SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JONATHAN TROFFA,	Index No. 609510/2016
Petitioner/Plaintiff,	Hon. Jerry Garguilo
JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	
Plaintiff,	
-against-	
JOSEPH M. TROFFA,	
Respondent/Defendant,	
LAURA J. TROFFA, JOS. M. TROFFA MATERIALS CORPORATION, NIMT ENTERPRISES, LLC, L.J.T. DEVELOPMENT ENTERPRISES, INC., and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT OF DISSOLUTION ON CONSENT, TO STRIKE AMENDED COMPLAINT, AND CONDITIONALLY APPOINTING RECEIVER TO LIQUIDATE AND WIND UP THE CORPORATION'S AFFAIRS

Peter A. Mahler
Franklin C. McRoberts
FARRELL FRITZ, P.C.
Attorneys for Respondent/Defendants
622 Third Avenue, Suite 37200
New York, New York 10017
(212) 687-1230

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Respondent/Defendant Joseph M. Troffa ("Joseph"), by his attorneys, Farrell Fritz, P.C., respectfully submits this Memorandum of Law in support of his motion for an Order: (i) pursuant to Business Corporation Law §§ 1104 and 1111, entering a judgment on Joseph's consent for the relief demanded in the First Cause of Action in the Verified Petition/Complaint, sworn to June 22, 2016 (the "Petition/Complaint"), and dissolving Plaintiff Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation"); (ii) pursuant to Business Corporation Law ("BCL") § 1116, striking the Verified Amended Complaint, sworn to August 16, 2016 (the "Amended Complaint"); (iii) pursuant to BCL § 1113, conditionally appointing a receiver to liquidate and wind up the Corporation's affairs; and (iv) granting such other and further relief as this Court deems just and proper.

PRELIMINARY STATEMENT

This is a dissolution proceeding under BCL § 1104 between two equal 50% shareholders of a corporation. The son, Petitioner/Plaintiff Jonathan Troffa ("Jonathan"), sued the father, Joseph, by whom Jonathan was gifted ownership of the Corporation in 1995. It is undisputed that Joseph and Jonathan are hopelessly deadlocked, cannot effectively carry on the business of the Corporation, that there is internal dissension, and that the two equal shareholders are so divided that dissolution would be beneficial to the shareholders.

At the commencement of the case, Jonathan moved, by Order to Show Cause, to impose a raft of needless temporary restraints on Joseph and the Corporation. After a month of ultimately fruitless settlement negotiations, on August 16, 2016, Joseph filed a formal consent to dissolution. Jonathan then attempted to foil Joseph's consent by filing a purported Amended Complaint omitting his dissolution claim without Court approval as required by BCL § 1116. For the following reasons, the Court should grant Joseph's motion in its entirety:

First, the Court should strike the Amended Complaint. Under BCL § 1116, a court order is required to withdraw a claim for dissolution under BCL § 1104, even if withdrawal would otherwise be as of right under CPLR 3217 (a). Jonathan did not ask for the Court's approval, and even if he had, he could not satisfy the standard under BCL § 1116, which requires proof that "the cause for dissolution did not exist or no longer exists." Here, the cause for dissolution is even greater now than when Jonathan filed his original pleading. Therefore, the Court should hold that Jonathan's attempted unilateral withdrawal of his claim for dissolution is a nullity and strike the Amended Complaint (*see* Point I).

Second, the Court should order a judgment on consent dissolving the Corporation. Pursuant to BCL § 1104, judicial dissolution of a corporation is warranted where deadlock and dissension destroy the orderly functioning of the business. Here, Joseph and Jonathan both agree that they are hopelessly deadlocked as to all aspects of the operation and finances of the business. For this reason, Joseph, the respondent, has formally consented to dissolution. Therefore, the Court should adjudge the Corporation dissolved (*see* Point II).

Third, the Court should order the conditional appointment of a receiver to liquidate and wind up the Corporation's affairs. Pursuant to BCL § 1113, 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..." Here, Joseph respectfully requests that the Court issue an order conditionally appointing a receiver to liquidate the Corporation's assets and wind up its affairs in the event that, within two weeks of the Court's order, the parties are unable to agree upon and submit a joint plan of liquidation (*see* Point III).

STATEMENT OF THE FACTS

The relevant facts are set forth in the Affidavit of Joseph M. Troffa in Support of Motion for Judgment of Dissolution on Consent, to Strike Amended Complaint, and Conditionally Appointing Receiver to Liquidate and Wind Up the Corporation's Affairs, sworn to September 16, 2016 (the "Troffa Aff."), to which the Court respectfully is referred.

Argument

Point I

THE COURT SHOULD STRIKE THE AMENDED COMPLAINT

BCL § 1116 provides that "[a]n action or special proceeding for the dissolution of a corporation may be discontinued at any stage when it is established that the cause for dissolution did not exist or no longer exists." BCL § 1116 supplants the usual rule for discontinuance as of right, requiring Court permission to withdraw a claim for dissolution under BCL §§ 1104 or 1104-a (*In re Astoria Sports Complex, Inc.*, 5 AD3d 681, 681 [2d Dept 2004]; *Matter of Musilli*, 134 AD2d 15, 18-21 [2d Dept 1987]; *see* CPLR 3217).

In *Morizio v Roeder* (44 Misc 3d 1214[A], *1 [Sup Ct, Albany County 2014]), a shareholder filed a complaint alleging claims for breach of contract, fraud, tortious interference, breach of fiduciary duty, unjust enrichment and dissolution under BCL § 1104-a. The defendants moved to dismiss the complaint under CPLR 3211 and for an order permitting a late election to buy plaintiff's shares under BCL § 1118 (*id.*, *1-*2). Plaintiff opposed the motion and cross-moved for permission to withdraw his dissolution claim under BCL § 1116.

Although CPLR 3217 (a) would have permitted Morizio to discontinue his dissolution claim as of right, the Court nonetheless denied his motion under BCL § 1116. (*id.*, *6). The Court explained:

> [P]laintiff moves for leave to withdraw his dissolution claim pursuant to BCL § 1116, which authorizes discontinuance of a "special proceeding for the dissolution of a corporation . . . when it is established that the cause for dissolution did not exist or no longer exists." Upon such a showing, the Court may exercise its discretion to authorize discontinuance of the proceeding "upon terms and conditions, as the court deems proper" (CPLR 3217 [b]; *see Matter of Astoria Sports Complex*, 5 AD3d 681, 681 [2d Dept 2004]).

(*id.*, *5). The Court held:

> In the exercise of its discretion, the Court . . . denies plaintiff's cross-motion for leave to withdraw his BCL § 1104-a claim for dissolution.
>
> Plaintiff has not demonstrated that "the [alleged] cause for dissolution . . . no longer exists" (BCL § 1116). Even if the BCL § 1104-a cause of action were withdrawn, the parties would remain embroiled in litigation in which plaintiff accuses the corporation and its majority shareholders of a persistent course of wrongful conduct.

(*id.*, *6).

Here, as in *Morizio*, Jonathan cannot show that "the cause for dissolution . . . no longer exists" (BCL § 1116). As explained more fully in Point II, the grounds for dissolution are stronger today than ever. Moreover, here, as in *Morizio*, "[e]ven if the BCL § 1104-a cause of action were withdrawn, the parties would remain embroiled in litigation in which [Jonathan] accuses the corporation and [Joseph] of a persistent course of wrongful conduct" (*Morizio v Roeder*, 44 Misc 3d 1214[A], *6; *compare e.g.* Troffa Aff., Ex. E, ¶¶ 28, 14 [alleging, *inter alia*, "an overarching scheme and conspiracy" to "defraud" Jonathan through "breaches of fiduciary duty, breaches of the duty of loyalty, diversion of corporate opportunities, self-dealing, corporate waste, undisclosed conflicts of interest and misrepresentation"]). Based on the foregoing, the Court should strike the Amended Complaint and hold that Jonathan's attempted unilateral withdrawal of his claim for dissolution is a nullity under BCL § 1116.

Point II

THE COURT SHOULD ADJUDGE
THE CORPORATION DISSOLVED ON CONSENT

Pursuant to BCL § 1104, judicial dissolution of a corporation is warranted where deadlock and dissension destroy the orderly functioning of the business (*see Matter of Dream Weaver Realty, Inc.*, 70 AD3d 941, 942 [2d Dept 2010] [granting dissolution where dissension between two equal 50% shareholders posed "an irreconcilable barrier to the continued functioning and prosperity of the corporation"] [internal quotations omitted]; *Oshrin v Hirsch*, 6 AD3d 352, 353 [1st Dept 2004] ["evident rancor between the families affords a basis for seeking judicial intervention without assigning fault"]; *Molod v Berkowitz*, 233 AD2d 149, 150 [1st Dept 1996] ["the evidence of dissension between the two 50% shareholders . . . leaves no doubt that the firm cannot continue to function effectively, and no alternative exists but dissolution"]). Under BCL § 1104, "[t]he underlying reason for the dissension is of no moment, nor is it at all relevant to ascribe fault to either party. Rather, the critical consideration is the fact that dissension exists and has resulted in a deadlock" (*In re Dream Weaver Realty, Inc.*, 70 AD3d at 942).

Here, Jonathan admitted in the Petition/Complaint that the Corporation is "hopelessly deadlocked" and "irreparably divided" (Troffa Aff., Ex. A, ¶¶ 77-84). He also admitted in an affidavit that Joseph and Jonathan are "deadlocked," that their relationship is "deteriorating," and that a cause of action for dissolution is "highly likely to be successful" (Troffa Aff., Ex. B, ¶¶ 1-3). Jonathan is bound by his judicial admissions (*see e.g. Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673–74 [1st Dept 2010] ["It is categorically stated in the verified complaint that Star of India was Sewa's agent for purposes of the contract. Such a statement in a pleading constitutes a formal judicial admission and

evidence of the fact admitted"]; *Retter v Zyskind*, 138 AD3d 496 [1st Dept 2016] ["plaintiff's statements in his affidavit . . . constitute judicial admissions"]).

Moreover, Jonathan's admissions that the Corporation is deadlocked are absolutely true and undisputed. Starting in 2010-11, a series of incidents, including, without limitation, Jonathan making enormous unauthorized charges on company and personal credit cards, refusing to cease the practice when instructed to do so, incurring approximately $68,000 in bank overdraft charges, refusing to implement a point-of-sales system, and over-purchasing stock which became obsolete, among others, seriously eroded Joseph's trust in Jonathan and raised serious concern that Jonathan was diverting cash receipts and had been using company funds on a large scale for personal credit card purchases (Troffa Aff., ¶¶ 14-22).

EventS escalated from there, and since late 2014, the atmosphere at work between Jonathan and Joseph has been positively toxic:

- Civil and constructive conversation has ceased completely.
- Jonathan has allowed Joseph no oversight of the hard goods business.
- Jonathan doesn't send or delays sending purchase tickets to the Corporation's bookkeeper. The staff under his supervision does not always make tickets for sales.
- Jonathan allows employees to handle cash purchases with no controls. Cash literally is dropped into a box with no security measures or recordkeeping.
- Jonathan does not record all cash sales.
- Aside from point-of-sales, Jonathan refuses to allow the use of a computerized purchase order system to track inventory the Corporation purchases.

- Jonathan makes sales to customers who are not current on their existing balances and are on credit-hold or C.O.D. status. When Joseph confronts Jonathan about these issues, he refuses to tell him what balances credit account customers owe the Corporation, and any payments Jonathan does receive from these credit accounts are not recorded on the Corporation's books.
- In the last two years Jonathan has gone on off-season buying sprees with vendors without Joseph's permission and even bypassing Joseph's directions to vendors that they not honor any purchase orders without his signature.
- Last year, as President, in an attempt to stop this practice, Joseph attempted to implement a computerized modern purchase order system by which the Corporation could track incoming and outgoing inventory. Jonathan refused to agree to comply with the purchase order system by continuing to order large quantities of hard goods product from suppliers without purchase orders approved by Joseph as President of the Corporation.
- Jonathan removed and to this day refuses to return about $2,000 worth of new telephone equipment purchased by NIMT for use by the Corporation.
- Jonathan refuses to cooperate and to secure the employees' assistance in moving and getting rid of materials in the yard in connection with Joseph's efforts to achieve compliance with town regulations governing outside storage.

- Jonathan continues to purchase cement blocks from a supplier who charges $200 more per truckload than another reputable supplier that Joseph asked him to use selling identical product.
- When Joseph presses Jonathan on these issues, Jonathan flies into a rage and becomes violent. It is impossible to discuss these issues with Jonathan without him becoming irate.
- Jonathan has done everything in his power to divide the Corporation into two factions, those loyal to him, and those loyal to Joseph. Those employees perceived to be loyal to Joseph are harassed and mistreated. To those employees perceived to be loyal to Jonathan, Joseph is depicted as powerless and inept.

(*id.*, ¶ 23). As shown, dissention among the shareholders permeates every aspect of the business.

Jonathan also has engaged in verbal abuse, physical intimidation and violence directed at Joseph and any staff he perceives to be loyal to Joseph, including Laura and the Corporation's bookkeeper, Sharon (*id.*, ¶ 24; *see* ECF Doc. No. 16, page 8 and Exhibit E thereto). Worst of all, Jonathan refuses to let Joseph have any contact with his grandchildren, Jonathan Thomas (age 13) and Mackenzie (age 12), whom Jonathan uses as leverage against Joseph (Troffa Aff., ¶¶ 6, 29). Matters since Jonathan filed for dissolution have not improved, and if anything have worsened: effectively Joseph remains locked out of the hard goods business which Jonathan continues to operate with no accountability (*id.*, ¶ 30). Joseph has serious reason to believe Jonathan is skimming thousands of dollars every week (*id.*). Nor is there any realistic chance of a turnaround in Joseph and Jonathan's relationship after Jonathan's public assault on Joseph's character and honesty and that of his wife's in the allegations against them in his lawsuit (*id.*, ¶

31). For all of these reasons, on August 16, 2016, Joseph filed a formal sworn Consent to Dissolution under BCL § 1104 (a) (ECF Doc. No. 28; *see* Troffa Aff., ¶¶ 35-42 and Ex. B).

Acknowledging that the business cannot continue in its current state, for about one month after the initial court appearance in this case on July 14, with the Court's active encouragement and assistance, the parties and their counsel engaged in renewed settlement negotiations based on Joseph's longstanding, very generous proposal to give Jonathan the assets associated with the hard goods business and allow him to run his own, new business at the same premises under lease (Troffa Aff., ¶ 35). The negotiations broke down in mid-August essentially because Jonathan continued to demand a large cash payment based on his fantastic idea that he is entitled to half the value of the real property owned by NIMT, L.J.T., and Joseph (*id.*, ¶ 36).

Literally while these discussions were taking place, approximately three weeks after he filed his Petition seeking dissolution and appointment of a receiver, without informing me (or the Court), Jonathan purchased in the Corporation's name from Ford of Smithtown, for his personal use, a 2015 F250 pickup truck at a total sale price of $55,160, of which he financed almost $48,000 (*id.*, ¶ 31 and Ex. A). Joseph only learned of the purchase in early September, when Jonathan left in the office for payment an invoice for the first monthly payment, after which Jonathan finally produced the purchase agreement (*id.*, ¶ 32).

In sum, there could hardly be a better case for dissolution. The breakdown between the two shareholders is absolute. Having exhausted every effort to resolve this dispute without the need for Court intervention, Joseph and Jonathan are left with no other option but dissolution. Based on the foregoing, the Court should issue an Order adjudging the Corporation dissolved on consent under BCL §§ 1104 and 1111.

Point III

THE COURT SHOULD CONDITIONALLY APPOINT A RECEIVER TO LIQUIDATE AND WIND UP THE CORPORATION'S AFFAIRS

The Court is authorized to order the appointment of a receiver under BCL Article 11. Pursuant to BCL § 1113, 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 article 12 (Receivership), who may be a director, officer or shareholder of the corporation." Here, Joseph respectfully requests that the Court issue an order conditionally appointing a receiver to liquidate the Corporation's assets and wind up its affairs in the event that, within two weeks of the Court's order, the parties are unable to agree upon and submit a joint plan of liquidation.

CONCLUSION

For all of the foregoing reasons, the Court should issue an Order: (i) striking the Amended Complaint; (ii) adjudging the Corporation dissolved on consent; (iii) approving Joseph's proposed Plan of Liquidation and Dissolution; and (iv) and granting such other and further relief as this Court deems just and proper.

Dated: September 16, 2016

FARRELL FRITZ, P.C.

By: /s/ *Peter A. Mahler*
Peter A. Mahler
Franklin C. McRoberts
Attorneys for Respondent/Defendants
622 Third Avenue, Suite 37200
New York, New York 10017
(212) 687-1230