SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,	Index No. 609510/2016
	Hon. Jerry Garguilo
Plaintiffs,	Motion Sequence No. 006
-against-	
JOSEPH M. TROFFA, 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 OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT

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Defendants Joseph M. Troffa ("Joseph"), Laura J. Troffa ("Laura"), Jos. M. Troffa Materials Corporation, NIMT Enterprises LLC, L.J.T. Development Enterprises, Inc. and Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Memorandum of Law in opposition to the motion of Plaintiff Jonathan Troffa ("Jonathan") for an Order, pursuant to CPLR 3025 (b) and 3211 (e), for leave to file a Verified Second Amended Complaint ("Second Amended Complaint").

PRELIMINARY STATEMENT

Jonathan's motion should be denied for three reasons.

First, it contravenes the explicit decretal provision in the Order and Judgment of Dissolution in the related dissolution proceeding, prohibiting the maintenance of this action without the Court's authorization after making due demand upon the Court-appointed Receiver. Under New York law, where a court has dissolved a corporation and appointed a receiver to wind up its affairs, a shareholder must make a demand upon the receiver and obtain the Court's permission before it may sue on behalf of the corporation. Here, the Court's Order and Judgment dissolving the Corporation and appointing the Hon. Joseph Covello receiver enjoined Jonathan from prosecuting this action, and required him to make a demand upon the receiver and obtain the Court's permission to litigate this case in which all of Jonathan's proposed claims are derivative. Jonathan failed to do so, utterly ignoring the Order and Judgment, requiring summary denial of this motion (*see* Point I, *infra*).

Second, Jonathan's motion essentially seeks to re-re-argue the Court's Order dated January 11, 2017, disguised as a motion to amend. The Court's January 11, 2017 Order dismissed the bulk of Jonathan's claims in his First Amended Complaint as time-barred and otherwise defective, including all of Jonathan's claims concerning ownership of five of the six

real properties on which the Corporation operated its business. Jonathan thereafter moved to reargue the January 11 Order, contending that his claims actually sounded in "fraud" and therefore got the benefit of the longer statute of limitations and fraud-discovery rule. By Order dated May 17, 2017, the Court denied Jonathan's reargument motion in its entirety and granted Joseph's reargument cross-motion dismissing Jonathan's claims as to the sixth real property. Jonathan's present motion to amend his complaint, seeking to allege a claim for fraud as to four[1] of the six properties, is based on the same arguments already rejected by the Court not once, but twice. Jonathan has appealed from the May 17 Order and, if he sees fit, should pursue appellate review (*see* Point II.A.1, *infra*).

Third, even ignoring the Court's prior rulings, Jonathan's proposed causes of action for fraud, fiduciary breach, waste, accounting, and his "alternative" derivative claim, are palpably insufficient and lacking in merit:

- The proposed First Cause of Action for fraud fails to articulate a specific false statement of fact, only bare conclusory allegations, without any supporting detail. At most, it alleges a speculative hope of future performance at some unstated and unknown time – that the Corporation might one day become an owner of the four real properties he admittedly knew were acquired and owned by other entities – one of which, NIMT Enterprises, is partly owned by Jonathan – to which the Corporation paid rent as a tenant for many years (generating substantial tax benefits for Jonathan). A plaintiff cannot state a claim for fraud based upon disappointment that a promised future benefit did not materialize (*see* Point II.A.2.a, *infra*). Jonathan also

[1] In his prior pleadings, Jonathan sought conveyance and/or money damages for all six real properties. In this latest permutation of his pleading, Jonathan seeks conveyance and/or money damages for only the four most recently-acquired properties (*see e.g.* Powell Aff., Ex. 4, ¶ 28 ["Of the aforementioned six parcels, four are the subject of this Action . . . ."]).

cannot show justifiable reliance. Oral representations regarding future outcomes, such as those alleged here, are deemed mere expressions of opinion or expectation, upon which the plaintiff cannot justifiably rely. In any event, it is unreasonable as a matter of law to rely upon alleged representations concerning real property that are contrary to public records, the content of which could be discovered with ordinary diligence (*see* Point II.A.2.b, *infra*).

- With respect to the proposed Second Cause of Action for breach of fiduciary duty for Joseph's acquisition of the "Compost Yard," the Court already ruled twice, in crystal clear terms, that this claim is barred by the three-year statute of limitations, notwithstanding Jonathans attempt to paint the claim as "equitable" rather than "monetary" in nature. The Court's holdings were correct. Jonathan offers no reason to deviate from them, especially at this late date (*see* Point II.B, *infra*).

- With respect to the proposed Third Cause of Action for corporate waste, the claim is entirely duplicative of the existing Fourth Cause of Action for derivative liability under BCL § 720, which encompasses "every form of waste of assets and violation of duty." It is well settled that Courts should deny leave to amend to allege duplicative causes of action (*see* Point II.C, *infra*).

- With respect to the proposed Fourth Cause of Action for an accounting, the Court already ruled that Jonathan may not seek an accounting directly, only derivatively as part of his existing Fourth Cause of Action under BCL § 720, which Jonathan would now replead as a Fifth Cause of Action. Therefore, the proposed claim is patently devoid of merit and entirely duplicative of his existing remaining claims (*see* Point II.D, *infra*).

Finally, this litigation is in its denouement. The Court already dissolved the Corporation and appointed a Receiver. The Corporation ceased operations. Jonathan is operating his own business at a separate location. Joseph and Jonathan at long last are separated. They should be looking towards the future, not the past. The Court should deny leave to amend in its entirety and put this matter to rest -- permanently.

STATEMENT OF THE FACTS

The Corporation was a wholesale and retail landscape and masonry supply business in East Setauket, New York. Joseph and his son, Jonathan, were the sole equal shareholders of the Corporation. Joseph founded the business in the 1970s. In December 1995, Joseph gifted Jonathan his stock. For many years, Joseph and Jonathan worked well together and the business grew, but in recent years their relationship soured, resulting in litigation to dissolve the business.

The Complaint

On June 27, 2016, Jonathan filed a Verified Petition/Complaint (the "Complaint") alleging four claims against his father: (i) a First Cause of Action for judicial dissolution under BCL § 1104 based upon deadlock; (ii) a Second Cause of Action for breach of fiduciary duty and an accounting, alleged directly not derivatively; (iii) a Third Cause of Action for constructive trust; and (iv) a Fourth Cause of Action to quiet title to a parcel of land known as the "Compost Yard" (*see* NYSECF Doc. No. 2).

Throughout his Complaint, Jonathan alleged that Joseph usurped corporate opportunities, breached his fiduciary duties, and committed "fraud" by acquiring (either himself or through entities he and Laura controlled) six real properties upon which the Corporation operated its business (*see id.*). Duly recorded deeds show that the six real property transactions for which Jonathan sought to recover occurred in 1980, 1992, 1997, 1998, 2004 and March 2013 – all more

than three years before Jonathan filed this Complaint (*see* Affirmation of Peter A. Mahler in Opposition to Motion for Leave to Amend Complaint, dated November 1, 2017 ["Mahler Aff."], Ex. A, ¶ 3 and Exs. F-L thereto).

The First Amended Complaint

On August 16, 2016, Jonathan filed a Verified Amended Complaint (the "First Amended Complaint") withdrawing his claim for judicial dissolution (in reaction to Joseph consenting to dissolution!) and alleging the following new claims: (i) a First Cause of Action for breach of fiduciary duty and an accounting alleged directly not derivatively; (ii) a Second Cause of Action for constructive trust; (iii) a Third Cause of Action to quiet title to the "Compost Yard;" and (iv) a Fourth Cause of Action, brought in the alternative to the First Cause of Action, for officer/director liability under BCL § 720, alleged derivatively (*see* Affirmation in Support of Motion to Amend of Jeffrey D. Powell, dated June 26, 2017 ["Powell Aff."], Ex. 1).

The Motion to Dismiss and for Dissolution on Consent

On September 16, 2016, Joseph filed two motions: (i) a motion to strike the Amended Complaint and its withdrawal of Jonathan's dissolution claim as non-compliant with BCL § 1116, and ordering judicial dissolution of the Corporation on the consent of Joseph; and (ii) a motion to dismiss all the non-dissolution claims in the Petition/Complaint, or in the alternative, in the Amended Complaint (*see e.g.* NYSECF Doc. Nos. 31, 34; Mahler Aff., Exs. A, B). On October 12, 2016, Jonathan filed a cross-motion for leave to withdraw his claim in the Petition/Complaint for judicial dissolution (*see* NYSECF Doc. Nos. 61, 67).

The Dismissal Decision

On January 11, 2017, the Hon. Jerry Garguilo issued a Short Form Order consolidating the three motions for determination (*see* Powell Aff., Ex. 5). The Court denied Joseph's motion

to strike the First Amended Complaint and for dissolution on consent on purely procedural grounds, and denied Jonathan's cross-motion to withdraw his dissolution claim as academic (*id*. at 2-3).

The Court construed Joseph's motion to dismiss as directed against the First Amended Complaint (*id*. at 3). The Court granted Joseph's motion to dismiss its First Cause of Action for breach of fiduciary duty as barred by the applicable three-year statute of limitations, thereby dismissing the claim as to all events before June 27, 2013 (*id*. at 4). Specifically, the Court ruled:

> With regard to the first cause of action, breach of fiduciary duty, duty of loyalty and accounting, the applicable statute of limitations for breach of fiduciary duty claims depends upon the substantive remedy sought (***Kaufman v Cohen***, 307 AD2d 113, 760 NYS2d 157 [1st Dept 2003], citing ***Leongard v Santa Fe Industries, Inc.***, 70 NY2d 262, 267, 519 NYS2d 801 [1987]). Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies (***Kaufman v Cohen***, *supra*, citing ***Leongard***, supra). "On the other hand, where suits alleging a breach of fiduciary duty seek only money damages, courts have viewed such actions as alleging 'injury to property,' to which a three-year statute of limitations applies" (***id***. citing CPLR 214 [4]).
>
> Here, the court finds that the statute of limitations for breach of fiduciary duty and duty of loyalty is three years since plaintiff seeks monetary damages (***Kaufman v Cohen***, *supra*). Thus, the equitable relief plaintiff seeks, including an accounting, is incidental to that relief (***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 879 NYS2d 355 [2009]). However, a shareholder who seeks a corporate accounting, as here, must do so in the context of a derivative action (*see* NY BCL § 720 [b]; ***Romanoff v Superior Career Institute Inc.***, 69 AD2d 856, 415 NYS2d 457 [1979]). Inasmuch as this action was commenced on June 27, 2016, the allegations of defendants' breach of fiduciary duty and loyalty prior to June 27, 2013 are time barred, which include the first five real estate purchases, as demonstrated by defendants' submission of the respective deeds to the parcels. The court notes that plaintiff has failed to identify an exception to the statute of limitations. Therefore, that branch of the motion seeking to dismiss the first cause of action is granted to the extent that all claims of breach of fiduciary duty and loyalty which occurred prior

> to June 27, 2013 are dismissed, as is the accounting claim in its entirety.

(Powell Aff., Ex. 5 at 4).

The Court dismissed the Second Cause of Action for constructive trust for failure to allege the essential elements of the claim (*id.*). The Court dismissed the Third Cause of Action to quiet title to the "Compost Yard" for failure to state a cause of action under Article 15 of the RPAPL (*id.*). Finally, the Court denied in its entirety Joseph's motion to dismiss the Fourth Cause of Action brought derivatively under BCL § 720 (*id*. at 4-5), effectively allowing Jonathan to maintain as derivative claims what little was left of the First Cause of Action for alleged breaches of fiduciary duty occurring after June 27, 2013.

Thus, as of today, what remains of the Amended Complaint is the following: (i) the First Cause of Action for breach of fiduciary duty for alleged wrongful conduct (other than the real estate) on or after June 27, 2013; (ii) the Fourth Cause of Action for derivative liability incorporating those same, miscellaneous claims (*id.*).[2]

The Reargument Motions

On February 25, 2017, Jonathan filed a motion for leave to reargue (*see* NYSECF Doc. No. 86; Mahler Aff., Ex. E). Jonathan attempted to persuade the Court – as he did to no avail on his prior motion – that his fiduciary duty claim was "based on fraud" and was "equitable in

[2] All that remains of the First Amended Complaint is the First Cause of Action for breach of fiduciary duty as to events on or after June 27, 2013, and the Fourth Cause of Action alleging the same claim derivatively in the alternative, consisting of allegations that: (i) Joseph engaged in "self-dealing" and "waste" by causing the Corporation to pay "exorbitant" rent for use of the real properties on which it operated; (ii) "secretly" closing the Corporation's bank account and opening a new one to "remove" Jonathan as a signatory; (iii) "purchasing equipment without authorization or Jonathan's consent" including "a phone system;" (iv) forming a new entity to "divert the bulk materials and ready mix segments of the Corporation's business;" (v) paying Laura "excessive compensation;" (vi) misappropriating "a computer, certain files, a printer and miscellaneous office supplies;" and (vii) paying "personal expenses without authorization and without Jonathan's consent."

nature" to try to get a limitations period longer than three years (*see e.g.* Mahler Aff., Ex. E at 9-11; *see also* Mahler Aff., Ex. H at 7-8).

On March 3, 2017, Joseph filed a cross-motion for leave to reargue, pointing out that the Court misspoke when it stated that only the "first five real estate purchases" were time barred (*see* Mahler Aff., Exs. F and G; *compare* Powell Aff, Ex. 5 at 4). The sixth transaction, the "Compost Yard," closed title on March 12, 2013, so it too was time barred (*see* Mahler Aff., Ex. A, ¶ 3 and Ex. L thereto).

The Reargument Decision

On May 17, 2017, the Hon. Jerry Garguilo issued a Short Form Order denying Jonathan's motion for leave to reargue and granting Joseph's motion for leave to reargue (*see* Mahler Aff., Ex. I). With respect to Jonathan's motion, the Court ruled that he "failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" (*id*. at 1).

With respect to Joseph's cross-motion, the Court ruled that "there is no dispute that the sixth real estate purchase closed on March 12, 2013, and therefore occurred more than three years prior to the commencement of the instant action, [so it] is time-barred in the first cause of action alleging breach of fiduciary duty" (*id*. at 1-2). Accordingly, in pertinent part the Court amended the original order to provide for "the deletion and replacement of the 'first five real estate purchases' with 'all six real estate purchases' that are barred by the applicable statute of limitations" (*id*. at 2).

The Dissolution Proceeding

On February 17, 2017, shortly after the Court denied Joseph's motion for dissolution on consent as procedurally defective (*see* Powell Aff., Ex. 5 at 3), Joseph filed a petition for

dissolution of the Corporation under BCL §§ 1102 and 1104 in a proceeding captioned *Joseph Troffa v Jonathan Troffa*, Supreme Court, Suffolk County, Index No. 000902/2017 (*see* NYSECF Doc. No. 4).

On May 23, 2017, the Hon. Jerry Garguilo issued a Short Form Order granting the petition and directing the parties to appear for a conference (*see* Mahler Aff., Ex. J). On June 19, 2017, at the conference, the Court directed the parties to submit proposed orders for the dissolution of the Corporation and for the appointment of a receiver to wind up its affairs. On July 7, 2017, the parties submitted dueling proposed orders for the Corporation's dissolution and for the appointment of a receiver (*see* NYSECF Doc. Nos. 48, 49).

The Order and Judgment of Dissolution and Appointment of Receiver

On July 21, 2017, the Hon. Jerry Garguilo issued an Order and Judgment of Dissolution and Appointment of Receiver (*see* Mahler Aff., Ex. K). The Court dissolved the Corporation under BCL §§ 1102 and 1104 and appointed the Hon. Joseph Covello as Receiver to take possession of the Corporation's property and wind up its affairs (*id*. at 1-3). Pursuant to the Order and Judgment, on September 30, 2017, as amended, the Corporation ceased all operations (*see* NYSECF Doc. No. 68).

The Order and Judgment contains at least two provisions important to this litigation. Pursuant to the fifth decretal paragraph beginning on page 7 of the Order and Judgment:

> the Parties, their agents, representatives, servants and attorneys, or any other person acting for or on their behalf, and all other persons whomever having notice of this Order and Judgment, be and they hereby are *enjoined and restrained from . . . without the Court's authorization after making due demand upon the Receiver*, *prosecuting (but not from defending) the action captioned Jonathan Troffa v. Joseph Troffa, et al.*, Supreme Court, Suffolk County, Index No. 609510/2016

(*id*. at 7-8 [italics added]).

Pursuant to the second decretal paragraph on page 6 of the Order and Judgment:

> the Receiver is hereby authorized to institute, prosecute and defend against all legal proceedings necessary for the winding up of the Corporation's affairs, including without limitation, the action captioned *Jonathan Troffa v. Joseph Troffa, et al.*, Supreme Court, Suffolk County, Index No. 609510/2016. . . . .

(*id*. at 6).

Jonathan and his counsel have not complied with the Order and Judgment. They did not make any demand upon the Receiver to continue prosecuting this lawsuit or to seek leave to file a Second Amended Complaint (Mahler Aff., ¶ 17). They did not seek or obtain the Court's authorization to continue prosecuting this action (*id.*, ¶ 18). Jonathan and his counsel did not take any steps to vacate the injunction, or otherwise to obtain the Receiver's or Court's permission to sue on behalf of the Corporation (*id.*, ¶ 19).

ARGUMENT

Point I

THE COURT SHOULD DENY LEAVE TO AMEND BECAUSE JONATHAN DID NOT MAKE A DEMAND UPON THE RECEIVER OR OBTAIN THE COURT'S APPROVAL TO CONTINUE THIS ACTION

Under New York law, where a court has dissolved a corporation and appointed a receiver to wind up its affairs, "Business Corporation Law § 626, and applicable case law require that a demand be made upon a receiver" before a director, officer, or shareholder may prosecute a derivative suit on behalf of the corporation (*Koenig v Koenig*, 2010 WL 3740639 [Sup Ct, Nassau County Sept. 17, 2010] [Driscoll, J.]). In addition to the requirement of making a demand upon the receiver, "it is generally held that the action cannot be maintained without the permission of the court which appointed the receiver" (20 Carmody-Wait 2d § 121:167).

In *Koenig*, a plaintiff purported to bring a derivative suit on behalf of a dissolved corporation in receivership without making a pre-suit demand upon the receiver (*Koenig v*

Koenig, 2010 WL 3740639). As a result, the defendant moved to dismiss the derivative suit, and the receiver submitted an affidavit in support of dismissal, explaining that a pre-suit demand would have been far more than a technical formality:

> The Receiver affirms . . . that had a demand been made on him prior to filing this action, that demand would not have been futile. Had Steven or his attorney provided the Receiver with the proposed allegations and evidence supporting those claims, the Receiver would have examined those and responded to Steven and his counsel. Had he received a demand, the Receiver would have provided the shareholders and the Court with an analysis of the claims, and the Receiver would also have made efforts to mediate the dispute in an effort to preserve the Company's assets.

(*id.*). Justice Driscoll held, "Upon consideration of that Affidavit, the Court concludes that Plaintiff lacks standing to pursue this action, in light of his failure to make demand upon the Receiver, and grants the motion to dismiss the Complaint" (*id.*).

Here, the Order and Judgment dissolving the Corporation and appointing Justice Covello receiver expressly incorporates the foregoing legal principles (Mahler Aff., Ex. K). Pursuant to the fifth decretal paragraph beginning on page 7 of the Order and Judgment:

> the Parties, their agents, representatives, servants and attorneys, or any other person acting for or on their behalf, and all other persons whomever having notice of this Order and Judgment, be and they hereby are enjoined and restrained from . . . *without the Court's authorization after making due demand upon the Receiver*, *prosecuting (but not from defending) the action captioned Jonathan Troffa v. Joseph Troffa, et al.*, Supreme Court, Suffolk County, Index No. 609510/2016

(*id*. at 7-8 [italics added]). Pursuant to the second decretal paragraph on page 6 of the Order and Judgment:

> the Receiver is hereby authorized to institute, prosecute and defend against all legal proceedings necessary for the winding up of the Corporation's affairs, including without limitation, the action captioned *Jonathan Troffa v. Joseph Troffa, et al.*, Supreme Court, Suffolk County, Index No. 609510/2016. . . . .

(*id*. at 6).

The limited, surviving claims in the First Amended Complaint are all derivative claims seeking recovery for injury allegedly incurred directly by the Corporation and only indirectly by its shareholders. The same is true with respect to all the proposed claims in Jonathan's Second Amended Complaint. Indeed, in addition to suing derivatively, Jonathan's Second Amended Complaint expressly purports to sue directly in the name and right of the Corporation even though Jonathan is only a 50% shareholder, is not a Director of the Corporation, and has no authority whatsoever to engage counsel, initiate or maintain litigation in the Corporation's name. *See Caplash v Rochester Oral & Maxillofacial Surgery Assoc., LLC*, 63 AD3d 1683 [3rd Dept 2009] ("[W]here there are only two stockholders each with a 50% share, an action cannot be maintained in the name of the corporation by one stockholder against another with an equal interest and degree of control over corporate affairs; the proper remedy is a stockholder's derivative action"); *L.W. Kent and Co., Inc. v Wolf*, 143 AD2d 813, 814 [2d Dept 1988]; *Sports Legends Inc. v Carberry*, 61 AD3d 449, 450 [1st Dept 2009]).

Jonathan and his counsel did not make a demand upon the receiver to prosecute this lawsuit (Mahler Aff., ¶ 17). They did not obtain the Court's authorization to continue to litigate (*id*., ¶ 18). The Court expressly enjoined Jonathan from prosecuting his lawsuit (Mahler Aff., Ex. K at 6). Jonathan and his counsel did not take any steps to vacate the injunction or otherwise obtain the Receiver's or Court's permission to sue on behalf of the Corporation[3] (Mahler Aff., ¶ 19). Accordingly, it would be error to grant Jonathan's motion for leave to amend.

[3] Jonathan may argue that he was not required to make a demand upon the receiver or obtain the permission of the Court to litigate this case because he filed this motion to amend before the Court issued the Order and Judgment dissolving the Corporation and appointing the receiver. Any such contention has no merit. By its own terms, the Order and Judgment enjoined Jonathan from prosecuting this action effective July 21, 2017 (*see* Mahler Aff., Ex. K at 7-8). The injunction remains in place.

Point II

THE COURT SHOULD DENY LEAVE TO AMEND BECAUSE THE PROPOSED AMENDMENT IS PATENTLY DEVOID OF MERIT

If the Court does not deny Jonathan's motion for failure to make a demand upon the Receiver and obtain the Court's permission to litigate, then the Court should deny Jonathan leave to amend on the merits.

"The determination to permit or deny leave to amend a pleading is committed to the sound discretion of the trial court" (*Darby Group Cos., Inc. v Wulforst Acquisition, LLC*, 130 AD3d 866, 867 [2d Dept 2015]). "Although leave to amend a complaint should be freely given, a court should deny a motion for leave to amend a complaint if the proposed amendment is palpably insufficient, would prejudice or surprise the defendant, or is patently devoid of merit" (*Martin v Rizzatti*, 142 AD3d 591, 593 [2d Dept 2016] [internal citation omitted]). Where the "insufficiency or lack of merit is clear and free from doubt," the Court should deny leave to amend (*Katz v Beil*, 142 AD3d 957 [2d Dept 2016] [internal quotations omitted]).

Under New York law, Jonathan bears the initial burden to "show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011] [internal quotations omitted]). Jonathan failed to satisfy his burden. His counsel's four-page brief consists entirely of legal boilerplate (*see* Memorandum of Law in Support of Plaintiffs' Motion for Leave to Serve and File Second Amended Complaint, dated June 26, 2017 ["Opening Bf."], at 1-4). The entirety of his "argument" in support of the proposed amendment consists of the following:

> A reading of the proposed pleading will make it manifestly clear that there is no surprise. Moreover, there is nothing that occurred in the short period of time between the original pleading and the proposed amendment which would prejudice Defendants.

(Opening Bf. at 4). The only other non-boilerplate remark of any kind in Jonathan's entire brief is the following:

> To the extent that the preceding pleading may have failed to articulate the relief sought and other factors to the satisfaction of the Court, Plaintiffs believe that the proposed pleading cures any such defects.

(*id*. at 1). Jonathan fails to explain how the proposed pleading would "cure" the prior pleading's many defects. His brief is devoid of analysis because his proposed new claims are doomed to dismissal, just like their predecessors. The claims are palpably insufficient and patently devoid of merit. The Court should deny leave to replead.

A. <u>The Proposed First Cause of Action for Fraud</u>

The proposed Second Amended Complaint seeks to allege a new First Cause of Action for fraud (Powell Aff., Ex. 4, ¶¶ 26-48). The obvious purpose of the proposed new claim for fraud is to try to benefit from the fraud-discovery rule under CPLR § 213 (8), pursuant to which "a fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it" (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009] [internal quotations omitted]).

The proposed First Cause of Action is Jonathan's third attempt to try to recover damages for "fraud" in connection with real property transactions that occurred up to 20 years ago, the title ownership of which was a matter of public record, easily discoverable with the exercise of ordinary diligence (*see* Mahler Aff., Ex. A, ¶ 3 and Exs. F-L thereto). The Court has already twice considered and rejected Jonathan's attempt to assert a theory of fraud (*see* Mahler Aff., Exs. E, J). Amendment would be futile. The Court should deny leave to amend.

1. The Prior Motions

In the prior motions, the parties thoroughly briefed and this Court rejected Jonathan's argument that his claims were timely under the "fraud discovery rule, including with respect to four real properties targeted in the Second Amended Complaint.

Jonathan opposed Joseph's motion to partially dismiss his fiduciary duty claim as time barred by arguing that Jonathan in actuality sought damages for "fraud" – using the word "fraud" not less than *46 times* in his opposition brief (Mahler Aff., Ex. C at i, 3, 4, 5, 7, 8, 11, 12, 13, 14, 15, 17, 19). Some examples include:

- "Jonathan asserts that his father, Joseph, the controlling principal of the Corporation . . . engaged in an extended and elaborate scheme to defraud the Corporation . . . and acquire the real property on which the Corporation conducted its business using funds belonging to the Corporation, while recording title to the properties for themselves" (*id*. at 3);

- "The period of concealment will be revealed during discovery and through a forensic accounting of the financial records of the Corporation and the Defendant entities" (*id.*).

- "It was not until late 2015 or early 2016 when Joseph finally revealed that he never intended to have acquired the properties for the Corporation. At that time, for the first time, he repudiated his trusteeship of the Corporation's real property and admitted his fraudulent misrepresentations, and that is when Jonathan realized that his trust in his father had been betrayed" (*id*. at 4).

- "[T]he claims seeking an order compelling Defendants to convey Parcel #1 (the "Main Yard"), Parcel #2, Parcels #3 and #4, and Parcel #5. . . are grounded in fraud and the governing Statute of Limitations for such claims is six years from the date of the act or two years from discovery. Accordingly, claims for the fraudulent diversion of all of the properties in question have been timely commenced" (*id*.).

- "The Complaint . . . seeks remedy for the fraud and other breaches of fiduciary duty committed by Defendants" (*id*. at 5).

- "Failing to disclose that which they were duty bound to disclose constitutes fraud" (*id*. at 11).

- "[T]he misappropriation of the Laura Properties and the Compost Yard through the knowingly false and misleading statements made to Jonathan by his father, made with the intention of convincing Jonathan to forego objections to the transfers, constitute fraudulent breaches of Joseph's and Laura's fiduciary duties" (*id*. at 12).

- "[A]n affirmative misrepresentation is not essential to a fraud cause of action, which may be predicated on acts of concealment where the defendant had a duty to disclose material information" (*id*.).

- "[T]he breaches of fiduciary duty claims are based on fraud, and are, therefore, subject to the statutes that relate to fraud" (*id*. at 13).

- "The discovery accrual rule . . . applies to fraud-based breach of fiduciary duty claims . . . . Thus, the applicable statutes to the causes of action for the fraudulent diversion of the real property at issue in this action are CPLR § 213(8) and § 203(g)" (*id*. at 14).

- "[T]he fact that Jonathan did not realize he was being defrauded by his father . . . and whether his faith (now clearly unjustified) was reasonable under the circumstances is an issue whose resolution is pre-mature in the absence of discovery" (*id*.).

- "Defendants' argument concerning when the fraud could have been discovered by a reasonable person in Jonathan's circumstances is not a matter to be adjudicated in this motion. Whether Jonathan was reasonable in his reliance on his father's promises or trusting his father's integrity are issues of fact which may not be divined from the pleadings, but require discovery" (*id*. at 15).

- "The extent to which the limitation period based on fraud and concealment may be extended beyond six years is a matter which must be deferred until discovery is completed and a forensic accounting completed" (*id*. at 19).

Thereafter, in his reargument motion, Jonathan once again exhaustively argued fraud, using the word not less than 33 times in his opening brief. For example:

- "The Court . . .failed to recognize and consider the fraud claims asserted by Jonathan and therefore did not apply the proper fraud-based statute of limitations, with its tolling provisions" (Mahler Aff., Ex. F at 2).

- "The Amended Complaint contains allegations which state a Cause of Action for fraud" (id.).

- "Because the Court failed to recognize the fraud claims, which affect the accrual of claims for constructive trust and breach of fiduciary duty, the Court wrongfully dismissed claims which should not have been dismissed" (id. at 3).

- "Joseph and Laura had a duty to disclose their conduct, and failure to do so constitutes actual fraud." (*id*. at 9).

Clearly, Jonathan fully briefed fraud in the prior motions to dismiss and for reargument. The Court was not persuaded then (*see* Powell Aff., Ex. 5; Mahler Aff., Ex. K), and it should not be persuaded now.

2. Jonathan Cannot State the Elements of Fraud

Jonathan cannot state a viable claim for fraud. "The elements of a cause of action to recover damages for fraud are [1] a material misrepresentation of fact, [2] knowledge of its falsity, [3] an intent to induce reliance, [4] justifiable reliance by the plaintiff, and [5] damages" (*Summit Dev. Corp. v Interstate Masonry Corp.*, 140 AD3d 1152, 1153 [2d Dept 2016]). Jonathan fails to plead – and cannot show – the essential elements of (i) false representation of fact and (ii) justifiable reliance. Courts routinely deny leave to amend for failure to plead these essential elements (*see e.g. Waters Edge @ Jude Thaddeus Landing, Inc. v B & G Group, Inc.*, 129 AD3d 706, 708 [2d Dept 2015] ["[T]he court properly denied that branch of the plaintiffs' cross motion which was for leave to amend the complaint so as to add a cause of action sounding in fraud, as it properly concluded that such an amendment was palpably without merit"]; *Confidential Lending, LLC v Nurse*, 120 AD3d 739, 742 [2d Dept 2014] ["the proposed allegations . . . sounding in fraud . . . were palpably insufficient and patently devoid of merit"]).

a. Jonathan Fails to Plead and Cannot Show a False Representation of Fact

The Court should find that Jonathan fails to plead a false representation of fact.

First, "[i]t is well established that a cause of action alleging fraud may not be based on disappointment that a promised future benefit did not materialize" (*Satler v Merlis*, 252 AD2d 551, 552 [2d Dept 1998]; *Crossland Sav., F.S.B. v SOI Dev. Corp.*, 166 AD2d 495 [2d Dept 1990] [same]). A fraud claim "may not be based upon a statement of future intentions, promises

or expectations which were speculative, or an expression of hope at the time when made, rather than a misrepresentation of fact" (*Tutak v Tutak*, 123 AD2d 758, 759 [2d Dept 1986]).

Here, the proposed pleading admits that temporally – at the time Joseph allegedly committed the "fraud" – Jonathan knew that the Corporation did not own the four properties at issue. Rather, Joseph explicitly told him "the deeds would be titled in the names of [other] entities" (*see* Powell Aff., Ex. 4, ¶ 37). Thus, for either the Corporation or Jonathan to become an owner of the properties, some future conveyance or transaction of some kind would necessarily have had to occur. The proposed pleading does not allege that Joseph *ever* promised that such a conveyance *would* occur, merely some vague speculative hope by Jonathan that it *might* one day happen (*id.*, ¶¶ 35-37).

Where, as here, a fraud claim merely alleges a hope or expectation that the plaintiff "would become an owner" of something in the future, it fails to state a claim for relief as a matter of law (*see e.g. Fulton v Hankin & Mazel, PLLC*, 132 AD3d 806, 808 [2d Dept 2015] ["To the extent that the plaintiff alleged that the [defendant] falsely represented that he would become an owner of Emjay by virtue of some event separate and apart from the agreement of sale, such representation related to the buyer's future intent, and did not constitute a misrepresentation of existing fact"]; *Satler v Merlis*, 252 AD2d at 552 ["The plaintiff also failed to state a cause of action to recover damages for fraud, as the defendants' purported declarations that the townhouse would be hers in perpetuity were, at most, promises of future intent rather than misrepresentations of existing fact"]).

<u>*Second*</u>, to plead the essential element of a false representation of fact, one must do more than make a bare "conclusory allegation that the . . . defendants knowingly made false representations" (*Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1189 [2d Dept 2012]).

A fraud claim requires "specific factual allegations that would establish that [the defendant] knowingly misrepresented a material fact" (*Weinstein v CohnReznick, LLP*, 144 AD3d 1140, 1141 [2d Dept 2016]). To satisfy CPLR 3016, "a cause of action alleging fraud must be pleaded with particularity," and it will be dismissed if it "contains only bare and conclusory allegations without any supporting detail" (*Greenberg v Blake*, 117 AD3d 683, 684 [2d Dept 2014] [internal quotations omitted]). "[T]he complaint must allege the basic facts to . . . suffice to permit a 'reasonable inference' of the alleged misconduct" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Here, the proposed Second Amended Complaint fails to plead sufficient facts about Joseph's alleged fraudulent statements. The proposed pleading conclusorily alleges as follows:

- "At or around the time of the purchase of each of the Laura Properties, Joseph told his son, Jonathan: each property was being acquired for the benefit of the Corporation; that the Corporation was to be the beneficial owner of said parcels, although the deeds would be titled in the names of the entities controlled by Laura; and that Laura's entities would hold the properties and title for the benefit of the Corporation" (Powell Aff., Ex. 4, ¶ 35).

- "The foregoing representations were false [and] were known to be false at the time they were made . . .. (*id.*, ¶ 36).

Other than generalities, the proposed claim fails to specify the alleged fraud. It does not describe the statements actually made, when the statements allegedly occurred, or the circumstances in which the statements were made. Stripped of lawyer-speak, the proposed First Cause of Action for fraud "fails to articulate any specific misrepresentation of a material present fact" (*Intl. Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]), instead offering "bare, conclusory allegations, without any supporting detail, which do not meet the specificity requirements of CPLR 3016(b) to sufficiently plead the existence of an underlying fraud" (*In re Woodson*, 136 AD3d 691, 693 [2d Dept 2016]).

b. Jonathan Fails to Plead and Cannot Show Justifiable Reliance

Even if the Court were to conclude that Jonathan sufficiently alleged a false representation of fact, his fraud claim would still be palpably insufficient for failure to plead reasonable reliance.

"[O]ral representations regarding the future outcome" of events are deemed "mere expressions of opinion of present or future expectations, upon which the plaintiff could not justifiably rely" (*Adrien v Estate of Zurita*, 29 AD3d 498, 499 [2d Dept 2006]). "Vague expressions of hope and future expectation provide an insufficient basis upon which to predicate a claim" the plaintiff "justifiably relied" (*Intl. Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d 372, 375 [2d Dept 2006]). Here, Jonathan admits that he always knew the four real properties were "titled in the names of . . . entities" other than the Corporation (Powell Aff., Ex. 4, ¶ 37). Undisputed documentary evidence shows that Jonathan was a member of defendant NIMT Enterprises, LLC, the record owner of two of the four real properties at issue (*see* Mahler Aff., Ex. A, Exs. N, J and K thereto). NIMT's tax returns show that Jonathan reported rental real estate income on his Form K-1s for rent the Corporation paid NIMT consistently from 1997 to 2015 (*see* Mahler Aff., Ex. A, Ex. N thereto). As a matter of law, it would have been unreasonable for Jonathan to rely on a vague speculative hope or expectation that the properties *might* one day be conveyed to the Corporation (*Adrien v Estate of Zurita*, 29 AD3d at 499; *Intl. Oil Field Supply Servs. Corp. v Fadeyi*, 35 AD3d at 375).

It also is unreasonable as a matter of law to rely upon alleged representations concerning real property that are contrary to publicly recorded documents, the content of which could be discovered with the exercise of ordinary diligence (*see e.g. Rojas v Paine*, 101 AD3d 843, 846 [2d Dept 2012] ["since the recorded deeds were matters of public record, not exclusively within

the knowledge of the Paines and their attorney Danziger, the failure to disclose that the Paines had acquired title by two separate deeds, thereby subdividing Lot No. 8, did not constitute active concealment, and is not actionable as a fraud"]; *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706, 708 [2d Dept 2009] ["plaintiffs' supposed reliance upon DiCorato's alleged misrepresentations concerning the location of the property's boundary lines was unreasonable as a matter of law" because "the plaintiffs could easily have ascertained these facts through the use of ordinary means" by searching the public record]; *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1056 [3d Dept 2009] ["Inasmuch as the true facts concerning the legal ownership of the property were easily ascertainable by reference to public records prior to Senter's execution of the contract, plaintiff's causes of action sounding in fraud were properly dismissed"]).

Here, undisputed documentary evidence shows that the deeds to all four real properties were a matter of public record having been duly recorded in the Office of the Clerk of the County of Suffolk (s*ee* Mahler Aff., Ex. A, ¶ 3, Exs. F-L thereto). Ownership of all four real properties "was readily verifiable through public records and there could be no justifiable reliance on [any] misrepresentations" made verbally contrary to the deeds themselves, like that the Corporation or Jonathan owned, or would own, the properties (*Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 438 [1st Dept 2011]). Therefore, the proposed First Cause of Action for fraud is palpably insufficient and patently devoid of merit. Leave to replead would be futile.

B. <u>The Proposed Second Cause of Action for Breach of Fiduciary Duty</u>

The proposed Second Cause of Action for breach of fiduciary duty (*see* Powell Aff., Ex. 4, ¶¶ 49-59) seeks to dress up his claim to recover money damages based upon Joseph's acquisition of the "Compost Yard," which the Court already dismissed as time-barred, in

equitable language to try to benefit from the six-year statute of limitations under CPLR § 213 (1) for fiduciary duty claims that are not "monetary in nature" (*Carbon Capital Mgt., LLC v Am. Exp. Co.*, 88 AD3d 933, 939 [2d Dept 2011]).

The Court should deny leave to amend as palpably insufficient and patently devoid of merit. Twice, Jonathan attempted to persuade this Court that his claim for damages for Joseph's acquisition of the "Compost Yard" was equitable rather than monetary.

Jonathan opposed Joseph's motion partially to dismiss his fiduciary duty claim as time barred by arguing that Jonathan sought "equitable" relief including conveyance of the properties to the Corporation:

- "Where . . . the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies" (Mahler Aff., Ex. C at 13).

- "[T]he primary remedy sought is to determine title to the property and compel Joseph to convey it to the Corporation, for which a six-year statute applies. The Laura Properties were also diverted from the Corporation, and Jonathan asks the Court to compel Laura and her companies to convey all of her ill-gotten properties to the Corporation. As to both Laura and Joseph, the Corporation seeks an accounting, the nature of which relief is equitable. The claims for a declaratory judgment and an order compelling transfer of title to the Corporation, because they seek equitable remedies, would generally be subject to the six-year statute" (*id.*).

In his later reargument motion, Jonathan yet again argued that his claim was "equitable":

- "Joseph breached his fiduciary duty and duty of undivided loyalty to the Corporation and Jonathan when he acquired the Compost Yard in his own name. . . . The Amended Complaint states a claim for compelling Joseph to deed the Compost Yard to its rightful owner, the Corporation and to account for his profits from the diverted assets. The Statute of Limitations for that cause of action is six years, because it seeks equitable relief" (Mahler Aff., Ex. F at 12).

Twice, this Court rejected Jonathan's attempts to depict his fiduciary duty claim as equitable rather than monetary. First, on the motion to dismiss, the Court held:

> Here, the court finds that the statute of limitations for breach of fiduciary duty and duty of loyalty is three years since

> plaintiff seeks monetary damages (***Kaufman v Cohen***, supra). Thus, the equitable relief plaintiff seeks, including an accounting, is incidental to that relief (***IDT Corp. v Morgan Stanley Dean Witter & Co.***, 12 NY3d 132, 879 NYS2d 355 [2009]).

(Powell Aff., Ex. 5 at 4). Second, on the motion to reargue, the Court held:

> With regard to plaintiffs' motion to reargue, the court finds that plaintiffs have failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in determining the prior motion. . . . Accordingly, the motion is denied.

(Mahler Aff., Ex. J at 1).

Therefore, the Court already twice held that Jonathan's claim to recover damages for Joseph's acquisition of the Compost Yard is time barred notwithstanding his attempt to reposition them as fraud claims (Powell Aff., Ex. 5 at 4; Mahler Aff., Ex. J at 2 ["[T]here is no dispute that the sixth real estate purchase closed on March 12, 2013, and therefore occurred more than three years prior to the commencement of the instant action, is time-barred in the first cause of action alleging breach of fiduciary duty"]). In addition, the Court already held twice that Jonathan failed to state a claim for the Compost Yard based upon theories of constructive trust and quiet title (Powell Aff., Ex. 5; Mahler Aff., Ex. I).

Thus, despite multiple attempts based upon multiple legal theories, the Court has conclusively ruled that Jonathan lacks a viable claim for Joseph's alleged misappropriation of the Compost Yard. The Court's holdings were correct. Jonathan offers no reason for the Court to depart from them. Accordingly, the Court should deny Jonathan's motion for leave to amend as palpably insufficient and patently devoid of merit.

C. <u>The Proposed Third Cause of Action for Corporate Waste</u>

The proposed Third Cause of Action claims corporate waste (*see* Powell Aff., Ex. 4, ¶¶ 60-81). The Court should deny leave to amend. Even assuming the Court allows Jonathan to

continue prosecuting this action at all (*see* Point I, *supra*), the claim is completely duplicative of Jonathan's Fourth Cause of Action in the First Amended Complaint under BCL § 720, which the Court previously declined to dismiss in its January 2017 Order (*see* Powell Aff., Ex. 1, ¶¶ 83-88; Powell Aff., Ex. 5 at 4-5). Whatever remedies Jonathan seeks in his proposed new claim for waste – whether money damages or an accounting – he can recover under his existing BCL § 720 claim because "[t]he statute is broad and covers every form of waste of assets and violation of duty whether as a result of intention, negligence, or predatory acquisition" (*Rapoport v Schneider*, 29 NY2d 396, 400 [1972]; *Amfesco Indus., Inc. v Greenblatt*, 172 AD2d 261, 265 [1st Dept 1991] [same]).

Where, as here, a proposed new claim is duplicative of an existing one, the Court should deny leave to amend (*see e.g. Freely v Donnenfeld*, 150 AD3d 695, 696 [2d Dept 2017] [affirming denial of motion to amend to allege breach of fiduciary duty as "duplicative" of other causes of action]; *Rich Prods. Corp. v Kenyon & Kenyon, LLP*, 128 AD3d 1532, 1534 [4th Dept 2015] ["We likewise conclude that the court properly denied plaintiff's motion for leave to serve a second amended complaint, because plaintiff sought only to add duplicative claims"]; *C.B.S. Rubbish Removal Co., Inc. v Winters Waste Servs., Inc.*, 18 AD3d 790, 792-93 [2d Dept 2005] ["the proposed second counterclaim was duplicative of the original counterclaim . . . and that branch of the cross motion which was for leave to amend the answer should have been denied in its entirety"]).

D. <u>The Proposed Fourth Cause of Action for Accounting</u>

The proposed Fourth Cause of Action seeks an "equitable accounting" (Powell Aff., Ex. 4, ¶¶ 82-85). The Court should deny leave to amend. First, Receiver in the dissolution proceeding has been charged with distributing the Corporation's net assets to Joseph and

Jonathan. Jonathan's proposed claim would directly interfere with the Receiver's duties. Second, the Court already ruled that Jonathan may not seek an accounting individually, only as part of his derivative claim (Mahler Aff., Ex. E at 4 ["[A] shareholder who seeks a corporate accounting, as here, must do so in the context of a derivative action (see NY BCL § 720 [b]; *Romanoff v Superior Career Institute Inc.*, 69 AD2d 856, 415 NYS2d 457 [1979]"]). Because Jonathan's Fourth Cause of Action in his First Amended Complaint fully encompasses his proposed new claim for an equitable accounting, the Court should deny leave to amend (*see e.g. Berardi v Berardi*, 108 AD3d 406, 407 [1st Dept 2013] [a shareholder's accounting claim must be brought derivatively under BCL § 720]; *Spitzer v Schussel*, 48 AD3d 233, 850 NYS2d 431 [1st Dept 2008] [a court should deny leave to add a duplicative cause of action]).

CONCLUSION

For all of the foregoing reasons, the Court should: (i) deny Jonathan's motion for leave to file a Second Amended Complaint; and (ii) award such other and further relief as the Court deems just and proper.

Dated: November 1, 2017

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