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

ALVIN CLAYTON FERNANDES, Petitioner, -against- MATRIX MODEL STAFFING, INC. Respondent.	**Index No. 160294/2021** **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PETITION FOR DISSOLUTION**

Respondent MATRIX MODEL STAFFING, INC. ("Matrix"), by and through its counsel, respectfully submits this memorandum of law in support of its motion to dismiss the amended verified petition for dissolution pursuant to CPLR 3211(a)(1) and (7)

Standard To Dismiss

Upon a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the Court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Salvatore v. Kumar,* 45 A.D.3d 560, 562–63, 845 N.Y.S.2d 384, 388 (2007) A motion for dismissal of a petition for dissolution is procedurally proper. *Application of Dubonnet Scarfs, Inc.*, 105 A.D.2d 339, 342, 484 N.Y.S.2d 541, 543 (1st Dept.1985)(we find that the instant Petition fails to state a cause of action since this petition does not allege any facts that would justify a judicial dissolution on any of the grounds set forth either in BCL sections 1104 or 1104–a)

The petition is of course to be afforded a liberal construction, the facts alleged therein accepted as true, and the petitioner accorded the benefit of every possible favorable inference. *Leon v. Martinez,* 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511.

However, "[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss[,] allegations consisting of bare legal conclusions…are not entitled to any such consideration." *Id.* (internal citations omitted) Here, the petition fails to plead both the standing and the special circumstances necessary to warrant involuntary dissolution of a corporation. The petition should be dismissed.

Standard For Involuntary Dissolution

The Amended Verified Petition ("Amended Petition" or "Amd. Pet.") of Alvin Clayton Fernandes ("Petitioner" or "Mr. Fernandes") for the dissolution of Matrix is brought under New York Business Corporation Law ("BCL") § 1104-a. BCL § 1104–a provides that the "holders of shares representing twenty percent or more of the votes of all outstanding shares" of a close corporation with the right to petition for judicial dissolution under certain "special circumstances" (BCL § 1104–a).

I. Petitioner Fails To Establish Standing

The Amended Petition fails to plead that Mr. Fernandes holds any voting shares, (Amd. Pet., ¶ 3), and so should be dismissed on that ground alone. *Matter of Wiedy's Furniture Clearance Ctr. Co., Inc.*, 108 A.D.2d 81, 83, 487 N.Y.S.2d 901 (1st Dept. 1985); see also *In re Michael Bernfeld, D.D.S.*, 86 A.D.3d 244, 252–53, 925 N.Y.S.2d 122, 128 (2nd Dept. 2011) (petitioner was not entitled to vote in an election of directors, [so] there was no basis upon which the petitioner could establish the prerequisites necessary for her to present the petition for judicial dissolution of the subject corporations)

II. Petitioner Fails To Establish "Special Circumstances"

Second, the Amended Petition fails to plead the requisite special circumstances, that the directors or those in control of the corporation being guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders. (BCL § 1104–a[a][1] and [2]).

A. Petition Fails To Allege Oppressive Acts

The Petition does not allege the Respondent committed an illegal act or fraud upon Mr. Fernandes, and so he appears to proceed on the "oppressive" prong of the statute. The statute does not define "oppressive actions," and so Courts have interpreted that phrase to mean a defeat of the petitioner's reasonable expectations of ownership of the corporation. *In re Williamson*, 259 A.D.2d 362, 687 N.Y.S.2d 53 (1st Dept. 1999); see also *Cunningham v. 344 6th Ave. Owners Corp.*, 256 A.D.2d 406, 407, 681 N.Y.S.2d 593, 593 (2nd Dept 1998)(oppressive conduct has been defined as thwarting the minority shareholder's reasonable expectations)

In *Matter of Kemp & Beatley* (*Gardstein*), the Court of Appeals examined the nature of oppressive conduct within the context of § 1104-a and concluded "that utilizing a complaining shareholder's 'reasonable expectations' as a means of identifying and measuring conduct alleged to be oppressive is appropriate." *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73, 473 N.E.2d 1173, 1179–80 (1984)

However, "mere disappointment in the results of a venture is not sufficient." *Id.* Rather, the statutory protection is more dramatic, and "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [minority shareholder's] decision to join the venture." *Id*.; see also *Matter of Wiedy's*, 108 A.D.2d at 83–84.

"Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled." *Matter of Kemp & Beatley,* 64 N.Y.2d at 73(disappointment alone should not be equated with oppression). That is especially true where a minority shareholder's own actions precluded the realization of any reasonable objective expectations. *Id.* at 74; *In re Bitter,* 270 A.D.2d 101, 704 N.Y.S.2d 250 (1st Dept. 2000), *leave to appeal denied*, 95 N.Y.2d 764, 716 N.Y.S.2d 39, 739 N.E.2d 295.

And that is exactly what happened here.

B. Admissions of Petitioner That Preclude Dissolution

As an initial matter, Petitioner nowhere states what expectations of his were central to his decision to join Matrix. However, Mr. Fernandes does use the phrase "reasonable expectations" in his Amended Petition, and he appears to plead that he reasonably expected to participate in the major operational and financial decisions of Matrix, and have the 80% owner, Jacquelyn Willard, heed his occasional advice. (Amd Pet., ¶ 21-23) However, as a 20% owner of shares, and non-voting shares at that, Mr. Fernandes could not have reasonably expected to have any rights to approve or disapprove the 80% holder's decisions, or "have real authority or role in the operation of Matrix." (Amd. Pet., ¶ 22).

In addition, Petitioner affirmatively rejected any role at Matrix, never mind reasonably expected one. This is established in the Amended Petition itself, where Petitioner candidly boasts of his other, non-Matrix-related ventures. (Amd. Pet., ¶ 22) There are three, any one of which make his meaningful, informed participation in Matrix's operations impossible.

First, petitioner proclaims himself a "Super Model," who has "graced the pages" of various "top publications" and "countless catalogues." He also avers to have recently been signed by the "world-renowned" IMG Models. While Petitioner does not provide what his day-

to-day responsibilities as a Super Model are, they would seem to entail an invariably hectic schedule of photography and videography sessions, and other media appearances, in far-flung exotic locales – that is if the careers of other supermodels such as Christie Brinkley, Elle MacPherson or Stephanie Seymour are any guide.

Next, Mr. Fernandes and his wife are owner/operators of the "award-winning" restaurant Alvin and Friends, in New Rochelle, NY. Mr. Fernandes does not explain how he could operate a bustling, celebrity-packed restaurant, itself a more-than-full time job, and also handle daily tasks at Matrix. Moreover, on top of those two separate, demanding careers, Mr. Fernandes is also an artist whose work appears in the Smithsonian and on the walls of various business and entertainment luminaries. With those three successful, vibrant non-Matrix careers, Mr. Fernandes could not reasonably expect to have a hand in its daily operations in any way. Nor did Mr. Fernandes want that for himself – instead he ignored dozens of requests of him to get involved in Matrix, by bringing in business, assisting with company requirements for various lending and refinancing needs, or even just to look at his Matrix e-mails or company documents. Each time Matrix was rebuffed. Mr. Fernandes was not squeezed out or frozen out by the majority, he walked out.

For example, in a 2019 Matrix attempt to refinance some of its debt, Matrix' majority owner, Jacquelyn Willard, had approached an entity called Smartbizloans to explore various options. In an email, which Mr. Fernandes received as a cc recipient, the Smartbiz lender wrote to Ms. Willard, "[o]riginally you mentioned Alvin was not as involved in the business as he has his own restaurant so we were fine leaving off the term loan. I noticed on your website he is still listed as an owner, what is his current involvement in the business?"

Ms. Willard responded, with Mr. Fernandes again a cc recipient, "Alvin takes the occasional meeting for the business when we need him to…he is not involved in the day-to-day operations of the company." Petitioner did not respond to these emails with the slightest protest or correction. To the contrary, Petitioner candidly admits that Ms. Willard "has been running the day-to-day operations of Matrix[.]" (Amd. Pet., ¶ 20)

Moreover, the desire to leave Mr. Fernandes off the loan arose because of his inaccurate representations of his financial status. In a previous financing exploration with Smartbiz, for an SBA loan, Mr. Fernandes as a 20% owner of Matrix was required to be a guarantor of the loan. Mr. Fernandes did provide his credit score to Matrix, to share with the lending institution, but provided a false one. Because of that, among other issues Smartbiz had uncovered concerning Mr. Fernandes, this option became unavailable to Matrix.

Subsequently and in a different refinancing attempt, Ms. Willard wrote to Mr. Fernandes, stating in part "the banks have given us a way forward by refinancing the loan, but they will only do this if we reduce your ownership interest by 1%. This isn't the first time this has come up, and it won't be the last. To be clear, your 20% interest is and has been main roadblock to us obtaining a small business loan….We are only asking for a mere 1% reduction of your ownership interest[.]"" Mr. Fernandes did not even bother to respond. The most meager request of a sacrifice was made of Mr. Fernandes, to help his struggling company, and even that was too much to ask. His desire to participate in Matrix affairs could hardly be less.

Mr. Fernandes also did not check his Matrix email account, apparently ever. Nor did he check the Google drive document sharing platform where Matrix financial documents were consistently shared with him, apparently ever.

As Ms. Willard wrote, on July 24, 2019, in part "I shouldn't have to beg you to check your email or Google drive…I have logged onto your email to discover you do not check it. This is incredibly discouraging to me as a business partner, especially considering what Matrix has been going through for quite some time now." Again, silence, even though Ms. Willard made a point of sending the email to his restaurant email address, in an attempt to overcome Mr. Fernandes' self-imposed communication obstacles.

Then, on August 20, 2019 Ms. Willard's concerned father (and Matrix creditor) wrote, in part: "Hello Alvin, It has now been 27 days since we sent this email to you…As you should already be aware, Jackie [Ms. Willard] has sent you several communications of late trying to update you on important matters." He went on to beseech Mr. Fernandes to respond to company communications, and keep even the very few commitments that he had made to the company.

After numerous emails to Mr. Fernandes asking for a response to Matrix issues, including dozens of emails from Matrix' business lawyers, Romano Law, Mr. Fernandes answered. His response came seven (7) months after Mr. Willard's email imploring him to participate in Matrix affairs in any way at all. Mr. Fernandes only then wrote to the man keeping Mr. Fernandes' own company afloat with frequent infusions of cash, by saying in part: "For a very long time the running of day to day running of Matrix [] has been conducted by Jacquelyn. I am well aware…of her wanting me to take on a more active role in the day to day running of the company, but I've been unable to do more than I was able to do….I give my voice, but at the end of the day Jacquelyn runs the company and has made all the major decisions over the past several years."

The next day, at 6:06 a.m., Mr. Fernandes took a decidedly less friendly tone in an email to Ms. Willard, a woman thirty (30) years his junior (her involvement at Matrix began when she

was 19), Mr. Fernandes wrote, in part: "I handle the day-to-day of my Restaurant and take ownership of all the decisions good and bad. It's call (*sic*.) business."

Just so. Mr. Fernandes should take his own advice and take ownership of his decision to walk away from Matrix, ignore the company email account and document storage platform, single-handedly sabotage its refinancing efforts, and occasionally misuse the Matrix debit card to buy videogames.

C. Corporate Mismanagement Claims Do Not Support Dissolution

As far as Matrix's tax and accounting issues, Mr. Fernandes concedes that these are issues of "corporate mismanagement." (Amd. Pet., ¶ 31) That, however, is not one of the Special Circumstances warranting dissolution under BCL § 1104-a.

To the extent Petitioner is basing his petition for dissolution on corporate waste, that too fails. "Waste has been held to include misappropriation of corporate assets for private purpose (see *Matter of Schwen*, 154 A.D.2d 601, 546 N.Y.S.2d 429; *cf.*, *Leibert v. Clapp*, 13 N.Y.2d 313, 247 N.Y.S.2d 102, 196 N.E.2d 540), as opposed to simple mismanagement (*cf.*, *Matter of Levandusky v. One Fifth Ave. Apt. Corp.*, 75 N.Y.2d 530, 554 N.Y.S.2d 807, 553 N.E.2d 1317). Petitioner explicitly accuses Ms. Willard of corporate mismanagement, but not looting or misappropriation of assets for her personal benefit.

III. Other Concerns and Public Policy Warrant Dismissal

As dissolution is a drastic, Draconian remedy, by statute a Court is required to "consider whether liquidation of the corporation is the only feasible means whereby petitioning shareholders may obtain a fair return on their investment, and whether it is reasonably necessary to protect the rights and interests of a substantial number of shareholders." *Fedele v. Seybert*, 250 A.D.2d 519, 521–22, 673 N.Y.S.2d 421, 423 (1st Dept. 1998); *DiPace v. Figueroa*, 223

A.D.2d 949, 951–52, 637 N.Y.S.2d 222, 224 (1st Dept. 1996); *Gimpel v. Bolstein*, 125 Misc. 2d 45, 49, 477 N.Y.S.2d 1014, 1017 (Sup. Ct. 1984) "Contrary to respondents' interpretation of an all or nothing approach to dissolution, upon a finding of oppressive conduct, 'consideration must be given to the totality of circumstances *** to determine whether some remedy short of or other than dissolution constitutes a feasible means' of resolving the dispute." *Matter of Wiedy's Furniture Clearance Ctr. Co., Inc.*, 108 A.D.2d 81, 84–85, 487 N.Y.S.2d 901 (1985)

It must be noted that Matrix employs 170 people, who do not seem to factor into Mr. Fernandes' desire for dissolution. It also must be noted that Matrix would actually harm Mr. Fernandes more than it would help. He has averred in his Amended Petition that he had been identified by the Internal Revenue Service as an individual responsible for Matrix' tax liability. But with Matrix gone, there is one less source to pay the IRS, and so Mr. Fernandes is that much more likely to be the one who the IRS determines must pay. And Mr. Fernandes is well acquainted with the fact that tax authorities will pursue the owners of small corporations for the tax liabilities of the corporation, solely because as owners they are deemed "a responsible person" of that entity. Just last April, a tax warrant was issued to "Alvin Clayton Fernandes Individually and as a Responsible Person of Alvin and Friends LLC" by the New York Department of State.

Accordingly, the petition should be dismissed on this basis as well.

Conclusion

In sum, Mr. Fernandes is an absentee owner of non-voting shares that he received for free (he does not allege contributing any capital at all), who affirmatively rejects knowing anything about Matrix or doing anything for Matrix. Simply put, Mr. Fernandes could not possibly have any reasonable expectations of Matrix, period. Instead, he has a simple, unreasonable

expectation of Matrix and Ms. Willard: "something for nothing." The remedy for Mr. Fernandes' unmet expectation, if there is any remedy at all, should not include the liquidation of a company that employs one hundred and seventy (170) people who do come to work, day after day, and have for years, and have tried to do the opposite of Mr. Fernandes, and make something out of nothing.

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