
000216-2019

**Docket No. CA 19-01849**

BRANDON M. BRADY Individually and Derivatively as a Shareholder of Brady Farms, Inc.,

*Plaintiff-Respondent,*

– against –

MYRON O. BRADY and MYRON C. BRADY,

*Defendants-Appellants,*

– and –

BRADY FARMS, INC.,

*Nominal Defendant.*

Index No.
000953-2018

# BRIEF FOR PETITIONER-RESPONDENT AND PLAINTIFF-RESPONDENT

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## PRELIMINARY STATEMENT

Unable to explain, justify, or even admit knowledge of their actions, Appellants Myron O. Brady ("Myron O.") and Myron C. Brady ("Myron C.") (together, "Appellants") ask this Court to reverse the trial court's: (1) dissolution of Brady Farms, Inc. (the "Company"), pursuant to Section 1104-a of the New York Business Corporation Law ("BCL"); and (2) appointment of a Receiver pursuant to BCL §1113 and CPLR 6401. Appellants base this request on little more than: (1) a recitation of irrelevant family history unrelated to the issues before the Court; (2) purported "issues of fact" that were neither raised before the trial court nor otherwise preserved for appeal; and (3) bad faith arguments that are intentionally misleading and, for that matter, sanctionable.

What is missing from Appellants' brief, however, is any compelling, or even plausible, reason why this Court should disturb the trial court's rulings. Indeed, Appellants do not even attempt to address, let alone adequately explain, the fact that they submitted literally no evidence in opposition to Brandon M. Brady's ("Brandon") Verified Petition, or the voluminous documentation supporting that Petition, in the Dissolution Proceeding (Docket No. CA 19-01847). Nor can Appellants point to any evidence in the Record upon which to challenge the trial court's appointment of a Receiver, pursuant to CPLR 6401, in the Plenary Action (Docket No. CA 19-01849). Nor, still, have Appellants presented any legal authority

that would support reversal of the trial court's rulings on procedural or other grounds.

Given Appellants' failure to substantively oppose the evidence submitted by Brandon, the trial court correctly held that Brandon's Verified Petition in the Dissolution Proceeding and motion to appoint a Receiver in the Plenary Action demonstrated grounds for dissolution of the Company and the appointment of a Receiver. This Court should reject Appellants' *post hoc* attempt to manufacture grounds for reversal, which attempt includes arguments that were, in large measure, never raised before the trial court, as well as arguments for which the Record lacks any evidentiary support. For the reasons that follow, the Court should affirm the trial court's Orders in their entirety.

## QUESTIONS PRESENTED

The two questions presented by this appeal are:

(1) whether the trial court, in the absence of any evidence submitted by Appellants in opposition to Brandon's Verified Petition and documentation submitted in support thereof, committed a clear abuse of discretion in granting Brandon's request for dissolution of the Company; and

(2) whether the trial court, in the absence of any evidence submitted by Appellants in opposition to Brandon's Verified Petition in the Dissolution Proceeding and motion in the Plenary Action, committed reversible error in granting

Brandon's request to appoint a Receiver, pursuant to BCL §1113 and CPLR 6401, for purposes of preserving the Company's property, managing the Company's affairs, and ultimately dissolving the Company and winding up its affairs.

The Court should answer both of these questions in the negative. The trial court's Orders in the Dissolution Proceeding and Plenary Action, respectively, are wholly supported by the Record and applicable New York law. This Court should affirm the trial court's rulings in their entirety.

## STATEMENT OF FACTS

At issue in both the Dissolution Proceeding and the Plenary Action is, principally, the misconduct of Myron O. and Myron C. in connection with their management of the Company generally and, more specifically, their malfeasance directed toward minority shareholder, Brandon. The Verified Petition in the Dissolution Proceeding and documentation submitted therewith, as well as the evidence submitted in support of Brandon's application in the Plenary Action, established specific acts of wrongdoing committed by Myron O. and Myron C. with respect to their management of the Company. The evidence also established a general scheme to freeze Brandon out from the Company and otherwise trample his rights as a shareholder. The trial court, appropriately, considered only such facts and only such evidence as relate to these issues.

Nevertheless, as they did before the trial court, Appellants spend a significant portion of their brief on appeal discussing: (1) Myron O.'s biography; (2) Myron O.'s divorce; (3) various transfers of property from Myron O. to Brandon that are entirely unrelated to the Company; and (4) unrelated litigation initiated by Myron O. against Brandon relating to certain real property held in trust. (See App.Br. at 10-15, 23). Those issues, however, have nothing to do with the issues before this Court relating to Brady Farms, Inc.; Myron O.'s and Myron C.'s misconduct; or the trial court's findings and Orders with respect thereto.

Rather, the relevant facts presented by Brandon's Verified Petition and motion for appointment of a Receiver relate solely to Appellants' conduct with respect to their: management of the Company; abuse of such management to Brandon's detriment; and oppressive misconduct and disregard of New York law in attempting to squeeze Brandon out from the Company and the benefits of being a shareholder thereof.

With respect to these facts, Appellants have very little to say. Indeed, before the trial court, Appellants did not even attempt to submit evidence with respect these issues. The relevant facts – either undisputed or supported by undisputable evidentiary documentation in the Record – are as follows.[1]

[1] In connection with the motion in the Plenary Action for appointment of a Receiver, Brandon relied on the same facts and evidence set forth in the Verified Petition. His Affidavit in support of that motion incorporated by reference the contents of the Verified Petition and exhibits thereto. (R. 241-42).

## A. Formation of Brady Farms, Inc. as a Farming Enterprise

The Company was created by a Certificate of Incorporation recorded in the Office of the Secretary of the State of New York on February 16, 1984, which Certificate remains filed for record with the Secretary of State. (R.18-19, 38-43, 134).

The Company is, essentially, a farming operation that owns substantial amounts of real property, most of which is utilized for farming purposes. Although Appellants somewhat deny that the Company was formed for the purpose of farming, the Company's Certificate of Incorporation provides expressly that the purpose of the Company is to, among other things: "buy, sell and deal in all kinds of grains, hay, feeds, livestock, remedies, minerals, milling products, farm equipment, and supplies and all articles useful or designed for raising livestock, and to transact a general milling business;" as well as to "rent, use, sell, and otherwise deal in all kinds of agricultural implements, machinery, parts and equipment for such machinery; to buy, sell, acquire, dispose of, and deal in all kinds of machinery, and equipment, and agricultural implements designed for, or used in connection with the planting, growing, cultivating, cutting, binding, harvesting, threshing, and handling of wheat, oats, and all other grains, seeds, grasses, and agricultural products, equipment and parts therefor." (R.40).

In addition, the Company's tax returns, authorized by Myron O. via electronic signature, describe the Company's business as "farming," and its product as "grains." (R.149, 156-60). They also show that the Company paid over $100,000 in salaries each year, as well as thousands of dollars in various "Pension, profit-sharing, etc., plans" and "employee benefit programs," all of which reflect an active farming operation. (R.72, 75).

Last, the Company holds a mortgage on a convenience store located across the street from the Company's tillable property and operated by Letchworth Country Store, Inc., which makes regular mortgage payments to the Company. (R.20, 135).

### B. Myron O.'s Management of Company Finances; Maintenance of Books and Records; and Transfer of Shares to Brandon

At all times, Myron O. managed the Company's finances and maintained the Company's books and records, which he kept in his home. (R.20-21; 131, 136). Brandon is a shareholder of the Company, who received his shares in the Company through multiple transfers of stock from Myron O. to Brandon during the period from 2006 through 2017. (R.21, 58-70; 136).

Although Myron O. denies the details of his agreement with Brandon that Myron O. would ultimately transfer to Brandon a full, 100% ownership interest in the Company (R.21, 136), he admits that he transferred stock to Brandon with the intention of Brandon taking over ownership of the Company, alleging that he did so as "the result of his desire for the land to remain in his family" and because "he

believed Brandon would continue to farm the land and hand the land down to his children." (R.130).

With respect to these transfers and other matters, Myron O. has confirmed that he "did not always strictly follow corporate formalities." (R.133). Nevertheless, Myron O., who maintained the Company's books and records and exercised exclusive control over the Company's finances, authorized the Company by electronic signature to file tax returns representing that Myron O. had transferred 48% of the Company's stock to Brandon as of 2017. (R.21, 71-78).

Brandon's 48% interest is also reflected in loan documents prepared on the Company's behalf, signed by Myron O., and submitted to Five Star Bank, the Company's banking establishment. (R.21). Myron O., despite having sole and exclusive responsibility for the Company's finances and books and records, did not submit evidence refuting this fact, but instead responded merely that he "den[ied] having knowledge or information sufficient to form a belief as to the truth of the allegations" regarding these loan documents and that "[a]ny such documents referenced in said paragraph are incorrect and require amendment." (R.137).

As of October 27, 2010, Brandon and Myron O. were the sole officers and directors of the Company. (R.22, 79-80). Although this fact is confirmed by a corporate resolution attached to the Verified Petition – which was signed by Myron

O. – Myron O. has asserted that he "den[ies] having knowledge or information sufficient to form a belief as to the truth" of the same. (R.137).

### C. Myron O. and Myron C. Scheme to Freeze Brandon Out of the Company

In early 2018, a dispute arose between Brandon and Myron O. regarding, among other things, a proposed renewal of the Company's lease with Myron C., which was either about to expire or already had expired. (R.22-24). Specifically, because Myron O.: (1) had never disclosed to Brandon the proceeds related to rent received by the Company from Myron C.; (2) had not otherwise provided Brandon with any distributions arising out of payments of rent received by Myron C.; and (3) on information and belief, had never even collected any rent from Myron C. in connection with the lease, Brandon believed it was in the Company's best interest to simply allow the lease to expire and begin to farm those 200 acres for the Company's own benefit. (R.23).

Although Myron O. denies the specific genesis of this dispute, he acknowledges that the dispute occurred. (R.22-24; 132; 138-39; App.Br. at 15). Once the dispute arose, Appellants embarked on a scheme to strip Brandon of his rights as a shareholder of the Company, to divert all corporate profits to themselves, and to otherwise freeze Brandon out from the Company, its operation, and its profits. The facts in this regard were not disputed in any meaningfully way before the trial court.

On May 23, 2018, Myron O. called a meeting of the Company's shareholders – at the time just Myron O. and Brandon – for the purpose of amending the Certificate of Incorporation to remove a provision that restricted the alienation of shares by requiring that a shareholder first offer those shares for sale to other stockholders. (R.24, 86). Specifically, this provision, which was paragraph 6 of the Certificate of Incorporation, stated that "[n]o certificate of stock shall be transferred to a person who is not a stockholder until it has first been offered for sale to other stockholders on terms to be fixed by the By-Laws, but in case the offer to sell is not accepted by the stockholders, this condition shall be no longer attached." (R.43).

At this meeting, Myron O. also took a new position, in contravention of the Company tax returns he had previously authorized, that Brandon owned only 62 shares, or 31% of the corporate stock, of the Company; in essence unilaterally purporting to reduce the amount of stock that he had previously acknowledged having transferred to Brandon. (R.24). Again, Appellants did not deny this allegation, but asserted that they "den[ied] having knowledge or information sufficient to form a belief as to the truth of the allegations contained therein." (R.139-40).

Over Brandon's objection, Myron O. nevertheless proceeded to vote in favor of removing the restriction on alienation, and also voted to elect himself and Myron C. as directors of the Company while also removing Brandon as a director. (R.25,

86). Yet again, although the meeting minutes reflecting these acts were signed by Myron O., with Myron C. – who was neither a shareholder nor an officer of the Company – also attesting that he "attended the meeting" and "approve[d] of these minutes" (R.86), Appellants answered in the trial court that they "[a]dmit[tted] Brandon generally objected but den[ied] having knowledge or information sufficient to form a belief as to the truth of the allegations." (R.140).

On that same date, Myron O. and Myron C. – purporting to be the directors of the Company – acted by their own unanimous written consent to remove the provision in the Company's Certificate of Incorporation that restricted the alienation of shares by requiring that a shareholder first offer those shares for sale to other stockholders. (R.24, 83-84).

Again, before the trial court, Appellants did not deny this allegation, instead answering that, despite the fact that the document was signed by both Myron O. and Myron C., they "den[ied] having knowledge or information sufficient to form a belief as to the truth of the allegations contained therein." (R.139).

Thereafter, on May 25, 2018, Appellants caused to be filed an amendment to the Company's Certificate of Incorporation purporting to remove the restriction on alienation. (R.25, 87-91). And, again, despite the Certificate of Amendment having been signed by Myron O. (R.87-91), Appellants "den[ied] having knowledge or information sufficient to form a belief as to the truth of the allegations." (R.140).

After purporting to eliminate this restriction on alienation, Myron O. and Myron C. then proceeded to engage in a transaction pursuant to which Myron O. would transfer stock to Myron C. without first offering Brandon – at that time the only other Company shareholder – the opportunity to purchase the stock as was otherwise required.

On June 12, 2018, Myron O. and Myron C. entered into a purported "Share Purchase Agreement," pursuant to which Myron O. agreed to sell to Myron C. 138 shares – or 69% – of the Company stock, despite having previously acknowledged that he held only a 52% interest in the Company. (R.25, 92-99). In other words, Myron O. agreed to sell to Myron C. shares of the Company, amounting to 17% of the Company's stock, that he did not own. (R.25). Appellants, again, did not deny these facts, but merely "den[ied] having knowledge or information sufficient to form a belief as to" them. (R.140). Yet, as with previous evidence submitted by Brandon in support of his Verified Petition, the "Share Purchase Agreement" – with respect to which Appellants purported to have no information or knowledge – was signed, multiple times, by both Myron O. and Myron C. (R.92-99).

Having improperly purported to transfer his (and Brandon's) shares of the Company, after improperly purporting to amend the Company's Certificate of Incorporation, Myron O. continued with his and Myron C.'s scheme to freeze

Brandon out of the Company and effectively render Brandon's ownership thereof worthless.

### D. Appellants' Continued Efforts to Freeze Brandon Out

After undertaking the above actions, Appellants then refused to provide Brandon with access to the Company's books and records to which Brandon was entitled under the BCL and common law. Specifically, Myron O. and Myron C. refused to provide Brandon with duly requested access to any such books and records other than the "Corporate Kit," which did not include such information as: (1) an annual balance sheet and profit and loss statement for the preceding fiscal year or the most recent interim balance sheet or profit and loss statement that ha been prepared by the Company; or (2) any other Company books and records maintained during the previous five years, including records showing sales, revenue, expenditures (capital and otherwise), salaries, purchases, employment records, subcontracts, expense reimbursements, and any other records involving financial transactions of the Company. (R.26, 172, 178-79, 181-82).

While Appellants generally denied this allegation before the trial court, the Record includes no evidence refuting the documentation submitted by Brandon.

In addition, Brandon learned that Myron O. and/or Myron C. had removed all funds from the Company's existing bank accounts and caused them to be closed. More specifically, Myron O. advised Brandon that he had closed all accounts for the

Company and that the Company was "no longer doing business." (R.27). Brandon also spoke with a Five Star Bank representative who confirmed that all funds had been removed from the Company accounts and that the accounts were closed. (Id.). Appellants generally denied this allegation, but proffered no evidence showing that the Company accounts remain open or funded. (R.141).

Further, despite Brandon having utilized Company land for over 20 years in order to access landlocked property that is owned by Brandon (and to which there is no other means of ingress or egress), Myron O. and Myron C. suddenly and improperly refused to grant Brandon continued access across Company property for this purpose. (R.28, 126-27). Appellants also denied this fact, despite their position being confirmed in correspondence from Appellants' own counsel, without providing any contrary evidence to substantiate their denial. (R.142, 126-27).

Moreover, Brandon was advised by Five Star Bank that Myron O. caused the Company to guaranty a personal operating loan and other personal loans, with respect to which Myron O. then defaulted, leaving the Company liable for Myron O.'s personal debts. (R.142, 150-51, 169-70). This was confirmed in a letter provided to Brandon by Five Star Bank. (Id.). Again, Appellants neither admitted nor denied these facts – let alone submitted evidence in opposition to the same – instead answering that they "den[ied] having knowledge or information sufficient to form a belief as to the truth of" these documented facts. (R.142).

As a result, Brandon was forced to incur costs, personally, to keep the Company from defaulting on its obligations, despite Myron O. and Myron C. having frozen him out from all affairs relating to the Company. Brandon also had to assume personal responsibility for making certain purchases and improvements necessary for the continued operation of the Company's farming business (such as concrete and electrical work installed in a Company building). None of these expenses incurred by Brandon have been paid or reimbursed by the Company. (R.45).

Again, Appellants did not deny the specific facts relating to Brandon's having to incur these expenses due to their default on their obligations to the Company. (R.142).

With respect to payments made to the Company for the mortgage held on the Letchworth County Store property, although the checks were written to the Company, Myron O. deposited them in his personal account for his personal use. (R.23, 81-82). Despite their general denials, yet again, Appellants provided no evidence to contradict that Myron O., in fact, deposited these checks in his personal account. Indeed, Defendants purported to "deny having knowledge or information sufficient to form a belief" as to matters relating to the checks. (R.138).

Finally, Myron O. and Myron C. caused the Company to fail to pay property taxes, and those taxes remained delinquent as of the date Brandon filed his Verified Petition. (R.29). Appellants denied this allegation but did not present any evidence

to show that they had caused the Company's taxes to be paid, despite, again, maintaining the Company's finances and managing the Company's affairs.

As a result of Myron O.'s and Myron C.'s wrongful conduct, Brandon filed the Plenary Action on November 6, 2018. (R.194-217). The Plenary Action asserts multiple causes of action, both individually and on behalf of the Company, against Myron O. and Myron C. It seeks relief relating to, among other things, Appellants' improper: refusal to allow Brandon access to Company books and records; transfer of shares from Myron O. to Myron C.; refusal to recognize Brandon's 48% ownership interest in the Company; failure to account to Brandon with respect to Company finances; diversion and conversion of Corporate assets; and breaches of fiduciary and other duties. (Id.).

Brandon subsequently initiated the Dissolution Proceeding by Verified Petition and Order to Show Cause on March 8, 2020, which sought, among other things, dissolution of the Company and appointment of a Receiver. (R.15-128). At the same time, Brandon also moved for appointment of a Receiver in the Plenary Action, pursuant to CPLR 6401. (Id.; 189-90).

The Order to Show Cause, when signed by the trial court, required the Company and Appellants, to, among other things: (1) "furnish the Court and [Brandon's] counsel with a statement of corporate assets and liabilities;" and (2) "make available for inspection and copying to [Brandon] under reasonable

conditions the corporate financial books and records for the three preceding years." (R.15-17). Even then, with the trial court having issued an Order requiring Appellants to provide this information to Brandon, they refused to do so. (R.152-53; 171-72).

In summary, Brandon provided the trial court with not just "allegations," but with documentary evidence of Appellants': (1) refusal to provide Brandon with Company books and records or other financial information; (2) unlawful attempt to improperly amend the Certificate of Incorporation and wrongfully transfer stock from Myron O. to Myron C. without first providing Brandon with an option to purchase the same; (3) unlawful attempt to reduce Brandon's 48% stock ownership in the Company after Myron O. had transferred that percentage of stock ownership to Brandon; (4) removal of funds from Company bank accounts and closure of those accounts; (5) securing a personal loan with Company assets and then defaulting on that loan; (6) depositing rent checks payable to the Company in personal accounts for personal use rather than in an account for the Company; and (7) otherwise engaging in illegal, fraudulent, or oppressive conduct toward Brandon, while looting, wasting, and diverting corporate assets for personal and non-corporate purposes.

In opposition, Appellants presented the trial court with nothing.

## E. The Trial Court's Decisions and Orders

Following oral argument on May 2, 2019 (R.5, 186), with respect to both: (1) Brandon's request for dissolution and appointment of a Receiver in the Dissolution Proceeding; and (2) his simultaneous request for appointment of a Receiver in the Plenary Action, the trial court issued two decisions, followed by the two Orders from which Appellants appeal.

### 1. The Decision and Order in the Dissolution Proceeding

The trial court's Decision and Order in the Dissolution Proceeding awarded Brandon multiple forms of relief, including, among other things: (1) granting Brandon's application for dissolution of the Company pursuant to BCL §1104-a and requiring that the Company's affairs be wound up under Article 11 of the BCL; (2) granting Brandon's request for appointment of a Receiver, pursuant to BCL §1113 and CPLR 6401, to preserve the Company's property; collect and marshal all rents and sale proceeds receivable by the Company on the Company's behalf; otherwise carry on the business and manage the affairs of the Company while the Dissolution Proceeding remains pending; and dissolve the Company in accordance with Article 11 of the BCL; and (3) directing the Company, upon receipt of the proceeds of the sale of the Company's properties and assets and payment of expenses and debts, to promptly distribute the proceeds of such sale to the shareholders in accordance with their pro-rata ownership interest in the Company, subject to any

surcharge to be imposed against Appellants in connection with their fraudulent and oppressive conduct. (R.3-14).

The trial court's Decision was clear as to the grounds upon which the relief was granted. First, the trial court, having recited the standard for appointing a receiver, found that "Brandon's application for a receiver is amply supported, whereas [Appellants'] opposition is wholly lacking, despite their control of the books and records." (R.12-13). Indeed, the trial court recognized that given the multitude of facts with respect to which Appellants responded with no evidence or assertions other than a purported lack of knowledge or information sufficient to form a belief, "Myron O. and Myron C. have asserted a disturbing lack of knowledge and information as to crucial financial, organizational, and other Company matters, despite Myron O.'s assertion that he has always managed the Company's finances and records." (R.13).

The trial court also found that Myron O. and Myron C. "assert a lack of knowledge on many Company matters undeniably within the purview of the individual(s) managing the Company finances and records." (R.13, 135-36, 139-40). In addition, the trial court recognized Myron O.'s admission that he "has not strictly followed corporate formalities" and found that Brandon "has successfully demonstrated a lack of oversight or supervision of the Company's affairs by the shareholders and/or the board," thereby rendering the appointment of a receiver

"necessary to protect and the assets of the Company pursuant to BCL Section 1113 and CPLR 6401." (R.13).

Second, the trial court found that dissolution was appropriate, because, as the trial court held (and as set forth in detail above), "Brandon has submitted evidence of [Appellants'] fraudulent and oppressive conduct, and [Appellants] have failed to come forward with any opposition to the evidence submitted by Brandon." (R.13). Providing just one example, the trial court noted, accurately, that "[f]or example, [Appellants] deny that Brandon owns 48% of the Company stock, but do not explain why the Company tax returns, signed by Myron O. acknowledge Brandon's 48% ownership." (Id.). The trial court also noted, more generally, that Appellants "[r]epeatedly . . . respond to the evidence presented by Brandon with unsubstantiated denials or allegation of a purported lack of knowledge or information." (Id.).

In short, having reviewed the Verified Petition and documentary evidence submitted by Brandon, and having recognized that Appellants responded with nothing more than "unsubstantiated denials or allegation of a purported lack of knowledge or information," the trial court granted Brandon's request for dissolution, which was then reduced to the Order from which Appellants appeal in the Dissolution Proceeding. (R.3-6).

2. The Trial Court's Decision and Order in the Plenary Action

As noted in footnote 1, above, the evidentiary support for Brandon's application for appointment of a Receiver pursuant to CPLR 6401 was derived from the evidence submitted in support of Brandon's requests for relief in the Verified Petition. Accordingly, because the trial court addressed the issue of appointment of a Receiver pursuant to both BCL §1113 and CPLR 6401 in the context of its Decision in the Dissolution Proceeding, the trial court simply confirmed in its Decision in the Plenary Action that a Receiver had been appointed and also granted Brandon's request for an accounting. (R.187-88).

The Decision in the Plenary Action was then reduced to the Order appealed from, which, in relevant part, granted Brandon's motion to appoint a temporary receiver to manage the affairs of the Company. (R.185-86).

This appeal followed. As will now be shown, this Court should affirm the trial court's Orders in all respects.

## ARGUMENT

## POINT I

## THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING DISSOLUTION OF THE COMPANY

Appellants acknowledge that the trial court's Order granting dissolution should not be reversed absent a finding that the trial court committed a clear abuse of discretion. See In re Kemp & Beatley, Inc., 64 N.Y.2d 63, 73 (1984). Indeed,

this Court has held that "'in the absence of a clear abuse of discretion' by the court, we will not disturb its determination in a dissolution proceeding." Matter of Inzer v. West Brighton Fire Dept., Inc., 173 A.D.3d 1826, 1827 (4th Dep't 2019) (quoting Matter of John Luther & Sons Co. v. Geneva Bldrs. & Trade Assn., 52 A.D.2d 737, 738 (4th Dep't 1976)).

Here, Appellants not only fail to satisfy this "clear abuse of discretion" standard, but the Record demonstrates that they failed to offer any evidence in opposition to Brandon's Verified Petition that would warrant a reversal of the trial court's Order granting dissolution.

## A. The Trial Court did not Abuse its Discretion by Ordering Dissolution Without Holding a Further Hearing

Notwithstanding their repeated, unsubstantiated denials and claims of lacking knowledge or information in response to the Verified Petition and evidence offered by Brandon, Appellants' primary argument as to why the trial court committed a "clear abuse of discretion" is that the trial court granted dissolution "on the pleadings alone" without first holding some additional, unspecified hearing. (App.Br. 1, 6, 7, 15, 19, 24). This contention is entirely without merit.

### 1. Appellants Did Not Request a Hearing and, Accordingly, the Issue Was Not Preserved for Appeal

Initially, the Court should not entertain Appellants' argument because, as a fundamental matter, Appellants did not preserve the issue for appeal.

More specifically, Appellants did not request a hearing with respect to the matters raised in the Verified Petition and, accordingly, did not preserve for appeal the issue of whether any further hearing should have been held.

Where the record in connection with a dissolution petition is "bereft of any request for a hearing," such issue is "unpreserved" for appeal. Matter of Quail Aero Serv., 300 A.D.2d 800, 803 (3d Dep't 2002). See also Seligson v. Russo, 16 A.D.3d 253, 253 (1st Dep't 2005) ("[i]n light of defendants' failure to request an evidentiary hearing [regarding dissolution], they cannot be heard to argue on appeal that one was required") (citing Quail Aero Serv.); Matter of Clever Innovations, Inc. (Dooley), 94 A.D.3d 1174, 1176-77 (3d Dep't 2012) (where respondent sought dissolution under BCL §1104-a and petitioner never requested a hearing, trial court was not required to hold one and did not abuse its discretion in granting dissolution).

Here, the Record includes no request by Appellants for any further hearing with respect to the Verified Petition. Rather, in response to Brandon's Verified Petition and the substantial documentary evidence submitted in support of his request for dissolution pursuant to BCL §1104-a, Appellants did nothing more than file an Answer to the Verified Petition with general denials and, bizarrely, claims that they lacked knowledge or information with respect to the actions that they undertook and documents that they executed. (R.129-46). Never did Appellants

make any request for a further hearing in connection with the Verified Petition or otherwise suggest that such a hearing was necessary.

In the absence of such a request before the trial court, Appellants cannot now ask this Court to find that the Order granting dissolution constitutes a "clear abuse of discretion" that should be vacated because the trial court did not first hold some additional hearing on the matter that Appellants themselves did not request.

2. Appellants Did Not Raise any Determinative Issues of Material Fact, in Any Event

In any event, even if the issue had been preserved for appeal, the Court should nevertheless find that the trial court did not commit a clear abuse of discretion by granting dissolution without holding a further hearing. That is because no further evidentiary hearing was required.

As specifically set forth in the trial court's Decision, Myron O. and Myron C. failed to submit any evidence in opposition to the substantial evidence submitted by Brandon demonstrating their illegal, fraudulent and oppressive conduct. Thus, neither Myron O. nor Myron C. raised a triable issue of fact requiring any further evidentiary hearing.

Under circumstances such as this – where the respondents in a dissolution proceeding fail to offer evidence raising a determinative issue of fact – it is unquestionably proper (and certainly not a "clear abuse of discretion"), for a court to grant the petition for dissolution on the evidence before it, as the trial court did in

this matter. See, e.g., Garay v. Langer, 37 A.D.2d 545 (1st Dep't 1971), aff'd, 30 N.Y.2d 493 (1972) ("All of the grounds for dissolution . . . are undeniably present here. No contested issues of fact have been shown, and, accordingly, no hearing is necessary").

Indeed, as this Court has held, because a dissolution proceeding is no different than any other litigated proceeding, the trial court may grant dissolution without a further hearing where there is no triable issue before it. See People ex rel. Abrams v. Oliver Schs., Inc., 206 A.D.2d 143, 145 (4th Dep't 1994) ("A hearing is required, however, only when there is some contested issue. There is nothing in the nature of a corporate dissolution proceeding that distinguishes it from any other litigated proceeding"). See also Goodman v. Lovett, 200 A.D.2d 670, 670 (2d Dep't 1994) (finding that "appellant's contention that dissolution of a corporation cannot be ordered without a hearing is without merit").

Moreover, although the "statutory proceeding for a dissolution does provide for a hearing . . . this provision is not jurisdictional." Matter of Gordon & Weiss Inc., 32 A.D.2d 279, 280 (1st Dep't 1969) (internal citation omitted). Thus, it "[can]not be maintained that a dissolution otherwise properly granted was a nullity because there was no hearing," and a hearing "is only required where there is some contested issue determinative of the validity of the application." Id.

Here, Myron O. and Myron C. were afforded an opportunity to submit evidence in rebuttal to the Verified Petition and supporting documentation, and they were unable to do so, despite having responsibility for the Company's management and custody of all Company books, records, and other documentation. Thus, any argument that the trial court somehow erred by not requiring an otherwise unnecessary additional hearing is entirely without merit.

Indeed, none of the cases cited by Appellants supports their argument to the contrary. In Matter of Inzer v. W. Brighton Fire Dept., Inc., 173 A.D.3d 1826 (4th Dep't 2019), which dealt with a petition for dissolution under the Not-For-Profit Corporation Law, the Court did not even address whether a hearing was required in the absence of a question of determinative material fact, let alone hold that such a hearing is required.

In Singer v. Evergreen Decorators, 205 A.D.2d 694 (2d Dep't 1994), the court held that the trial court should not have dismissed the dissolution petition without a hearing to determine whether the petitioner was even a shareholder of the company in question. Id. at 695. In other words, there was an issue of fact – namely, whether the petitioner had standing to seek judicial dissolution – that was determinative of the outcome of the proceeding. Moreover, the court noted that the hearing was necessary only because "the parties' affidavits and affirmations create[d] questions of fact" with respect to that dispositive issue. Id.

Here, by contrast, the Record reveals no such dispositive questions of fact. Rather, Appellants' general denials and claims to lack knowledge or information regarding the evidence presented by Brandon did not present any determinative issues of fact with respect to whether dissolution is appropriate or with respect to which the trial court could plausibly be said to have "clearly abused its discretion" in granting dissolution.

In Jedrzejcyk v. Gomez, 116 A.D.3d 632 (1st Dep't 2014), as in Singer, the court likewise found that there was an issue of fact as to whether the petitioner held a sufficient number of shares of the company in question such that she had standing to seek dissolution. Id. at 632-33.

Here, there is no dispute that Brandon is a shareholder or that he owns at least a 20% interest in the Company, which is the requisite ownership interest pursuant to which a shareholder has standing to bring a dissolution petition under BCL §1104-a. (See BCL §1104-a(a)). To the contrary, Myron O. and Myron C. acknowledge that Brandon owns at least 31% of the Company's outstanding stock. (App.Br. at 18). Thus, even if the Court were to find an issue of fact with respect to the specific amount of Brandon's ownership interest in the Company (for reasons set forth below, it should not), that issue is not determinative as to the trial court's Order granting dissolution because it does not speak to the substantive grounds for dissolution asserted by Brandon in his Verified Petition. It speaks only to the

percentage of proceeds to which Brandon is entitled upon the winding up of the Company's affairs.

Finally, in In re Kournianos, 175 A.D.2d 129 (2d Dep't 1991), the court held that there was a determinative issue of fact relating to whether the petitioner held a sufficient number of shares to bring a proceeding under BCL §1104 and that there were unresolved issues of fact that would require a hearing under BCL §1104-a. Id. at 129-30. Here, again, there is no dispute that Brandon owns sufficient shares in the Company to seek dissolution under BCL §1104-a, nor did Appellants submit to the trial court literally any evidence to counter – let alone defeat – Brandon's substantiated claims in the Verified Petition.

Accordingly, the trial court did not commit a "clear abuse of discretion" by granting dissolution without a further hearing where the Appellants submitted no evidence in opposition to the evidence submitted in support of Brandon's Verified Petition.

**B. The Record Before the Trial Court Supported the Order of Dissolution**

In any event, the Record supported the trial court's Order granting dissolution, such that Appellants cannot plausibly contend that the Order constitutes a "clear abuse of discretion."

As recounted above, Brandon proffered substantial evidence of Appellants' illegal, fraudulent, and oppressive conduct, including their efforts to, among other

things: (1) reduce Brandon's percentage of stock ownership from 48% to 31%, despite Myron O.'s authorization and approval of Company tax returns reflecting Brandon's 48% ownership; (2) illegally transfer stock owned by Brandon to Myron C.; (3) illegally transfer stock owned by Myron O. to Myron C. without first giving Brandon the opportunity to purchase those shares, as required by the Company's Certificate of Incorporation; (4) refuse to provide Brandon with duly requested access to Company books, records, and other financial information in contravention of both the BCL and common law; and (5) deny Brandon access across Company property to reach his own property, in contravention of over 20 years of precedent. (R.21-22, 24-26, 28, 58-78, 83-99, 125-28).

Although they served an Answer with general denials of these claims, neither Myron O. nor Myron C. provided the trial court with any evidence to dispute the documentary evidence that was submitted by Brandon, instead answering in most cases that the documentation provided "is the best evidence of the allegations contained therein" and "deny[ing] having knowledge or information sufficient to form a belief as to the truth of the allegations."

As the trial court noted in its decision, "Respondents have failed to come forward with any opposition to the evidence submitted by Brandon;" and "[r]epeatedly respondents respond to the evidence presented by Brandon with

unsubstantiated denials or allegation [sic] of a purported lack of knowledge or information." (R.13).

To the extent Appellants now attempt for the first time on appeal to challenge the documentary evidence submitted by Brandon in support of his Verified Petition, or to otherwise argue that the evidence before the trial court did not constitute sufficient grounds for dissolution, the Court should reject such contentions.

1. The Trial Court Did Not Err in Finding that Brandon Owns a 48% Ownership Interest in the Company, nor is Such Finding Relevant to the Trial Court's Ultimate Dissolution Order

Appellants' primary objection to the trial court's Order of dissolution is – as noted above – one that has no real bearing on whether dissolution was appropriate in the first instance. Specifically, Appellants challenge the trial court's finding that Brandon owns 48% of the Company's stock, as represented by Myron O. on the Company's tax return.

BCL §1104-a(a) provides that "[t]he holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . may present a petition of dissolution" on the grounds that "[t]he directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;" or that "[t]he 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." (BCL §1104-a(a); emphasis added).

While Appellants focus almost single-mindedly on the trial court's finding that Brandon owns 48% of the Company's stock, this issue is irrelevant to whether the Order granting dissolution constituted an abuse of discretion. That is because, pursuant to BCL §1104-a, Brandon would be entitled to dissolution even if he owned only 31% of the Company's stock (as Appellants now claim) based on the multitude of other grounds for dissolution set forth in the Verified Petition.

In other words, because the trial court found that Appellants engaged in fraudulent and oppressive conduct, in any event, the extent of Brandon's ownership in the Company, whether 48% (as Myron O. represented in Company tax returns) or 31% (as Myron O. and Myron C. claim, *post hoc*) is not relevant to whether the trial court's dissolution Order should be reversed. Nevertheless, as will now be shown, the trial court properly found, based on the evidence in the Record, that Brandon owns 48% of the Company's stock.

2. Myron O. is Estopped from Arguing that Brandon Owns a Lesser Interest in the Company

Although Myron O. and Myron C. generally denied that Brandon owns 48% of the Company stock, they provided the trial court with literally no response or explanation, legally or otherwise, as to why the Company's tax returns, authorized and approved by Myron O. after he made multiple transfers of stock to Brandon over an eleven-year period, acknowledged Brandon's 48% ownership. (R.58-78). Indeed, the trial court recognized explicitly that Appellants, who managed the

Company and controlled its finances and books and records, did nothing to "explain why the Company tax returns, signed by Myron O. acknowledge Brandon's 48% ownership." (R.13). Instead, Appellants simply asserted that the tax returns were incorrect and "require amendment." (R.137).

With Myron O. and Myron C. making no assertion that the tax returns bearing Myron O.'s electronic signature were not, in fact, authorized or approved by Myron O.; and with no evidence submitted by Appellants to that effect, the trial court properly followed New York law in holding that the Company tax returns were determinative as to the amount of Brandon's stock ownership and that Myron O. could not, for purposes of litigation, take a contrary position.

In this regard, it is well settled in New York, as the Court of Appeals has held and this Court has recognized, that a party to litigation may not take a position contrary to a position taken in an income tax return. See, e.g., Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 422 (2009); Matter of Tehan, 144 A.D.3d 1530, 1532 (4th Dep't 2016) (respondent in dissolution proceeding estopped from taking a position contrary to the position taken in its tax returns regarding the ownership interest held by a decedent's estate); Winship v. Winship, 115 A.D.3d 1328, 1330 (4th Dep't 2014) (plaintiff could not take position regarding ownership of farm that was inconsistent with information shown on his tax returns); Man Choi Chiu v. Chiu, 125 A.D.3d 824, 825-26 (2d Dep't 2015) (although member of limited liability

company "contends that the LLC's records were incorrect, he cannot subsequently take a position contrary to that taken in the income tax returns which he admitted that he signed"); Livathinos v. Vaughan, 121 A.D.3d 485, 486 (1st Dep't 2014) (shareholder could not assert in litigation different ownership interest than declared on company's tax returns). See also Naghavi v. New York Life Ins. Co., 260 A.D.2d 252, 252 (1st Dep't 1999) (party "bound by his contrary representations" in previously filed income tax returns); Amazon Concrete, Inc. v. Maffei, 2013 N.Y. Misc. LEXIS 6808, at *8 (Sup. Ct., Westchester Co., 2013) (argument that tax return "is in error and was improperly prepared" was "wholly insufficient" for the court to treat the company tax return as "anything other than constituting binding admissions by [respondent]").

Faced with this dispositive case authority, Appellants now make the disingenuous argument that the trial court's reliance on tax returns bearing Myron O.'s electronic signature was erroneous because "[w]hile Myron O's name was typed on the income tax returns (R.72; 75), there was no indication in the petition, other supporting papers, or any exhibits before the lower court at that time, that the typed name was an electronically authorized signature or otherwise." (App.Br. at 19). The Court should reject this argument out of hand for two reasons.

First, Appellants did not preserve this issue for appeal because they never raised any factual issue before the trial court as to whether Myron O. approved or

authorized the tax returns. "It is well settled that a party may not argue on appeal a theory never presented to the court of original jurisdiction." Vista Eng'g Corp. v. Everest Indem. Ins. Co., 161 A.D.3d 596, 598 (1st Dep't 2018) (citing numerous cases). See also Oram v. Capone, 206 A.D.2d 839, 840 (4th Dep't 1994) (an issue "may not be raised for the first time on appeal . . . where it could have been obviated or cured by factual showings or legal countersteps in the trial court") (internal quotations omitted); Orellano v. Samples Tire Equipment & Supply Corp., 110 A.D.2d 757, 758 (2d Dep't 1985) ("appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to overcome them had they been presented in the court of first instance").

Thus, a party may not raise for the first time on appeal an issue that is "not a purely legal issue apparent on the face of the record but requires for resolution facts not brought to [the other party's] attention" before the trial court. Botfeld v. Wong, 104 A.D.3d 433, 434 (1st Dep't 2013).

Although Myron O. and Myron C. answered the Verified Petition by stating that the tax returns "require amendment" (R.137), they did not deny that Myron O. had authorized the tax returns to be filed on the Company's behalf, as reflected on the returns themselves. Nor did they deny that Myron O. received his Schedule K-1 for the Company's tax returns, which plainly represented his ownership interest as 52%. (R.74). Nor did they in any way suggest, let alone argue, that Myron O.

objected to, failed to approve, or otherwise lacked responsibility for the content of the tax returns. Indeed, Appellants did not present any evidence showing that Myron O.'s electronic signature on the tax returns – which are business records of the Company – was placed there mistakenly, or without his authorization. Accordingly, there was never any factual issue before the trial court as to whether Myron O. had authorized the returns, and, in turn, Brandon never had any reason or opportunity to address such a contention. Rather, the only evidence before the trial court in this regard were the tax returns themselves, which bore Myron O.'s electronic signature.

Because Appellants did not challenge Myron O.'s authorization of the Company tax returns before the trial court – which is purely a factual issue that "could have been cured by factual showings or legal countersteps" – the Court should find that any issue as to whether Myron O. approved and authorized the Company's tax returns representing Brandon's 48% ownership interest has not been preserved for appeal.

Second, the Court should nevertheless reject Appellants' new contention that there is or was some issue of fact with respect to Myron O.'s authorization of the Company tax returns because it is made frivolously and in bad faith. On appeal, Appellants argue that there was no documentation showing that Myron O.'s signature was authorized "before the lower court at that time." (App.Br. 19, 29, 30). Notably, although they imply that there is some issue of fact with respect to Myron

O.'s authorization of the tax returns, Appellants stop short of arguing explicitly that Myron O. did not authorize his electronic signature to be used on the returns. Thus, even now, Appellants don't go so far as to claim that this is a disputed issue of fact.

That is because Appellants do, and did, have affirmative knowledge that Myron O. did execute documentation authorizing his electronic signature on the Company tax returns. The evidence of this fact (apart from the tax returns themselves) consists of an affidavit from Daniel Beaty, the Company's accountant and tax preparer, along with the authorization documents actually executed by Myron O.

Myron O.'s executed authorization forms, which Brandon obtained only after the Verified Petition was granted, are documents whose existence was exclusively within Myron O.'s (and the Company accountant's) knowledge, and the fact that Appellants now raise an argument based on a "factual" predicate that they know to be demonstrably false not only renders their argument invalid, but is sanctionable as frivolous conduct.

Indeed, Appellants' new argument, which implies a knowingly false representation – i.e., that Myron O. did not authorize the Company's tax returns despite his electronic signature appearing thereon – constitutes cynical and sanctionable misconduct. Accordingly, Brandon has submitted the Beaty Affidavit and authorization documents executed by Mryon O. to the Court in connection with

a contemporaneous motion for sanctions relating to Appellants' inclusion in their Brief of knowingly false and misleading factual representations with respect to this issue.

In summary, copies of Myron O.'s executed tax return authorization forms – and the authenticating affidavit submitted by the Company's accountant – have been submitted to the Court with Brandon's motion for sanctions, and they demonstrate conclusively both that: (1) Appellants' argument is made disingenuously and in bad faith; and (2) if Appellants had raised any argument regarding Myron O.'s authorization of the Company tax returns before the trial court in opposition to the Verified Petition (they did not), Brandon could readily have offered evidence disproving such a frivolous claim.

Thus, even if the Court were to disregard Myron O.'s electronic signature on the tax returns and entertain Appellants' argument regarding Myron O.'s authorization thereof, the Court should disregard such argument as frivolous, disingenuous, and – simply put – false.

Third, and finally, the Court should reject Appellants' new argument because, even now, Appellants don't claim that Myron O. did not authorize the filing of the Company's 2017 tax return. They simply argue – ignoring the face of the tax returns themselves – that there was "no evidence" before the trial court that Myron O. authorized his electronic signature, neglecting to point to any evidence in the Record

suggesting that he did not. Thus, there is no disputed issue of fact warranting reversal of the trial court's finding that Brandon owns 48% of the Company's stock.

3. Company Books and Records Generated and Maintained by Myron O. Cannot Govern Over His Authorized Tax Returns

Appellants also attempt to avoid the doctrine of estoppel by arguing that the Company's stock transfer records – which they acknowledge and admit were maintained by Myron O. – are inconsistent with Brandon's ownership of 48% of the Company's stock because they show that Myron O. transferred more than 48% of the Company stock to Brandon.

Yet, circumstances such as this are precisely the reason that the doctrine of estoppel, as set forth in Mahoney-Buntzman and other cases, was established. For example, in Man Choi Chiu, supra, the appellant made precisely the same argument that Myron O. attempts to make here, namely, that the Mahoney-Buntzman doctrine should not apply because the records maintained by the limited liability company at issue were incorrect. Man Choi Chiu, 125 A.D.3d at 825-26. The court held that "[a]lthough Man Choi Chiu contends that the LLC's records were incorrect, he cannot subsequently take a position contrary to that taken in the income tax returns which he admitted that he signed." Id. (citing cases).

Indeed, the estoppel principles upon which Mahoney-Buntzman are founded are even more necessary in situations such as this, where one of the parties – the party who undisputedly has exclusive control over and maintenance of the

Company's books and records – attempts to claim that those documents should govern over representations made on the Company's behalf in Federal tax documents.

Here, the undisputed facts, even accepted most charitably in Myron O.'s favor, are that: (1) Myron O. sought to transfer ownership interest in the Company to Brandon with the ultimate goal of ensuring that "Brandon would continue to farm the land and hand the land down to his children, who would continue the family farm" (R.130); (2) in furtherance of this goal, Myron O. made a series of stock transfers to Brandon during the eleven-year period of 2006 through 2017 and generated documents to reflect his intended transfers (R.58-70); (3) all "responsibilities in corporate operations or decisions" were left with Myron O. (R.130), including with respect to the documentation of his intended transfers to Brandon; (4) Myron O., who was solely responsible for maintaining the Company's books and records and managing its finances and operations, authorized and approved tax returns reflecting that his transfers to Brandon represented 48% of the ownership interest in the Company as of 2017 (R. 72-74); (5) neither Myron O. nor Brandon raised any objection or issue with this understanding, as reflected in Company tax returns, prior to this dispute arising; and (6) only after this dispute arose, when Myron O. and Myron C. sought to remove Brandon as a director and amend the Certificate of Incorporation, did Myron O. for the first time attempt to

assert that he had "really" only transferred 31% of the Company's shares to Brandon. (R.86).

Now, despite confirming that he, and he alone, was responsible for the Company's operations, books and records, transactions, and finances, Myron O. argues that the Court should not apply the Mahoney-Buntzman doctrine because the books and records for which Myron O. was solely responsible for generating and maintaining are in conflict with the Company tax returns that Myron O. authorized and approved. Further still, Myron O. argues, incredibly, that the trial court should not have applied the Mahoney-Buntzman doctrine because "the discrepancy regarding Brandon's ownership interest in the Company, given the conflict between the stock certificates and the income tax returns . . . was never explained." (App.Br. at 28).

Yet, this lack of explanation is precisely the reason that Mahoney-Buntzman is properly applied in this case. Any explanation as to why the Company's stock transfer records created by Myron O. do not match the tax returns subscribed to by Myron O. would be required to be provided by Myron O., who generated, kept, and maintained those records. In opposition to the Verified Petition, however, Myron O. was unable to provide any such explanation, as noted by the trial court in its Decision. (R.13). Indeed, even the case law relied upon by Appellants makes this point.

Specifically, Appellants rely on the non-precedential New York Tile Wholesale case for the proposition that the estoppel doctrine, as a matter of policy, "extends to prevent a party from asserting, without ample explanation, a factual position in a legal proceeding that is directly contradicted by his or her tax return." (App.Br. at 30) (quoting New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp., 35 Misc.3d 1206(A) (Kings Co. 2012))(emphasis added in App.Br.).

Here, as the trial court noted, not only did Myron O. fail to provide "ample explanation" for his authorization of Company tax returns that contradict the position he now takes in this litigation, but Myron O. failed to provide any explanation for the discrepancy, despite the fact that the purported discrepancy was entirely a matter of his responsibility.

Accordingly, as with virtually every other case in which a party has challenged in subsequent litigation representations made in prior authorized tax returns, the tax returns authorized and approved by Myron O. constitute binding admissions. Indeed, absent application of the Mahoney-Buntzman doctrine to cases such as this, company managers or directors could simply maintain whatever haphazard books and records they choose and then point to such records to create an "issue of fact" in the event that a minority shareholder ever challenges their conduct.

For these reasons, the trial court properly deemed the Company tax returns to be binding admissions as to Myron O., and Appellants' attempt to take a contrary

position in this dispute should be rejected in accordance with the well-settled law set forth in Mahoney-choi and its progeny.

4. The Trial Court Did Not Commit a Clear Abuse of Discretion in Finding that Myron O. and Myron C. Engaged in Fraudulent and Oppressive Conduct Toward Brandon

With respect to the trial court's finding that dissolution was appropriate due to Myron O.'s and Myron C.'s scheme to freeze Brandon out of the Company, Appellants fail to show that such finding constituted a "clear abuse of discretion." Indeed, the trial court's conclusion was compelled by the Record.

a. Myron O. and Myron C. Unlawfully Stripped Brandon of His Right of First Refusal to Purchase Myron O.'s Remaining Shares in the Company

Although Myron O. and Myron C. generally denied that they acted to strip Brandon of his right of first refusal to purchase Myron O.'s shares and to reduce Brandon's ownership interest in the Company, they again provided no evidence, documentary or otherwise, to contradict or explain the series of transactions pursuant to which they initiated an unlawful transfer stock from Myron O. to Myron C., all of which transactions were reflected in documentary evidence provided by Brandon. (R.24-26, 83-99). Instead, remarkably, Myron O. and Myron C. asserted a lack of knowledge or information with respect to these transactions (R.139-40), despite being the only individuals who executed the documents in question and/or voted to approve the same. (R.83-99).

Only now, for the first time on appeal, do Myron O. and Myron C. attempt to explain these actions as being something other than what they were – an oppressive scheme to illegally strip Brandon of his ownership interest and rights as a shareholder of the Company. This oppression was demonstrated clearly by Brandon in multiple, independent ways, none of which was refuted by Appellants before the trial court.

Initially, Appellants' *post hoc* effort to rationalize their actions fails to even acknowledge, let alone demonstrate compliance with, Appellants' obligations to comply with BCL §803. That statute makes clear that any change or amendment of a company's certificate of incorporation must first be "authorized by the board, followed by vote of a majority of all outstanding shares entitled to vote thereon at a meeting of shareholders." (BCL §803; emphasis added). Here, in their haste to deprive Brandon of his rights as a shareholder and to misappropriate his shares, Myron O. and Myron C. simply ignored this requirement.

The Record shows that Myron O. and Myron C. orchestrated a shareholders' meeting and directors' meeting on the date of May 23, 2018. The meeting minutes confirm that when the shareholders' meeting occurred, Brandon was a director of the Company, while Myron C. was not. (R.86). Indeed, it was at that shareholders' meeting where Myron C. purported to replace Brandon on the Board of Directors. (Id.). The minutes of this shareholders' meeting reflect that: (1) its purpose was to

elect a Board of Directors and consider a proposed amendment to the Certificate of Incorporation; and (2) Myron O. replaced Brandon as director and installed Myron C. in his place, while also voting to approve an amendment removing the restriction on alienability of Company stock. (Id.).

After this shareholders' meeting, Myron O. and Myron C. then resolved, "by unanimous written consent of the Board of Directors," to amend the Certificate of Incorporation by removing the restriction on alienability. (R.84). This action necessarily followed the shareholders' meeting, because it was only at the shareholders' meeting that Myron O. voted to replace Brandon with Myron C. as a director. (R.86).

Subsequently, Myron O. and Myron C. then caused the Certificate of Incorporation to be amended to remove the restriction on alienation that would have required Myron O. to first offer his shares to Brandon and initiated the illegal transfer of shares to Myron C. (R.87-99).

Because BCL §803 requires the vote of the directors to precede the vote of the shareholders in connection with an amendment to the certificate of incorporation, Myron O.'s vote at the shareholders' meeting was a nullity because it happened before the directors approved of the resolution to amend the Company's Certificate of Incorporation. Moreover, even if Appellants were to argue that the Board of Directors meeting occurred before the shareholders' meeting, then the Board

resolution was a nullity because Myron C. was not yet eligible to vote as a director prior to the shareholders' meeting.

Either way, Myron O. and Myron C.'s actions on May 23, 2018 were invalid and precluded the filing of an amendment to the Certificate of Incorporation, thereby rendering invalid Myron O.'s purported transfer of stock to Myron C. on June 12, 2018 without first offering that stock to Brandon.

On appeal, Appellants argue that, despite the explicit language in BCL §803 providing that an amendment to a company's certificate of incorporation "may be authorized by the board, followed by vote of a majority" of shareholders, Myron O. and Myron C. were permitted to amend the Company's Certificate of Incorporation regardless of whether the board of directors approved of the resolution prior to the shareholders' vote. (App.Br. at 35). In support of this argument, Appellants cite In re McKinney, 306 N.Y. 207 (1954). Yet, that case is entirely inapposite, for at least two reasons.

First, contrary to the principle argued by Appellants, the Court of Appeals based its decision in McKinney on the fact that the petitioners failed to act in accordance with "the plain language of the statute" in question. See McKinney, 306 N.Y. at 210. This is consistent with the longstanding maxim that "[i]n construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which

involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998) (quoting Tompkins v. Hunter, 149 N.Y. 117, 122-23 (1896)). Put in simpler terms, "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Id.

Here, Appellants ignore the plain language of BCL §803, which expressly states that the amendment in question must first be approved by the Board of Directors, "followed by" a vote of the shareholders. The Court should reject Appellants' suggestion that the clear language of BCL §803 can simply be disregarded.

Second, the Court in McKinney did not deal with a statute that addressed both director and shareholder approval, but dealt instead with a statute that required only shareholder approval. See McKinney, 306 N.Y. at 213 ("sections 21 and 38 cannot be read as referring to any voting except voting by stockholders"). Thus, Appellants' attempt to portray McKinney as somehow holding that the "authorization of a certificate of amendment requires a vote of the board of directors and of the shareholders, but it is not necessary that the votes of those two bodies occur in that order," reflects a complete misreading of the case and relies on a flawed

interpretation of the Court's holding with respect to an entirely different statute than the one at issue here.

b. Myron O. Purported to Transfer to Myron C. Shares That Were Owned by Brandon

In any event, even if Myron O. and Myron C. were permitted to disregard the requirements of the BCL in their scheme to strip Brandon of his stock ownership and rights as a shareholder, they failed to present any evidence supporting their contention that Myron O. actually owned the percentage of Company stock that he purported to transfer to Myron C.

As set forth above, the Company's tax returns, authorized and approved by Myron O., show that Brandon owns a 48% interest in the Company. Yet, in addition to violating BCL §803 and purporting to transfer Myron O.'s shares to Myron C. without first affording Brandon the opportunity to purchase them, Myron O. and Myron C. also disregarded the actual ownership percentage held by Myron O. when they purported to initiate a transfer of 69% of the shares of the Company from Myron O. to Myron C. (R.93-99). In other words, they attempted to convert 17% of the Company's ownership interest from Brandon.

c. Denial of Books and Records

Further still, with respect to the evidence showing that Myron O. and Myron C. refused to provide Brandon with the Company's books and records to which Brandon duly requested access, Appellants simply denied the allegation, without

more, despite there being documented evidence of Brandon's request, as well as the inadequate and insufficient response provided by Myron O. and Myron C. (R.172, 177-82). Rather than provide this information to Brandon, as required by law, Appellants chose not to do so, and provided the trial court with no evidence that they complied, or even attempted to comply, with Brandon's legitimate request, instead simply stating that Brandon "always had full access to the Company's books and records." (R.131).

Yet, curiously, when Brandon formally requested the information prior to initiating litigation, Appellants did not respond that Brandon already had access, but instead ignored the request before, ultimately, providing Brandon with only the "corporate kit." (R.181).

d. Appellants' Failure to Make Distributions of Farming Profits to Brandon

In defense of their failure to provide Brandon with any profits from the Company's farming operations, Appellants argued before the trial court that Brady Farms, Inc. is simply a real estate holding company that Myron O., individually, used for farming purposes. (R.129).

Again, however, the evidence completely contradicted this claim. Appellants not only failed to provide any evidence to support their conclusory claim that the Company is merely "a real estate holding company," but they also failed to justify

such a position in light of the documentary evidence to the contrary set forth in Brandon's Verified Petition.

Specifically, as noted above, the Company's Certificate of Incorporation expressly provides that the Company's purpose is to, among other things, engage in multiple types of farming-related enterprises (R.40); the Company's tax returns expressly describe the Company's business as "farming" (R.156-60); and the tax returns show multiple expenditures on salaries, retirement plans, and employee benefit programs. (R.72, 75). Thus, Appellants' claim that the Company is nothing more than a "real estate holding company" – and associated argument that Brandon is therefore not entitled to any Company profits – is demonstrably false.

e. Other Demonstrated Examples of Oppression Went Unexplained

And the list goes on. Appellants denied that Brandon and Myron O. were the sole officers and directors of the Company as of October 27, 2010 (R.22, 137), but presented no evidence to contradict the Company resolution of that same date electing just Myron O and Brandon as officers and directors. (R.22, 79-80). They denied that the Company made any distributions or that they received any money from the Company in amounts disproportionate to monies received by Brandon (R.22-23, 138), but they provided no evidence of where monies received by the Company have gone.

Appellants denied that Myron O. removed all funds from and closed the Company's existing bank accounts (R.27, 141), but presented no evidence demonstrating that such accounts remained open. They denied that they caused the Company to fail to pay the requisite property taxes (R.29, 142), but provided no evidence of payment. They denied that Myron O. deposited rent checks made out to the Company in his personal account (R.23, 138), but provided no evidence that these checks were deposited in a Company account. They denied that Myron O. failed to collect rent for Company property rented to Myron C. (R.21, 138), but provided no evidence of any such rent payments made by Myron C.

Still further, with respect to Myron O.'s having caused the Company to guaranty a personal operating loan and other personal loans, on which loans he then defaulted, Myron O. did not deny this allegation, but instead asserted a "lack of knowledge." (R.28, 142). Yet, Brandon provided the trial court with documentary evidence of Five Star Bank issuing a Notice of Default with respect to such loans and demanding payment of over $290,000 to prevent foreclosure on Company property. (R.150-51, 168-70).

And, with respect to Brandon's claim – documented in a letter from Appellants' counsel – that Myron O. and Myron C. had abruptly cut off access to Brandon of Company land for ingress and egress to other property owned by Brandon (R. 28), Appellants denied the allegation despite having less than two

months earlier sent a letter explicitly rejecting Brandon's request for access. (R.125-28, 142).

Again and again, Appellants responded to the evidence filed in support of the Verified Petition with either unsubstantiated denials or a purported "lack of knowledge or information." Appellants gave these responses despite the fact that Myron O. has, by his own admission, "always managed the Company's finances and records," (R.136), and, therefore, would not only be in position to provide evidence to refute Brandon's substantiated assertions, but would be in the best position to do so.

For Myron O. and Myron C. to now argue that the trial court committed a "clear abuse of discretion" in ordering dissolution – when they provided literally no evidence in opposition to the Verified Petition – is entirely baseless.

## POINT II

## THE TRIAL COURT DID NOT ERR IN APPOINTING A RECEIVER

Contrary to Appellants' contentions, the trial court did not err in issuing its Orders (in both the Plenary Action and Dissolution Proceeding) appointing a Receiver pursuant to BCL §1113 and CPLR 6401.

### A. The Trial Court Properly Appointed a Receiver Pursuant to BCL §1113

BCL §1113 provides that "[a]t any stage of an action or special proceeding under BCL article 11, the court may, in its discretion, make all such orders as it may

deem proper in connection with preserving the property and carrying on the business of the corporation, including the appointment and removal of a receiver under BCL article 12."

BCL article 12 provides that in a dissolution proceeding, the trial court may appoint a receiver, including a temporary receiver, which may be granted all of the powers and duties of a permanent receiver, or so much of them as the Court deems proper. (See BCL §§1203(a), (b)). Other trial courts have held that appointment of a receiver is appropriate where, as here, the Record demonstrates that there is no oversight or supervision of a Company's affairs by the shareholders or a functional board of directors. See, e.g., Matter of Papakonstadinou (Gozzer Corp.), 2019 N.Y. Misc. LEXIS 509, at *25 (Sup. Ct., Albany Co., 2019).

Further, appointment of a receiver is warranted where, as here, compelling evidence is presented that the subject corporation is threatening its own continued viability. See Rosan v. Vassell, 257 A.D.2d 436, 437 (1st Dep't 1999).

In this regard, the Record demonstrates that Appellants' nonchalant attitude with respect to "strictly follow[ing] corporate formalities" resulted in the very real threat of Company property being foreclosed upon due to Myron O.'s having guaranteed personal loans using Company assets. (R.28, 150-51, 169-70).

Additionally, appointment of a receiver has been deemed appropriate where, as here, "the corporate records are in complete disarray and there are significant

issues of the Corporation's use of the absence of records to allegedly strip . . . owners of their respective interest in the premises." Canada v. 207-213 W.L 44th St. Hous. Dev. Fund Corp., 2017 N.Y. Misc. LEXIS 1138, at *9 (Sup. Ct., N.Y. Co., 2017).

In this case, Appellants' opposition to the Verified Petition demonstrates that Appellants attempted to use the absence – or at least non-disclosure – of Company records as a means to preclude Brandon from enforcing his rights. Indeed, as set forth above, the crux of Appellants' argument regarding the trial court's finding as to Brandon's 48% ownership in the Company is that the Company's books and records – generated and maintained by Myron O. – include inconsistencies and discrepancies that should preclude reliance on the Company's tax returns, which themselves were authorized, approved, and electronically signed by Myron O. In other words, Appellants seek to use their own "inconsistent" records precisely for the purpose of stripping Brandon of at least a portion of his ownership interest in the Company. The Court should not countenance such a self-serving argument.

In a similar vein, Appellants failed to present any evidence in rebuttal or opposition to Brandon's assertion that Myron O. had emptied and closed the Company's bank accounts.

Further, Appellants made multiple, contradictory assertions in their opposition to the Verified Petition, asserting in some instances that the Company was nothing more than a holding company that owned certain real estate farmed by

Myron O., individually, but then affirmatively acknowledging Myron O.'s active "operation" of the Company and maintenance of books and records, and finances. (R.129-33).

Appellants also denied having knowledge or information with respect to matters that anyone operating a company should have, and failed to offer evidence that refuted the misconduct established by Brandon, including that Appellants: (1) commingled funds; (2) failed to account to Brandon or the trial court related to their management of the Company; (3) put the Company's assets in jeopardy by using them to secure personal loans; (4) failed to account for and diverted for their personal use crop proceeds, as well as rent and mortgage payments received by the Company; and (5) drained and closed the Company's bank accounts.

In short, Brandon's Verified Petition and supporting documentation presented the trial court with a picture of the Company being pillaged and looted by Appellants at Brandon's expense; of Brandon's ownership interest being stolen; of Company management refusing to abide by corporate formalities and fudging corporate books and records; of the Company's directors and officers purporting to lack knowledge of even the most rudimentary matters of corporate functionality and of their own actions and conduct; and of a Company whose purported "only asset," namely, the real estate, was faced with the threat of foreclosure due to Myron O. having defaulted on a personal loan that he improperly secured with the Company's property.

Under these circumstances, the trial court found that, although "courts of equity exercise extreme caution in appointing receivers *pendente lite*," appointment of a receiver in this case was necessary because of, among other things, Appellants' "disturbing lack of knowledge and information as to crucial financial, organizational, and other Company matters;" failure to follow corporate formalities; and "a lack of oversight or supervision of the Company's affairs." (R.12-13). Thus, the trial court did not abuse its discretion under BCL §1113 by appointing a receiver where the trial court deemed it "necessary to protect and preserve the assets of the Company." (R.13).

And, in the context of the trial court having decided that dissolution was appropriate, the appointment of a Receiver to aid in the management of the Company's affairs and marshal the Company's assets for purposes of sale, distribution, and ultimate winding up of the Company's affairs was also appropriate.

### B. In Any Event, the Trial Court's Appointment of a Receiver Was Appropriate Pursuant to CPLR 6401

Even if the Court were to find that the trial court erred in appointing a temporary receiver under BCL §1113, Brandon was nevertheless entitled to have a temporary receiver appointed pursuant to CPLR 6401 in order to preserve and protect the Company's assets.

CPLR 6401(a) provides, in relevant part, that "[u]pon motion of a person having an apparent interest in property which is the subject of an action in the

supreme or a county court, a temporary receiver of property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed." (CPLR 6401(a)).

Under New York law, "[t]he power to appoint a receiver of the property of a corporation is inherent in the Supreme Court." Sandfield v. Goldstein, 29 A.D.2d 999, 1000 (3d Dep't 1968) (citing cases). A receivership pending trial "is a conservation and preservation remedy resting in the sound discretion of the court." Hamilton Heights Cluster Assoc., L.P. v. Urban Green Mgt., Inc., 2015 N.Y. Misc. LEXIS 2446, at *29 (Sup. Ct., N.Y. Co., 2015).

The appointment of a temporary receiver for purposes of operating and managing an ongoing business while litigation is pending is appropriate where, as here: (1) the litigation involves the assets of a specific business; (2) the plaintiff's ownership interest in that business and its assets is easily established by documentary evidence; and (3) the defendant fails to controvert any allegations that an accounting has not been rendered nor profits distributed to the plaintiff. See, e.g., Nelson v. Nelson, 99 A.D.2d 917, 917-18 (3d Dep't 1984). Under such circumstances, the appointment of a receiver is "necessary for the conservation of the property and the preservation of the parties' respective interests" therein. Id.

Thus, in Nelson, the court affirmed the appointment of a temporary receiver to manage and operate a restaurant in the context of an underlying action for an accounting of that business that was jointly owned by the parties. Nelson, 99 A.D.2d at 917-18. See also Nesis v. Paris Int'l Lighting, Inc., 184 A.D.2d 485, 485 (1st Dep't 1992) (affirming appointment of a receiver for defendant corporation where plaintiff showed likelihood of waste and demonstrated a fraudulent transfer of assets) (citing Nelson, supra).

Similarly, in Gimbel v. Reibman, 78 A.D.2d 897, 897-98 (2d Dep't 1980), the court reversed an order denying the appointment of a temporary receiver where the plaintiff had an unquestioned interest in the ownership and management of a joint venture and had established that the defendants commingled income and otherwise placed the corporate defendant's solvency into question. Id. These facts created "a situation ripe for dilution of the income assets and harm to the interests of" the plaintiff. Id. at 898.

Further still, in Rosan v. Vassell, 257 A.D.2d 436 (1st Dep't 1999), the court affirmed the appointment of a temporary receiver to manage a corporate defendant where there was "compelling evidence of a struggle within the subject corporation threatening its continued viability" and where the receiver was "essential to the preservation of the corporation's assets during the pendency of the underlying litigation." Id. at 437.

In each of these cases, a temporary receiver was deemed appropriate under CPLR 6401 upon a showing that the defendants' management of the business at issue involved commingling or questionable transfers of Company assets that were inimical to the Company's interests.

Here, Appellants, among other things: (1) admitted to their commingling of funds; (2) failed to account to either Brandon or the trial court with respect to their management of the Company; (3) demonstrably put the Company's assets in jeopardy by using those assets to guaranty personal loans; (4) failed to account for their disposition of crop proceeds and rents received by the Company; and (5) drained and closed the Company's bank accounts.

Thus, there is no question that the applicable standards were met for the trial court to appoint a temporary receiver to manage the Company during the pendency of the Dissolution Proceeding and Plenary Action.

First, both matters, at their core, involve the assets of a specific business, namely, the Company's real property and other, financial assets. Moreover, as set forth above, Brandon established that, among other things: (1) Appellants had already removed all funds from the Company's existing bank accounts and caused them to be closed; (2) Appellants collected monies on behalf of the Company but failed to deposit those proceeds in a Company account or otherwise distribute them to shareholders, instead diverting them for personal gain; and (3) with respect to

property leased by the Company to Myron C., Appellants failed to account for either the receipt of rent from Myron C. or the use to which any rental proceeds have been put.

All of these wrongful actions have affected – directly – the specific assets of the Company.

Second, although Myron O. and Myron C. have attempted, wrongfully, to reduce Brandon's ownership interest in the Company, they do not dispute that Brandon is a shareholder of, and has an interest in, the Company and its property.

Third, not only did Myron O. and Myron C. fail "to controvert any allegations that an accounting has not been rendered nor profits distributed to the plaintiff" (see Nelson, 99 A.D.2d at 917-18), but they affirmatively admitted that Brandon is entitled to an accounting. (R.210, 231).

Further, as set forth herein, Myron O. and Myron C. never provided Brandon with any records in response to his September 11, 2018 request for books and records under BCL §624 and at common law, save for the purported "Corporate Kit," which itself revealed facial wrongdoing and misconduct by Myron O. and Myron C.

Given these facts, the trial court properly exercised its discretion in appointing a receiver pursuant to CPLR 6401 to manage the affairs of the Company and preserve its assets while the litigation is pending. The trial court's determination in this regard should not be disturbed.

## C. Compliance with BCL §1203(a) was not "Fatally Defective"

Appellants' final argument for reversal of the trial court's appointment of a receiver is that Brandon did not provide the New York Attorney General with notice of Brandon's application for a receiver pursuant to BCL §1203(a). This argument, too, is without merit.

First, Appellants' argument ignores the fact that Brandon's application for a receiver was made pursuant to both BCL §1113 and CPLR 6401, pursuant to which no notice to the Attorney General is required. Indeed, the trial court granted Brandon's application pursuant to CPLR 6401 as well as pursuant to BCL §1113. Thus, lack of notice pursuant to BCL §1203(a) does not and cannot constitute a "fatal flaw," as Appellants suggest.

Second, BCL §1203(a) deals only with providing notice of an application for the appointment of a receiver, not with providing notice of a petition for dissolution or initiating a dissolution proceeding. Thus, to the extent Appellants appeal from that portion of the Court's rulings that ordered dissolution, a disposition of Company assets, and a distribution of the proceeds to the shareholders of the company, §1203(a) is entirely inapplicable. And, since this substantive relief granted by the trial court was granted pursuant to sections of the BCL to which §1203(a) does not apply, such relief cannot be appealed (let alone reversed) on this basis, in any event.

If anything, Appellants' argument would speak only to reversal of that part of the Court's dissolution Order that appointed a Receiver.

Third, §1203(a) provides only that notice shall be given "in such manner as the court directs." In this case, the trial court did not direct Brandon to do so. (R.15-17). Given that the trial court did not direct that notice be provided to the Attorney General, Brandon cannot be deemed to have failed to comply with this provision of the BCL.

Finally, Appellants have not cited to any precedential authority for the proposition that a lack of notice to the Attorney General's Office is a jurisdictional or otherwise "fatal" flaw. Indeed, the lone case cited by Appellants, a 1963 decision from the New York County Supreme Court, itself refers to BCL §1203(a) only in *dicta*, and cites to another, Kings County Supreme Court decision, which rejected the notion that BCL §1203(a) was jurisdictional or should otherwise preclude a trial court from addressing a receiver application on its merits. See Leonard v. Soufoul, 13 Misc.2d 659, 660 (Sup. Ct., Kings Co., 1957).

Accordingly, because the trial court appointed a receiver pursuant to CPLR 6401 in addition to BCL §1113; because the trial court did not direct Brandon to provide notice to the Attorney General's Office, in any event; and because compliance with §1203(a) is not a jurisdictional issue, the trial court's appointment of a Receiver should not be disturbed on this ground.

## CONCLUSION

WHEREFORE, Brandon M. Brady respectfully requests that this Court affirm the trial court's Decisions and Orders in their entirety.

Dated: August 27, 2020
Rochester, New York

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Font: Times New Roman

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Dated: August 27, 2020

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