SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of the Application of	Index No. 17-00902
JOSEPH M. TROFFA, as Sole Director and Holder of Shares Representing One-Half of the Votes of All Outstanding Shares of Jos. M. Troffa Landscape and Mason Supply, Inc.,	Date Purchased: 2-17-2017 Hon. Jerry Garguilo
Petitioner,	
For the Dissolution of JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC., a Domestic Corporation, Pursuant to Sections 1102 and 1104 (a)(3) of the Business Corporation Law,	
- against -	
JONATHAN TROFFA,	
Respondent.	

MEMORANDUM OF LAW IN SUPPORT PETITION FOR DISSOLUTION AND FOR CONDITIONAL APPOINTMENT OF A RECEIVER

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Petitioner Joseph M. Troffa ("Joseph"), by his attorneys, Farrell Fritz, P.C., respectfully submits this Memorandum of Law in support of his Verified Petition (the "Petition") for an Order: (i) dissolving Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation") pursuant to Business Corporation Law ("BCL") §§ 1102 and 1104 (a)(3); (ii) conditionally appointing a receiver to liquidate and wind up the Corporation's affairs pursuant to BCL § 1113; and (iii) granting such other and further relief as the Court deems just, equitable and proper.

PRELIMINARY STATEMENT

"You have forgotten the face of your father."

Steven King – The Dark Tower

This is a dissolution proceeding between father and son, the two equal shareholders of a landscape and masonry supply business founded by the father in 1972, before his son's birth. In a prior dissolution proceeding, Respondent Jonathan Troffa ("Jonathan"), the son, sued his father, Joseph, who in 1995 gifted Jonathan his stake in the Corporation out of love and generosity. Jonathan's relationship with his father has gone terribly astray. The two barely communicate, and only when absolutely necessary. Jonathan has totally excluded Joseph from the "hard goods" side of the Corporation, which accounts for 75% of the business. In Jonathan's dissolution proceeding, which he commenced in June 2016 under Index No. 609510/2016 (Gargiulo, *J.*), Jonathan said there was an urgent need to dissolve because he and Joseph cannot continue to effectively carry on the business jointly, and that they are so divided dissolution would be beneficial to the shareholders. Jonathan swore that a claim for dissolution was "highly likely to be successful" because he and Joseph are "deadlocked," and their relationship is rapidly "deteriorating." Jonathan's own words.

At the time, Jonathan expected Joseph to buckle from the threat of possible dissolution of the business he founded forty-five years ago. Jonathan thought Joseph would promptly settle and give Jonathan most of the business, with a large cash payment to top it off. The case did not go as planned. Joseph offered a fair settlement, but Jonathan wanted far, far too much. With no settlement possible, Joseph consented to dissolution because he cannot, under any circumstances, continue to do business with his son. Dissolution having lost its tactical advantage, Jonathan abruptly withdrew his dissolution claim before joinder of issue. In response, Joseph filed a motion for dissolution on consent, arguing that Jonathan's purported unilateral withdrawal of his dissolution claim violated BCL § 1116, which requires a court order to withdraw a claim for dissolution, and only upon a showing that the "cause for dissolution did not exist or no longer exists." The Court eventually ruled that because it declined to sign Jonathan's Order to Show Cause commencing the proceeding, the proceeding was not properly brought under BCL § 1106. Jonathan thus avoided dissolution on a technicality.

This proceeding is to finish what Jonathan started. For the following reasons, the Court should grant the Petition in all respects:

First, the Court should order dissolution under BCL § 1102. The Board of Directors of the Corporation recently adopted a resolution, based in part on the Corporation's grim financial performance for the year ended December 31, 2016, determining that dissolution of the Corporation and liquidation of its assets will be beneficial to the shareholders, and authorizing Joseph, as sole Director, to file a petition for judicial dissolution of the Corporation. This Petition is brought pursuant to the Board's authorization (*see* Point I).

Second, the Court should order dissolution under BCL § 1104 (a)(3). There is undisputed evidence of intense strife between the shareholders, which Jonathan readily admitted to in his

own prior petition for dissolution, effectively crippling Joseph and Jonathan's ability to jointly operate the Corporation. Jonathan adamantly refuses to implement essential business practices, like documenting purchases and sales. He refuses even to use a cash register. Jonathan becomes enraged and violent when Joseph attempts to speak with him about such matters. Jonathan has turned Joseph's own employees against him, forcing the staff into factions loyal either to Joseph or Jonathan. Jonathan has entirely locked Joseph out of management, or even a modicum of control, over the "hard goods" segment of the business, which now constitutes 75% of all revenues of the Corporation. Jonathan refuses to let Joseph see or speak with his own grandchildren. Under such circumstances, the Court can, and should, order dissolution without a hearing because there is no genuine dispute as to the existence of deadlock and dissension (*see* Point II).

Third, the Court should conditionally appoint a receiver to liquidate the Corporation's assets and wind up its affairs under BCL § 1113. The Court has broad discretion to allow the parties to work amongst themselves on a post-dissolution plan of liquidation of the Corporation's assets. However, if they cannot agree, then the only authorized disposition of corporate assets is liquidation at a public sale. Accordingly, the Court should appoint a receiver to sell the Corporation's assets in a public sale unless the parties are able to agree upon and submit a joint plan of liquidation within two weeks of the Court's order dissolving the Corporation (*see* Point III).

STATEMENT OF THE FACTS

The relevant facts are set forth in the accompanying Petition, to which Joseph respectfully refers the Court.

ARGUMENT

Point I

THE COURT SHOULD DISSOLVE THE CORPORATION UNDER BCL § 1102

BCL § 1102 provides, "If a majority of the board adopts a resolution that finds . . . that a dissolution will be beneficial to the shareholders, it may present a petition for its dissolution." "The power to voluntarily dissolve a domestic corporation" under BCL § 1102 "is vested in the board of directors" (*Fiorillo v New York State Dept. of Envtl. Conservation*, 123 AD2d 151, 154 [3d Dept 1987]). In *Deblinger v Deblinger* (2010 WL 3443332 [Sup Ct, Nassau County Aug. 19, 2010]), Justice Bucaria granted a sole director's petition to dissolve two family-held corporations under BCL § 1102 based solely upon a finding of "acrimony which has developed" among the shareholders.

Here, Joseph is the sole Director of the Corporation (Petition ¶ 33). In February 2017, Joseph received the Corporation's preliminary financial statements for the year ended December 31, 2016 (Petition, Ex. 17). The financial statements disclose that the dispute between the two shareholders is severely affecting the Corporation's finances, causing, among other things, a sudden, dramatic drop in sales, from $4,519,321 in 2015 to $3,942,164 in 2016. That amounts to an alarming $577,000 (13%) decline in sales versus the previous year, bringing the Corporation's sales to their lowest point since 2010. As a result of its declining sales, the Corporation will report an approximate $71,000 (185%) decline in net income versus the previous year, and a net loss of over $34,000 in 2016 as compared to a net profit in 2015 of $37,000 (Petition ¶¶ 185-96).

On February 15, 2017, the Board of Directors of the Corporation, through Joseph, its sole Director, adopted a resolution concluding that the Corporation's eroding finances are the direct

result of the dissension, conflict and litigation among Joseph and Jonathan (Petition, Ex. 18). The Board further determined that dissolution of the Corporation and liquidation of the Corporation's assets will be beneficial to, and in the best interest of, the shareholders (*id.*). The Board authorized Joseph, as sole Director, to file a petition for judicial dissolution of the Corporation (*id.*). Joseph has now done so. Based on the foregoing, the Court should issue an Order dissolving the Corporation pursuant to BCL § 1102.

Point II

THE COURT SHOULD DISSOLVE THE CORPORATION UNDER BCL § 1104

BCL § 1104 (a)(3) provides that a holder of at least half of a corporation's shares entitled to vote at an election of directors may petition for dissolution where "there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders."

"In the case of a close corporation the relationship between the shareholders is akin to that of partners and when the relationship begins to deteriorate, the ensuing deadlock and dissension can effectively destroy the orderly functioning of the corporation" (*Greer v Greer*, 124 AD2d 707, 708 [2d Dept 1986]). "In such a case, dissolution is an appropriate remedy available to the court" (*id.*). Pursuant to BCL § 1104, "when a point is reached where the shareholders who are actively conducting the business of the corporation cannot agree, it becomes in the best interests of those shareholders to order a dissolution" (*Matter of T.J. Ronan Paint Corp.*, 98 AD2d 413, 422 [1st Dept 1984] [internal quotations omitted]).

"In determining whether dissolution is in order, the issue is not who is at fault for a deadlock, but whether a deadlock exists" (*In re Dream Weaver Realty, Inc.*, 70 AD3d 941, 942 [2d Dept 2010] [internal quotations omitted]). "The 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 precluding the successful and profitable conduct of the corporation's affairs" (*id.* [internal quotations and brackets omitted]; *Sternberg v Osman*, 181 AD2d 897, 898 [2d Dept 1992] [same]). "The appropriateness of an order of dissolution is in every case vested in the sound discretion of the court" (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 73 [1984]).

In *Dream Weaver* (70 AD3d at 942), the Second Department held that Supreme Court "properly granted" dissolution because "the record amply demonstrates sufficient dissension among the parties, resulting in a deadlock, so as to warrant dissolution" (internal quotations omitted).

In *Matter of Validation Review Assoc., Inc.* (236 AD2d 477, 478 [2d Dept 1997], *revd on other grounds* 91 NY2d 840 [1997]), the Second Department ruled:

> The record here clearly demonstrates that there are sufficient differences and animosity between the shareholders to prevent the continued efficient operation of the corporation. It is undisputed that the shareholders have fundamental differences in opinion regarding, *inter alia*, the expansion and direction of VRA's business, profit distribution, salary and bonus treatment of employees, and their respective roles in the operation of the business. Under these circumstances, the petitioner was entitled to summary judgment dissolving the corporation.

In *Goodman v Lovett* (200 AD2d 670, 671 [2d Dept 1994]), the Second Department held:

> As noted by the Supreme Court, the shareholders do not dispute that they have not spoken with each other since October 31, 1990, when they had a disagreement over how corporate profits should be allocated. The record clearly demonstrates there are sufficient differences and animosity between the shareholders to prevent the continued efficient operation of the corporation. Therefore, under the circumstances, dissolution is the only viable alternative.

In *Greer v Greer* (124 AD2d at 708), the Second Department ruled:

> The appellant Samuel Greer and the temporary receiver William Hubert Greer are brothers who each own 50% of the shares of the subject corporations. After apparently operating a Toyota dealership amicably for many years, the brothers, over the last several years, have been unable to agree on how the business should be run. This dissension . . . has led to an inability to agree on any corporate decisions including the hiring and firing of employees, the election of officers and the allocation of corporate spending. Additionally, each brother alleged that the other misappropriated corporate money for his personal use. In light of this clear evidence of dissension, the court properly granted the petitions for dissolution of the corporations pursuant to Business Corporation Law § 1104.

Here, like in each the foregoing cases, there is undisputed evidence of intense strife between Joseph and Jonathan, which has effectively crippled their ability to operate the Corporation together. The record amply demonstrates sufficient dissension among the parties resulting in a deadlock. Jonathan already swore that "the Corporation is deadlocked and its condition is deteriorating" (Petition, Ex. 11, ¶ 2). Jonathan admitted that the intense conflict between he and Joseph "render[s] the continued existence of any workable business relationship untenable" and "compel[s] the dissolution of the Corporation (Petition, Ex. 10, ¶ 81). Jonathan stated under oath that "it would be futile to attempt to conduct an election of directors because the two shareholders are so hopelessly deadlocked and irreparably divided with respect to the management and operations of the Corporation that the votes necessary for the election of directors, a majority, cannot be obtained" (*id.*, ¶ 82). In Jonathan's own words, he and Joseph are "*hopelessly* deadlocked and *irreparably* divided" (*id.*, ¶ 83 [emphasis added]). Those are words of permanency. Words of immutability. Thus, as in *Molod v Berkowitz* (233 AD2d 149, 150 [1st Dept 1996]), there are no "genuine issues of fact raised as to the possibility of reconciliation."

Jonathan's prior sworn statements are not hyperbole. They are absolutely true and undisputed. Joseph and Jonathan fundamentally disagree about every conceivable aspect of the business. For example, for many years, Joseph has attempted to implement internal controls and computerized accounting, billing, purchasing, and inventory systems. Jonathan adamantly refuses to agree to such practices, resulting in a total impasse. At one time, Joseph tried to install a point of sales system, including a cash register, to record transactions. The Corporation spent tens of thousands of dollars on the equipment, but Jonathan ordered the Corporation's employees not to use it. To date, the Corporation still has no point-of-sales system, not even a cash register, to record cash transactions. Without one, there is no real way of knowing where inventory is going, what products are being sold to customers, and how much of the Corporation's receivables are actually being collected (Petition ¶¶ 55-73).

Lacking a point of sales system, Jonathan totally refuses to record sales. Rather than account to the Corporation, as any normal owner does, Jonathan runs his own business within a business. The Corporation's customers call Jonathan for sales on his private cell phone. This affords Jonathan the opportunity to make an unrecorded sale with no paperwork. The staff under Jonathan's supervision does not make sales tickets. Jonathan sells goods and does not make sales tickets recording the transaction. Jonathan collects checks that he mystifyingly does not cash. Jonathan allows employees to handle cash purchases with no controls. Cash literally is dropped into a box with no security measures or recordkeeping. Jonathan runs a multi-million dollar business like a lemonade stand (*id.*, ¶¶ 55-73, 92).

Jonathan refuses to allow the use of a computerized purchase order system to track inventory the Corporation purchases. Jonathan goes on off-season buying sprees with vendors without Joseph's permission and even bypasses Joseph's directions to vendors that they not

honor any purchase orders without Joseph's signature. In 2015, 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. The over-purchased inventory becomes obsolete and remains sitting in the yard for years degrading and losing value in the hundreds of thousands of dollars (*id.*, ¶¶ 84-95, 82).

Jonathan extends credit or makes sales to customers who are not current on their existing balances and are on credit-hold or C.O.D. status, meaning that they are forbidden from receiving any further credit. Joseph instructs the sales staff to not extend credit to high risk customers, and Jonathan instructs them to extend credit anyway. When Joseph confronts Jonathan about these issues, Jonathan refuses to tell Joseph what balances the Corporation's credit account customers owe the Corporation, and any payments Jonathan does receive from these credit accounts are not recorded on the Corporation's books. As a result, the Corporation does not get paid for many of these credit transactions, and the business loses thousands of dollars as a result (id., ¶¶ 98-100).

Compounding these problems, Jonathan has anger-management issues. When Joseph presses Jonathan on business issues with which they disagree, such as installing a point of sale cash register, purchase order system, insisting that delinquent customers stay on credit hold, etc., Jonathan becomes enraged and violent. It is impossible to discuss these issues with Jonathan without him becoming irate. Jonathan has cursed Joseph out a number of times at the sales counter about these subjects in front of the Corporation's employees. Jonathan has gone into many rages and become violent. Jonathan has thrown a rolling file cabinet at the wall.

Jonathan has thrown a hammer through an open doorway where customers come and go. Jonathan's behavior is a danger to himself and others (id., ¶¶ 109-116).

Jonathan has done everything in his power to divide the Corporation into two factions, those loyal to him, and those loyal to Joseph. Jonathan tells the Corporation's employees not to listen to Joseph. Jonathan tells the Corporation's employees that he is running the Corporation and that it belongs to him alone. Jonathan harasses and mistreats employees perceived to be loyal to Joseph. The Corporation's employees are afraid to cooperate or be friendly with Joseph for fear of angering Jonathan. Jonathan depicts Joseph as powerless and inept to employees perceived to be loyal to him. Jonathan has engaged in verbal abuse, physical intimidation and violence directed at Joseph and any staff he perceives to be loyal to Joseph, including Joseph's wife, Laura Troffa, and the Corporation's bookkeeper, Sharon. Joseph was forced to send Jonathan a cease-and-desist letter against engaging in such behavior (id., ¶¶ 117-126, Ex. 9).

Jonathan's "specialty," the hard goods side of the business, accounts for roughly 75% of the Corporation's revenues. Jonathan has now effectively locked Joseph out of the hard goods segment of the company altogether, which Jonathan operates with no accountability or control of any kind. Upon information and belief, Jonathan is taking advantage of the Corporation's lack of a modern record keeping system for inventory and sales to skim money from the Corporation for his own personal benefit. Jonathan refuses to acknowledge his father's right to manage the Corporation, and has emasculated his authority with the Corporation's employees. Joseph has largely given up on his attempts to manage the business segments since Jonathan is stonewalling him, and Joseph do not want a violent confrontation if he tries to enforce the use of a cash register, computer system, purchase order system, etc. (Petition, ¶¶ 163-175).

Joseph and Jonathan's disagreement over the business has degraded their personal relationship so profoundly that Jonathan refuses to let Joseph have any contact with his own grandchildren. The last time Joseph visited with his grandchildren was over two years ago, when Jonathan's ex-wife invited Joseph to come have cake at her home for his granddaughter's birthday. When Jonathan learned of it, he stormed over to halt the occasion, forcing Joseph to leave before an unseemly confrontation broke out. Joseph has not seen his grandchildren since (id., ¶¶ 176-181).

Under BCL § 1111 (b)(3), "dissolution is not to be denied merely because a corporate business has been or could be conducted at a profit" (*Tavlin v Munsey Candlelight Corp.*, 69 AD2d 865, 866 [2d Dept 1979]). Based upon BCL § 1111, in *Neville v Martin* (29 AD3d 444, 444-45 [1st Dept 2006]), the Court held:

> The grant of the dissolution petition pursuant to Business Corporation Law § 1104 (a) (2) was proper given the record evidence of dissension between the two 50% shareholders of the subject close corporation. This evidence left no doubt that the corporation could not continue to function effectively. That the dissension had no appreciable impact on the firm's profitability was not a sufficient ground for the petition's denial.

(internal citation omitted).

In sum, the breakdown between the two shareholders is absolute and permanent. Dissolution is the only remedy for the intense antagonism and distrust between Joseph and Jonathan, which is crippling their joint operation of the business. Having exhausted every effort to resolve this dispute, including with the Court's involvement to try to reach a settlement, Joseph and Jonathan are left with no other option but dissolution. Based on the foregoing, the Court should issue an order dissolving the Corporation under BCL § 1104.

Jonathan might argue that a hearing is required before the Court may order dissolution. Not correct. A "contention that dissolution of a corporation cannot be ordered without a hearing

is without merit. A hearing is only required where there is some contested issue determinative of the application. In the absence of such an issue, there is nothing in the nature of such a proceeding that distinguishes it from any other litigated proceeding" (*Goodman v Lovett*, 200 AD2d 670, 670 [2d Dept 1994]). Based on these principles, in *Dream Weaver* (70 AD3d at 942), the Second Department ruled that the Supreme Court "properly granted the petition without a hearing, as there was no genuine dispute as to the existence of deadlock and dissension" (*In re Dream Weaver Realty, Inc.*, 70 AD3d at 942). Here, as in *Dream Weaver*, there is no genuine dispute as to the existence of deadlock and dissension. Jonathan previously swore under oath that he and Joseph are "hopelessly deadlocked and irreparably divided" in all aspects of the "management and operations of the Corporation," an assertion amply supported by the record (*see* Petition, Ex. 10, ¶ 82-83). Therefore, a hearing is unnecessary and unwarranted.

Point III

THE COURT SHOULD CONDITIONALLY APPOINT 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 . . . who may be a director, officer or shareholder of the corporation."

Under New York law, the Court has ample discretion to permit the parties to try amongst themselves to devise a post-dissolution plan of liquidation of the Corporation's assets (*see e.g. Sternberg v Osman*, 181 AD2d 899, 900 [2d Dept 1992]). "Accordingly, *if* the parties can agree to sell the business as a whole, or to sell to one another, they should be permitted to do so" (*id.*). But on the other hand, "[w]hen the parties cannot reach an agreement amongst themselves with respect to the sale of the corporation's assets either to one another or to a third party, the only

authorized disposition of corporate assets is liquidation at a public sale" (*Ravitz v Furst*, 65 AD3d 1049, 1050 [2d Dept 2009] [internal quotations omitted]).

Here, Joseph and Jonathan have negotiated for two and a half years, with the Court's assistance, without success, on a plan to divide the business among themselves and go their separate ways. Thus far, all efforts have failed. Upon dissolution, the Court should consider granting the parties a very short period of time in which to try, one last time, to dispose of the Corporation's assets, and absent an agreement, appoint a receiver to do so. Therefore, Joseph respectfully requests that the Court issue an order conditionally appointing a receiver to liquidate the Corporation's assets at a public sale and wind up its affairs unless the parties are able to agree upon and submit a joint plan of liquidation within two weeks of the Court's order dissolving the Corporation.

CONCLUSION

For all of the foregoing reasons, the Court should issue an Order: (i) dissolving the Corporation: (ii) conditionally appointing a receiver to wind up the Corporation's affairs; and (iii) granting such other and further relief as the Court deems just, equitable and proper.

Dated: February 17, 2017

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