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 FURTHER SUPPORT OF APPLICATION TO PERMIT NOTICE OF ELECTION TO PURCHASE PETITIONER'S SHARES**

JACQUELYN WILLARD, the majority owner of Respondent MATRIX MODEL STAFFING, INC. ("Matrix"), by and through counsel, respectfully submits this memorandum of law in further support of her application: i) to permit, pursuant to New York Business Corporation Law § 1118(a), the Notice of Election of the majority shareholder of Respondent Matrix Model Staffing, Inc. ("Matrix"), Ms. Jacquelyn Willard, to purchase the shares owned by Petitioner Alvin Clayton Fernandes at their fair value, and ii) to limit the scope of the reference by this Court to the Special Referees Part to the determination of the fair value of Petitioner's shares.

Preliminary Statement

The best reason to grant Ms. Willard's Notice of Election to Purchase Petitioner's Shares in Respondent Matrix Model Staffing, Inc. is that Petitioner does not actually oppose it. Petitioner instead writes that "Petitioner does not per se reject a possible BCL 1118 buy-out[.]" Petitioner's Memorandum of Law In Opposition, dated December 30, 2022 ("Pet. Mem."), at 6.

In addition, Petitioner simply does not address why "the appropriate remedy should not consider an election under BCL § 1118 as a non-exclusive remedy at the BCL § 1109 hearing[]" despite the Court's clear direction that it do so. Order to Show Cause Why Notice of Election

Should Not Be Permitted By This Court, of Hon. Frank Nervo, J.S.C., dated November 17, 2022 ("OSC")(NYSCEF Doc. No. 42), at 3. Accordingly, it is undisputed that the BCL § 1109 hearing should consider a BCL § 1118 buyout. In fact, it must be considered. "Every order of dissolution, however, must be conditioned upon permitting any shareholder of the corporation to elect to purchase the complaining shareholder's stock at fair value." *E.g.*, *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 74, 473 N.E.2d 1173, 1180 (1984)(emphasis added)

The point, however, of an election to purchase Petitioner's shares is to stop the litigation on the merits of the dissolution, and thereby save on the costs of the litigation. In making the election now, the grounds for dissolution are effectively conceded. If Petitioner wants to continue the litigation anyway, and decide later whether it will accept the election, if he proves grounds for dissolution, then there is certainly no reason to require posting of a bond as if the election were accepted. Accordingly, Petitioner offers no law holding that a bond must be posted by a company which may be liquidated. There is also no law offered by Petitioner to require the posting of a bond merely to have the notice of election considered. If Petitioner wants to accept the election later, the bond question comes later. It is as simple as that.

Next, Petitioner falsely states that he does not have access to "the corporate financial books and records [of Matrix] for the three preceding years" as BCL § 1104-a(c). On February 16, 2022 Petitioner's counsel was affirmatively sent two hundred sixty five (265) pages of financial records of Matrix, comprised of its General Ledger for 2021, its Trial Balance as of December 31, 2020, and its Balance Sheet as of December 31, 2021. Petitioner's counsel did not ever hint that this documentation was insufficient to make a determination of the value of Matrix as a company, nor of Petitioner's twenty percent (20%) ownership interest, under any potential method of fair value determination at the applicable time. Petitioner's counsel has, in fact, never

sought any factual documentation from Matrix's undersigned counsel, on any topic, since the beginning of this matter. Even after Ms. Willard made a Notice of Election on May 3, 2022 Petitioner failed to ask for a single sheet of financial documentation. In fact, Petitioner did not respond at all for some six (6) months. In any event, if Petitioner would like company financial documents, he only needs to ask.

Finally, on the topic of his tactical desire for Ms. Willard to post a bond, Petitioner fails to offer any evidence at all that the assets of Matrix have been or are being dissipated while his petition is pending. In fact, Petitioner does not even allege that is happening. But absent such evidence, there is no basis for Ms. Willard or Matrix to post a bond – as a matter of law – even if Petitioner had accepted Ms. Willard's election. The "primary purpose of the bond requirement under section 1118 (c) (2) is to protect minority shareholders against tactical fluctuations in their share prices during the valuation process." That is according to Petitioner's own caselaw on this subject – in a section that Petitioner declines to share with the Court. See *In re 212 E. 52nd St. Corp.*, 185 Misc. 2d 95, 99, 712 N.Y.S.2d 777 (Sup. Ct. 2000); citing *Matter of Smith v Russo,* 230 A.D.2d 863 (2nd Dept. 1996) Here, there is absolutely no hint that there has been the slightest fluctuation whatsoever in Matrix or Petitioner's ownership in it. Accordingly, by law, there is no basis for a bond.

Argument

I. The Election To Purchase Shares Should Be Permitted

The law in New York plainly favors a buy-out as opposed to the liquidation of an on-going company – certainly one like Matrix that employs several dozens or hundreds of people at any given time. The law on this point is clear, and undisputed. "The purpose behind enactment of a [section 1118] buy-out provision was to provide the corporation or its shareholders with a

mechanism for preserving the enterprise as a going concern." *Matter of Seagroatt Floral Co., Inc.*, 78 N.Y.2d 439, 449, 583 N.E.2d 287, 292 (1991) "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) Here, there is. Petitioner does not say otherwise, and it is by definition fair to Petitioner for him to receive the fair value of his shares.

Notably, Petitioner does not claim that he would be financially better off if Matrix were liquidated, as opposed to his shares being bought out. Nor does Petitioner dispute that the opposite is in fact true, which is that he would actually be better off if Matrix remained an on-going entity. An on-going Matrix can continue to pay down the payroll tax liability. A liquidated Matrix cannot.

In short, there is absolutely no reason at all to liquidate Matrix – and a hundred reasons (or however many employees Matrix has at any given time) not to.

Additionally, although totally unnecessary to the narrow issue at hand, Matrix' counsel will say that the reason why Ms. Willard did not submit a fact affidavit in support of Matrix' prior Motion to Dismiss is because a moving party generally may not do so. On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the issue is one of law only, and based only upon the face of the pleading and whether it states a cause of action standing alone. In determining whether a complaint is legally sufficient, "unless the motion is converted to a 3212 motion for summary judgment the court will not consider [affidavits] for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will

accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint. *See Nonnon v. City of New York,* 9 N.Y.3d 825, 827 (2008); *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 635–636 (1976). An affidavit from Ms. Willard would not have been proper. *Major League Soccer, L.L.C. v. Fed. Ins. Co.*, 45 Misc. 3d 1211(A), 3 N.Y.S.3d 285 (N.Y. Sup. 2014)

Unfortunately, Petitioner's speculation that Ms. Willard must have designated him as the person responsible for collecting and paying Matrix payroll taxes, however spurious and wrong, was and is not something that can conclusively be disproven at the pleading stage. Even if Ms. Willard denied that she so-designated Petitioner in this motion practice, and she certainly will if and when a hearing occurs, there would still be a question of fact and credibility for the fact-finder to evaluate. Petitioner has sworn under oath that she did.

Most importantly, however, the question of who to believe about that designation (the IRS in fact advised Petitioner that he was a responsible person for payroll taxes, not the responsible person as the Court found in denying the motion to dismiss – an important distinction it is respectfully submitted in a two-owner corporation) is irrelevant here. It simply has nothing at all to do with the narrow legal question of whether an election to purchase shares should be permitted, now, as an alternative to the corporate death sentence of dissolution by liquidation (how liquidation would address Petitioner's tax liability is not explained).

In fact, even the question of whether Petitioner is potentially co-liable for the tax liability of Matrix, or not, is irrelevant. Either way, the value of Matrix stays exactly the same – the tax liability is still a company liability. And of course Petitioner is entirely free to make any argument he chooses concerning the value of his interest, if the election is allowed – but that is different from whether the election should be allowed in the first place – as it should.

II. A Bond Would Be Improper

In order for a bond to be appropriate now, pursuant to BCL § 1118, the Court must be given "proof persuasively demonstrating a need for such relief" from the party *O'Connor v. Coccadotts, Inc.*, 47 Misc. 3d 331, 334, 3 N.Y.S.3d 567, 569 (N.Y. Sup. 2015) Additionally, that proof must relate to an alleged diminution of the assets of the company at issue – and here there is absolutely no hint of diminution of assets at all – never mind proof of it.

Petitioner, in his Opposition, simply overlooks the law holding that allegations that do not implicate the value of the company are irrelevant to the narrow task of deciding if a buy-out bond should be posted. Contrary to what Petitioner asserts, "[t]he allegations of misconduct are relevant [only] if any alleged misconduct by those in control of the corporation has had an adverse impact upon the corporation's value." *Markman v. Exterior Delite, Inc.*, 14 Misc. 3d 910, 915, 831 N.Y.S.2d 656, 661 (Sup. Ct. 2006)(emphasis added). Otherwise, "the rule articulated in *In Re Pace Photographers, Ltd., supra,* applies when a BCL § 1104–a petition is brought solely under section (a)(1)…such claims are irrelevant in a BCL § 1118 proceeding, where fixing blame is immaterial once the respondent shareholders have elected to buy the petitioner's shares." *Markman*, 14 Misc.3d at 917.

It simply stands the law on its head to say that: there should not be an election to purchase Petitioner's shares, something available only if Petitioner pleads enough to get to a dissolution proceeding, precisely because he pled enough to get to a dissolution hearing. If that were the rule, an election to purchase shares would never be available in a dissolution context. Instead, the law is that the election is always available. *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 74.

Moreover, Petitioner's own case authority is perfectly in accord – when read in full. Unlike what is found in Petitioner's Opposition, the below is a comprehensive quotation of *In re Kastleman*, as opposed to the brief mischaracterization that Petitioner offers. (Pet. Mem. at 7)

> In light of petitioner's serious allegations, the rather questionable financial capability of William Shalom to carry through on his offer to purchase petitioner's shares, the parties' drastically different opinions as to the value of petitioner's shares, the pendency of several lawsuits against William Shalom and his family and the likelihood, if petitioner's allegations of waste and mismanagement are substantiated, that the corporation would be worthless, the IAS Court's denial of petitioner's application was improvident. As for the amount of such an undertaking, there is significant evidence that the corporation is worth far more than the Shaloms claim. In our view, a bond in the amount as indicated herein will protect petitioner's interests.

In re Kastleman, 234 A.D.2d 181, 182, 651 N.Y.S.2d 485 (1996)

Unlike in Petitioner's leading case, *Kastleman*, here Petitioner offers absolutely (i) no reason to think Ms. Willard cannot purchase Petitioner's shares, (ii) no opinion on the value of Matrix value or Petitioner's share, at all, nor of course whether Matrix has a different opinion of its value, and (iii) no suggestion that the financial health of Matrix or Ms. Willard has deteriorated since the Petition was filed. With absolutely no evidence given to the Court to remotely estimate the value of Matrix, or Petitioner's interest, there is absolutely no factual basis to set a value for a bond to protect that interest. However, according to *Kastleman*, if evidence does develop that the assets of Matrix are being drained, and if evidence of the value of those assets is presented, then Petitioner should have the right to seek such a bond. But that has not happened yet.

III. Legal Fees Should Not Be Awarded

Legal fees should not be awarded to Petitioner, for work done prior to the notice of election to purchase shares, for the simple reason that Petitioner is still opposing that election. See *Qadan v. Tehseldar*, 139 A.D.3d 1036, 1037, 32 N.Y.S.3d 285, 287 (2016) A shift in legal

fees makes sense if the Petitioner paid for unnecessary legal work given his acceptance of election to purchase shares, because litigation on the legal merits of the petition for dissolution was accordingly unnecessary. But here, that is decidedly not the case. Instead, Petitioner wants to keep litigating while taking the benefit of not litigating and accepting the election. In other words, Petitioner wants to have his cake and eat it too – as he has wanted all along with Matrix.

Conclusion

For the foregoing reasons, this Court should GRANT the application: i) to permit, pursuant to New York Business Corporation Law § 1118(a), the Notice of Election of the majority shareholder of Respondent Matrix Model Staffing, Inc. ("Matrix"), Ms. Jacquelyn Willard, to purchase the shares owned by Petitioner Alvin Clayton Fernandes at their fair value, and ii) to limit the scope of the reference by this Court to the Special Referees Part to the determination of the fair value of Petitioner's shares. Further, and in light of this Court's instructions in its Order to Show Cause, the applicant respectfully submits that no bond should be posted in this matter, and that in any event no amount of a potential bond can be reasonably calculated in the absence of any assertion or evidence of the value of Matrix, or Petitioner's interest therein.

Dated: January 6, 2023
New York, New York

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