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. 007
-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 SUPPORT OF MOTION TO QUASH AND FOR PROTECTIVE ORDER

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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," together "Defendants"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Memorandum of Law in support of their motion for an Order: (i) pursuant to CPLR § 2304, quashing the Subpoenas Duces Tecum served by Plaintiff Jonathan Troffa ("Jonathan" or "Plaintiff") upon the Offices of Michael R. Strauss, Esq. (the "Strauss Firm"), Cohen, Warren, Meyer & Gitter, P.C. (the "Cohen Firm"), and Cullen & Danowski, LLP (the "Cullen Firm"), dated July 11 and 17, 2018 (together, the "Subpoenas"); (ii) pursuant to CPLR § 3103, issuing a protective order relieving the Strauss Firm, Cohen Firm, and Cullen Firm of any obligation to comply with the Subpoenas; and (iii) awarding such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

In litigation, as in life, there comes a time of reckoning. A time to take stock and honestly assess whether one's efforts have been for naught; whether it is time to move on. For Jonathan, that time has come and gone. After losing a blitzkrieg of motions, including a petition granting Joseph judicial dissolution, a motion dismissing most of Jonathan's complaint, a motion denying Jonathan's motion to reargue the complaint's dismissal, and a motion denying Jonathan leave to amend the complaint, by now even the most self-deluded litigants would have come to the unavoidable conclusion: it's over.

But not Jonathan. Even after the Court, not once, not twice, but *three times*, held Jonathan's claim to recover money damages and/or equitable relief for the so-called "Compost Yard" transaction barred by the applicable three-year statute of limitations, and otherwise utterly lacking in substantive merit, Jonathan is now forcing Joseph to make this – his fourth motion –

addressing the exact same legal issues the Court already decided three times over. Enough is enough.

No matter which theory, spin, characterization, or label Jonathan tries to apply to the "Compost Yard" transaction, it is barred by the three-year statute of limitations. The Court already reached that holding in crystal-clear terms. Jonathan initially appealed the Court's statute of limitations decision, but then withdrew his appeal at the last possible moment. His ultimate decision to not appeal the Court's dismissal of the Compost Yard claim has consequences, including full application of the doctrine of the law of the case. Therefore, as more fully explained below, the Court should, under the doctrine of the law of the case, quash all three Subpoenas, the only purpose of which is to obtain documents concerning the thrice-dismissed, meritless, utterly defeated claim for the Company Yard sale.

STATEMENT OF THE FACTS

The Corporation, the Dissolution, the Receivership, and the Winding Up

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. Jonathan paid nothing for his 50% interest in the Corporation's business, established by Joseph when Jonathan was in diapers.

In a related corporate dissolution proceeding, captioned *Joseph M. Troffa v Jonathan Troffa*, Supreme Court, Suffolk County, Index No. 000902/2017, the Court dissolved the Corporation under Section 1104 of the Business Corporation Law (the "BCL"), and appointed the Hon. Joseph Covello receiver to wind up the Corporation's affairs. The wind up is now almost complete. From the Corporation's ashes, Joseph and Jonathan now operate their own,

separate, competing businesses. They are approaching the end of their first full calendar year apart. Joseph is looking toward the future. Jonathan is focused bitterly on the past.

The Compost Yard

On March 12, 2013, more than three years before June 27, 2016, the date Jonathan filed this lawsuit (*see* NYSCEF Doc. Nos. 1-11), pursuant to a Purchase/Lease Agreement, Joseph purchased from Laurence E. Schreiber, Ronald Schreiber, and Schreiber & Schreiber Realty, LLC (together "Schreiber"), a 1.78-acre, vacant parcel of real property located at 70 A Comsewogue Road, East Setauket, New York 11733, known to the parties as the "Compost Yard" (*see e.g.* Affirmation of Peter A. Mahler in Support of Motion to Quash and for Protective Order, dated August 13, 2018 ["Mahler Aff."], Ex. 1, ¶¶ 38-39 and Ex. A thereto). The Compost Yard was leased by the Corporation before, during, and after the Purchase/Lease Agreement.

As shown below, for more than two years, despite being the focal point of no less than five motions, as well as three orders of this Court ruling the Compost Yard transaction barred by the statute of limitations, Jonathan has doggedly, to the point of disregard for the Court and its rulings, attempted to re-plead, by any means possible, a viable claim to recover money damages and/or equitable relief based upon Joseph's purchase of the Compost Yard (*see e.g.* Mahler Aff., Exs. 6 [deciding motion sequence nos. 001, 002, and 003], 14 [deciding motion sequence nos. 004 and 005], and 22 [deciding motion sequence no. 006]). All efforts have failed. The Court should reject this, Jonathan's fourth effort.

The Amended Complaint

On August 16, 2016, in Jonathan's most recent pleading, the Verified Amended Complaint (the "Amended Complaint"), Jonathan alleged four claims: (i) a First Cause of Action for breach of fiduciary duty / accounting; (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 alleged derivatively under BCL § 720 (*see* Mahler Aff., Ex. 1).

The Motion to Dismiss

On September 16, 2016, Joseph filed two motions: (i) a motion to strike the Amended Complaint and its withdrawal of Jonathan's judicial dissolution claim in his original Verified Petition/Complaint (the "Complaint") (NYSCEF Doc. No. 2), as non-compliant with BCL § 1116, and ordering judicial dissolution of the Corporation on the consent of Joseph (NYSCEF Doc. Nos. 30-34; and (ii) a motion to dismiss all the non-dissolution claims in the Complaint, or in the alternative, in the Amended Complaint (Mahler Aff., Exs. 2, 4, and 5). Jonathan cross-moved to withdraw his dissolution claim (NYSCEF Doc. Nos. 60-67).

The First Subpoena to the Cullen Firm

On October 5, 2016, as the parties were in the midst of briefing the first round of motion practice in this case, Jonathan served his first Subpoena Duces Tecum on the Corporation's outside accountants, the Cullen Firm (Mahler Aff., Ex. 3). The Subpoena contained 21 extremely broad document demands (*id*. at 3-4). For example, the very first demand asked the Cullen Firm to produce, "The entire account[ing] file for each of the [Defendants]" (*id*. at 3). Defendants did not oppose or object to the Subpoena (Mahler Aff., ¶ 4).

On December 1, 2016, the Cullen Firm responded in full to the Subpoena, producing 680 pages of accounting records concerning the Defendants (Mahler Aff., ¶ 8 and Ex. 6). Jonathan did not object to the Cullen Firm's production or complain that it was incomplete in any way (Mahler Aff., ¶ 8). Later, Defendants produced many of the same accounting records, and others, a second time in response to Plaintiff's Notice for Discovery and Inspection (Mahler Aff., ¶¶ 8,

28 and Exs. 26 and 27). In his most recent Subpoena to the Cullen Firm, the subject of this current motion, Plaintiff seeks production of many of the same accounting records a third time (Mahler Aff., ¶ 8 and Ex. 32).

The Dismissal Decision

On January 11, 2017, the Hon. Jerry Garguilo issued a Short Form Order under Motion Sequence Nos. 001, 002, and 003 (the "Dismissal Decision") denying Joseph's motion to strike the Amended Complaint and for dissolution on consent on purely procedural grounds, and denying Jonathan's cross-motion to withdraw his dissolution claim as academic (Mahler Aff., Ex. 7 at 2-3). The Court construed Joseph's motion to dismiss as directed against the Amended Complaint (*id*. at 3). The Court granted Joseph's motion to dismiss the First Cause of Action for breach of fiduciary duty / accounting 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). 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.

(*id*. at 4).

The Court dismissed the Second Cause of Action for constructive trust in its entirety 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 Joseph's motion to dismiss the Fourth Cause of Action brought derivatively for lack of standing, effectively allowing Jonathan to maintain as a derivative claim what little was left of the First Cause of Action for alleged breach of fiduciary duty occurring after June 27, 2013 (*id*. at 4-5). Jonathan did not file a Notice of Appeal from the Dismissal Decision (Mahler Aff., ¶ 9).

Thus, what remains of the Amended Complaint is the following: (i) the First Cause of Action for breach of fiduciary duty for alleged wrongful conduct on or after June 27, 2013; (ii) the Fourth Cause of Action for derivative liability incorporating those same, miscellaneous claims (*id.*). The only surviving post-June 27, 2013 claims are that: (a) Joseph engaged in "self-dealing" and "waste" by causing the Corporation to pay "exorbitant" rent; (b) "secretly" closing the Corporation's bank account and opening a new one to "remove" Jonathan as a signatory; (c) "purchasing equipment without authorization or Jonathan's consent" including "a phone system;" (d) forming a new entity to "divert the bulk materials and ready mix segments of the

Corporation's business;" (e) paying Laura "excessive compensation;" (f) misappropriating "a computer, certain files, a printer and miscellaneous office supplies;" and (g) paying "personal expenses without authorization and without Jonathan's consent" (Mahler Aff., Ex. 1).

The Reargument Motions

On February 25, 2017, Jonathan filed a motion for leave to reargue the Dismissal Decision's partial dismissal of the Amended Complaint, including the Compost Yard transaction as time barred (*see* Mahler Aff., Ex. 8). Jonathan attempted to persuade the Court – as he did to no avail on the prior dismissal motion – that his fiduciary duty claim was "based on fraud" and/or "equitable in nature," to try to get a limitations period of six rather than three years (*see* Mahler Aff., Exs. 8 and 12).

On March 3, 2017, Joseph filed a cross-motion for leave to reargue the Dismissal Decision, pointing out that the Court misspoke when it stated that only the "first five real estate purchases" were time barred (Mahler Aff., Ex. 10; Mahler Aff., Ex. 7 at 4). The sixth transaction, the Compost Yard, closed title on March 12, 2013, so it also was barred by the three-year statute of limitations (Mahler Aff., Ex. 1, Ex. A thereto).

The Reargument Decision

On May 17, 2017, the Hon. Jerry Garguilo issued a Short Form Order under Motion Sequence Nos. 004 and 005 (the "Reargument Decision") denying Jonathan's motion for leave to reargue and granting Joseph's cross-motion for leave to reargue (*see* Mahler Aff., Ex. 14). 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 Withdrawn Appeal of the Reargument Decision

On June 14, 2017, Jonathan filed a Notice of Appeal of the Reargument Decision (Mahler Aff., Ex. 15). In his Request for Appellate Division Intervention, Jonathan framed the issue on appeal as follows: "Whether the Court erred in granting Defendants' cross-motion and dismissing the causes of action concerning the 6th parcel of land" — *i.e.*, the Compost Yard (*id*. at 4).

On December 6, 2017, a week before Jonathan was required to perfect his appeal of the Reargument Decision, Jonathan's counsel sent the Second Department a letter withdrawing his appeal of the Reargument Decision (Mahler Aff., Ex. 20). On December 7, 2017, Jonathan's counsel sent the Second Department another letter stating:

> Following up on my letter dated December 6, 2017, this letter is to confirm that the Notice of Appeal, filed on June 14, 2017 in the above-referenced appeal, is withdrawn as to both Plaintiffs Jonathan Troffa and Jos. M. Troffa Landscape and Mason Supply, Inc.

(Mahler Aff., Ex. 21).

The Amendment Motion

On June 26, 2017, Jonathan filed a motion for leave to file a proposed Second Amended Verified Complaint (the "Second Amended Complaint") (Mahler Aff., Exs. 16 and 17). Masquerading as a motion for leave to amend, Jonathan's motion to file the Second Amended Complaint in reality sought to re-reargue the Dismissal and Reargument Decisions, which twice dismissed the Compost Yard transaction as time barred (Mahler Aff., Ex. 17). The proposed First Cause of Action tried to re-allege fraud for Joseph's acquisition of the Compost Yard (Mahler Aff., Ex. 16, ¶¶ 26-48). The proposed Second Cause of Action tried to re-allege breach of fiduciary duty for Joseph's acquisition of the Compost Yard (*id.*, ¶¶ 49-59). The proposed Third Cause of Action tried to re-allege corporate waste for Joseph's acquisition of the Compost Yard (*id.*, ¶¶ 60-81). The proposed Fourth Cause of Action tried to re-allege an accounting, which the Court previously dismissed in full (*id.*, ¶¶ 82-85).

The Amendment Decision

On February 7, 2018, the Hon. Jerry Garguilo issued a Short Form Order under Motion Sequence No. 006 (the "Amendment Decision") denying Jonathan's motion for leave to file the Second Amended Complaint (Mahler Aff., Ex. 22). The Court acknowledged Defendants' arguments that "plaintiff is merely using this new motion as a further attempt to reargue the prior motion to dismiss and the motion to reargue" (*id.* at 2), that "plaintiff is seeking to utilize the fraud and corporate waste claims in order to bypass the statute of limitations" (*id.*), and that "the court already ruled on the allegations in the second cause of action for breach of fiduciary duty for defendant Troffa's acquisition of the compost yard, in that the claim is barred by the three-year statute of limitations" (*id.*).

Thus, the Court ruled that all of the proposed new claims were either "palpably insufficient as a matter of law," "duplicative" of previously dismissed claims, or duplicative of the remaining portions of the First and Fourth Causes of Action in the Amended Complaint (*id.* at 3). The Court explained:

> Plaintiff's motion is denied as the second amended complaint is palpably insufficient as a matter of law (***Bankers Trust Co. v Cusumano***). The court finds that the first cause of action alleging fraud fails to state in detail (CPLR 3016 [b]) when the original statement was made and exactly when the second statement was made by defendant Joseph Troffa (CPLR 3016 [b]). Contrary to plaintiff's contentions, the two-year fraud discovery rule pursuant to CPLR 213 (8) is inapplicable.
>
> The second cause of action alleging breach of duty of loyalty and fiduciary duty is duplicative of the third cause of action in the first amended complaint which sought quiet title to the compost yard and was dismissed by order dated January 11, 2017 (Garguilo, J.), and is therefore without merit. The third and fourth causes of action seeking an accounting and an equitable accounting are subsumed in the fifth cause of action which alleges a derivative cause of action pursuant to New York Business and Corporations Law §720 and are dismissed.
>
> Accordingly, under the present circumstances and in the Court's discretion, plaintiff's motion seeking leave to amend the first amended complaint is denied.

(*id.*).

The Pending Unperfected Appeal of the Amendment Decision

On March 9, 2018, Jonathan filed a Notice of Appeal of the Amendment Decision (Mahler Aff., Ex. 23). His appeal is pending and unperfected (Mahler Aff., ¶ 25). Jonathan is required to perfect the appeal no later than September 10, 2018 (*id.*).

Jonathan's Correspondence Alleging the Compost Yard Transaction Remains Viable

On March 12, 2018, the parties appeared for a Preliminary Conference (NYSCEF Doc. No. 142). At the conference, Jonathan' counsel asserted his belief that the Compost Yard transaction remains viable, despite being dismissed by the Court three times in the Dismissal Decision, the Reargument Decision, and the Amendment Decision (*see* Mahler Aff., Ex. 24 at 3). That same day, Jonathan's counsel sent Defendants' counsel an email reiterating his position (*id.*).

On March 14, 2018, Defendant's counsel sent Jonathan's counsel a letter asserting that the Compost Yard transaction was dismissed, and for that reason, Jonathan is not entitled to disclosure concerning the dismissed claim (*id*. at 4). On March 15, 2018, Jonathan's counsel sent the Court a letter asserting that the Compost Yard transaction remains a viable claim, despite having already been dismissed (*id*. at 1). On March 20, 2018, Defendants' counsel sent the Court a reply letter, stating that any attempt by Jonathan to re-litigate the Compost Yard claim a fourth time would be frivolous (*see* Mahler Aff., Ex. 25).

The Disclosure Demands and Responses

On July 3, 2018, Defendants responded to Jonathan's First Notice for Discovery and Inspection and First Set of Interrogatories, both of which contained demands concerning the dismissed Compost Yard transaction (Mahler Aff., Exs. 26; 27 at 18; 28 at 4, 5). Defendants responded to Jonathan's demands for documents and information concerning the Compost Yard as follows: "Defendants object to this request on the grounds that the Court previously dismissed all claims based upon the alleged 'Compost Yard' transaction as barred by the statute of limitations" (Mahler Aff., Exs. 27 at 18; 28 at 4, 5). With their responses, Defendants produced 839 pages of documents, including accounting records the Cullen Firm produced in response to

Plaintiff's first Subpoena (*see* Mahler Aff., Ex. 26). In his most recent Subpoena to the Cullen Firm, Plaintiff seeks production of many of the same accounting records again a third time (*see* Mahler Aff., Ex. 32).

The Subpoenas to the Strauss Firm and Cohen Firm

On July 11, 2018, in an attempt to bypass Defendants' justified refusal to produce documents concerning the dismissed Compost Yard transaction, Jonathan served Subpoenas on the Strauss Firm and Cohen Firm (*see* Mahler Aff., Exs. 29 and 30). The Strauss Firm was the attorney for the sellers in connection with Joseph's purchase of the Compost Yard (Mahler Aff., ¶ 31). The Cohen Firm was the attorney for Joseph in connection with his purchase of the Compost Yard (Mahler Aff., ¶ 32). The Subpoenas seek both law firms' "entire file (including paper copies and electronically stored information) in connection with the purchase of the Premises by Joseph Troffa" in March 2013 (Mahler Aff., Exs. 29 and 30 at 3). The Subpoenas are returnable August 13, 2018 (*id*. at 1).

The Second Subpoena to the Cullen Firm

On July 17, 2018, Jonathan served a Subpoena on the Cullen Firm, Defendants' outside accountants, his second such Subpoena in the same action (*see* Mahler Aff., Ex. 32). Many of the demands sought documents duplicative of the first Subpoena to the Cullen Firm and Jonathan's First Notice for Discovery and Inspection, responses to which contained comprehensive accounting records and financial information (Mahler Aff., Exs. 32, 3, 6, 26, 27, and 28).

The Demands to Withdraw the Subpoenas and the Pre-Motion Conference

On July 16, 2018, Defendants' counsel sent Jonathan's counsel a letter demanding he withdraw the Subpoenas to the Strauss Firm and Cohen Firm (*see* Mahler Aff., Ex. 31). Jonathan did not withdraw the Subpoenas.

On July 17, 2018, at a Compliance Conference, Defendants objected to the Subpoenas and raised this anticipated motion with the Court (Mahler Aff., ¶ 38). The parties conferenced the potential motion with the Court (*id.*). After discussing the potential motion, Defendants requested, and the Court granted, permission for Defendants to make this motion (*id.*). The Court directed Defendants to move by no later than August 13, 2018, the return date of the Subpoenas (*id.*).

On July 18, 2018, Defendants' counsel sent the Strauss Firm and Cohen Firm a letter notifying them that Defendants would be filing this motion, and asking them, pursuant to CPLR § 3103 (b), not to comply with the Subpoenas until the Court decides this motion (*see* Mahler Aff., Ex. 33).

On July 26, 2018, Defendants' counsel sent Jonathan's counsel a letter demanding he withdraw the Subpoena to the Cullen Firm (*see* Mahler Aff., Ex. 34). Jonathan did not withdraw the Subpoena (Mahler Aff., ¶ 36).

On July 26, 2018, Defendants' counsel sent the Cullen Firm a letter notifying it that Defendants would be filing this motion, and asking it, pursuant to CPLR § 3103 (b), not to comply with the Subpoenas until the Court decides this motion (*see* Mahler Aff., Ex. 35).

ARGUMENT

Point I

THE SUBPOENAS SEEK UTTERLY IRRELEVANT DOCUMENTS CONCERNING THE DISMISSED, TIME-BARRED "COMPOST YARD" TRANSACTION

"A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (*Hudson City Sav. Bank v 59 Sands Point, LLC*, 153 AD3d 611, 613 [2d Dept 2017] [affirming order quashing subpoenas] [quotations omitted]).

"Should the movant meet this burden, the subpoenaing party must then establish that the discovery sought is material and necessary to the prosecution or defense of the action" (*id.* [quotations and brackets omitted]). "If the relevance of the subpoena is challenged, it is incumbent upon the issuer to come forward with a factual basis establishing the relevance of the documents sought" (*N. v Novello*, 13 AD3d 631, 632 [2d Dept 2004]).

Under the doctrine of the law of the case, the Subpoenas are utterly irrelevant to Jonathan's partial remaining claims. Therefore, the Court should grant Defendants' motion to quash the Subpoenas and issue a protective order relieving the recipients of any obligation to comply with them.

"The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, 1253 [2d Dept 2016] [quotations omitted]). "The law of the case doctrine operates to foreclose reexamination of the question absent a showing of subsequent evidence or

change of law" (*Haberman v Zoning Bd. of Appeals of City of Long Beach*, 94 AD3d 997, 1000 [2d Dept 2012] [quotations and brackets omitted]). The doctrine applies to "legal determinations that were necessarily resolved on the merits in a prior decision" (*Strujan v Glencord Bldg. Corp.*, 137 AD3d at 1253 [quotations omitted]). "When there is an appeal from an order which is found to have been made in violation of the doctrine of law of the case, the Appellate Division may properly reverse it for that reason alone, without regard to the merits" (*Carbon Capital Mgt., LLC v Am. Exp. Co.*, 88 AD3d 933, 936 [2d Dept 2011] [quotation omitted]).

The law of the case applies to decisions granting motions to dismiss under CPLR 3211 or 3212 (*see e.g. Moran Enters., Inc. v Hurst*, 96 AD3d 914, 916 [2d Dept 2012] [since the court "necessarily resolved on the merits the grounds for dismissal raised in her pre-answer motion to dismiss . . .reconsideration of those grounds is barred by the doctrine of law of the case"] [quotations omitted]; *Ahrorgulova v Mann*, 144 AD3d 953, 953 [2d Dept 2016] [prior determination by trial court dismissing third-party complaint was a legal determination on the merits and thus was law of the case]). It also applies to decisions denying motions to amend under CPLR 3025 (*see e.g. Strujan v Glencord Bldg. Corp.*, 137 AD3d at 1253 ["Inasmuch as the Supreme Court's order dated January 10, 2013, denied the plaintiff's motion for leave to amend her complaint on the merits, that order is law of the case"]).

In particular, the doctrine applies to decisions holding claims barred by the statute of limitations (*see e.g. Salvaggio v Am. Exp. Bank, FSB*, 129 AD3d 816, 817 [2d Dept 2015] ["Contrary to the plaintiff's contention, the Supreme Court properly relied upon the law of the case doctrine in determining that her General Business Law § 349 claim was governed by a three-year statute of limitations"]; *Spindell v Brooklyn Jewish Hosp.*, 35 AD2d 962, 962-63 [2d Dept 1970], *affd* 29 NY2d 888 [1972] ["We are of the view that it was error to have struck the

defense of res judicata. Plaintiff never exercised her right to move to reopen her default on the motion to dismiss the complaint in the prior action and thus the determination therein, that the Statute of Limitations barred the claim, became the law of the case"]).

Here, under the doctrine of the law of case, the subject of the Subpoenas – the Compost Yard transaction – has been dismissed on the merits and is no longer part of the case (Mahler Aff., Exs. 29, 30, and 32). In the Dismissal Decision, the Court dismissed in their entirety Jonathan's claims concerning the Compost Yard transaction under CPLR 3211 (a) (5) (*see* Mahler Aff., Ex. 7). Then, in the Reargument Decision, the Court denied Jonathan's motion for leave to reargue the Dismissal Decision, including dismissal of the Compost Yard claims (*see* Mahler Aff., Ex. 14). Then, in the Amendment Decision, it denied Jonathan's motion attempting to replead claims concerning the Compost Yard (*see* Mahler Aff., Ex. 22). Under the doctrine of the law of the case, the Compost Yard transaction has been dismissed under the applicable three-year statute of limitations under CPLR 3211 (a) (5) – a pure "legal determination" that was "necessarily resolved on the merits in a prior decision" – in fact, three of them (*Strujan v Glencord Bldg. Corp.*, 137 AD3d at 1253; *see* Mahler Aff., Exs. 7, 14, and 22). Therefore, documents concerning the Compost Yard transaction are utterly irrelevant and not discoverable.

Importantly, Jonathan chose not to file a Notice of Appeal from the Dismissal Decision (Mahler Aff., ¶ 9). He did file a Notice of Appeal from the Reargument Decision,[1] but then withdrew the appeal a week before he was required to perfect it (*see* Mahler Aff., Exs. 15, 20, and 21). Where, as here, a plaintiff could have appealed from a decision, but chose to not do so, the law of the case applies with particular force (*see e.g. Brown-Jodoin v Pirrotti*, 138 AD3d

[1] Had Jonathan attempted to perfect his appeal of the Reargument Decision, the Appellate Division would have dismissed the appeal because, of course, an order denying a motion for leave to reargue is "not appealable" (*Maddaloni v Maddaloni*, ___ AD3d ___, 2018 NY Slip Op 05295, at *1 [2d Dept July 18, 2018]).

661, 663 [2d Dept 2016] ["Since the defendants did not appeal the August 17, 2011, order, the finding therein constituted the law of the case, and the Supreme Court properly applied the doctrine in reaching its decision on the subject motion"]; *Certain Underwriters at Lloyd's London v N. Shore Signature Homes, Inc.*, 125 AD3d 799, 800 [2d Dept 2015] ["the Supreme Court properly applied the law of the case doctrine, since, in an order dated May 24, 2011, from which Wischhusen and North Shore did not appeal, the court had already determined that the disputed file was not discoverable"]; *Czernicki v Lawniczak*, 103 AD3d 769, 770 [2d Dept 2013] ["Inasmuch as the plaintiff's contentions were raised or could have been raised in the prior appeal in this matter, the contentions are . . . barred by the doctrine of the law of the case"]; *Shkolnik v Hosp. for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 351 [1st Dept 1995] ["Having held that Dr. Krinick is not liable as a matter of law, we are constrained to dismiss the complaint here inasmuch as plaintiff's withdrawal of her cross-appeal effectively renders Dr. Shankman's non-liability law of the case"]).

Therefore, for all of the foregoing reasons, the Court should quash the Subpoenas, grant a protective order, and rule the Compost Yard transaction – once and for all – no longer a part of this litigation.

Point II

THE SUBPOENA TO THE CULLEN FIRM IS DUPLICATIVE OF JONATHAN'S PRIOR SUBPOENA TO THE CULLEN FIRM

The Court should quash Jonathan's Subpoena to the Cullen Firm for the additional reason that it is duplicative of the original Subpoena he served on the Cullen Firm in October 2016, to which Joseph did not object, to which the Cullen Firm responded in full, and in response to which Jonathan did not object to the Cullen Firm's production or complain that it was incomplete in any way (*see* Mahler Aff., ¶¶ 5, 8 and Exs. 3, 6, and 32).

Where, as here, a subpoena is "duplicative" of an earlier subpoena to the same non-party for the same records, the subpoena is "property quashed" (*Christie's, Inc. v Koch*, 110 AD3d 651, 651 [1st Dept 2013] ["Even assuming that the requested information regarding the April 2007 auction is relevant," the subpoena nonetheless was "duplicative of respondent's request in a November 2009 subpoena served on Christie's. Christie's produced documents in connection with that request, and respondent did not raise any timely objections"]; *see also e.g. Smith v Smith*, 26 AD2d 922, 922-23 [1st Dept 1966] ["A similar subpoena to examine on the same subject matter and to produce the same documents had been served" and a "witness appeared in response to that subpoena and was examined fully. We can see no purpose in the examination currently sought except to inconvenience and harass the proposed witness. No necessity was shown and, in view of the fact that the information had already been obtained, it is doubtful that any valid purpose could be shown"]).

Therefore, in addition to seeking utterly irrelevant documents, the Court should quash the Subpoenas to the Cullen Firm as duplicative of Jonathan's earlier Subpoena to the Cullen Firm seeking the same documents.

CONCLUSION

For all of the foregoing reasons, the Court should: (i) quash the Subpoenas; (ii) issue a protective order relieving the Strauss Firm, Cohen Firm, and Cullen Firm of any obligation to comply with the Subpoenas; and (iii) award such other and further relief as the Court deems just and proper.

Dated: August 13, 2018

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