To Be Argued By:
Peter A. Mahler
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No.
2018-12622

JONATHAN TROFFA and JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC.,

Plaintiffs-Appellants,

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-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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SUMMARY OF THE ARGUMENT

This misbegotten business divorce lawsuit pitted an ungrateful, only son, Plaintiff-Appellant Jonathan Troffa ("Jonathan"), against his own father, Defendant-Respondent Joseph M. Troffa ("Joseph"). Two decades ago, Joseph gifted Jonathan, then barely out of high school, half the stock in a business bearing Joseph's name, which Joseph founded, capitalized, and singlehandedly grew into a thriving enterprise, Defendant-Respondent Jos. M. Troffa Landscape and Masonry Supply, Inc. (the "Corporation").

As a result of the son's lawsuit and a subsequent corporate dissolution proceeding reluctantly commenced by Joseph, captioned *Joseph M. Troffa v Jonathan Troffa*, Supreme Court, Suffolk County, Index No. 000902/2017, the Hon. Jerry Garguilo, Supreme Court, Suffolk County (the "Motion Court") judicially dissolved the Corporation in 2017 under Section 1104 of the Business Corporation Law (the "BCL"). This Court's former Associate Justice Joseph Covello was appointed receiver under whose guidance the Corporation's assets were marshalled, liquidated, sold, and its affairs wound up. For over a year, Jonathan and Joseph have operated separate, new, competing businesses at separate locations. For better or for worse, they have almost entirely disentangled themselves from one another, both personally and professionally. Proceedings in this action before the Motion Court

are currently stayed pending this appeal. If this Court issues an affirmance, as it should, it will likely bring this case to its well-deserved end.

The heart and focal point of Jonathan's lawsuit was his contention that his father and stepmother, either individually or through entities they owned, "misappropriated" alleged "opportunities" that should have belonged to the Corporation by acquiring six contiguous parcels of land upon which the Corporation operated its business in East Setauket, New York, and to which the Corporation paid below-market rents. Some of the land purchases Jonathan attacked were truly ancient – occurring as long ago as 1980, a decade and a half prior to Jonathan even becoming a shareholder of the Corporation through his father's generosity. Three of the purchases were made by an entity in which Jonathan personally is an equity owner.

Despite not having even the slightest chance of success recovering for these ancient, stale claims and transactions, Jonathan brought them anyway, throwing everything against the wall in hopes something might stick. The most recent land acquisition in particular – the purchase by Joseph of a 1.78-acre, vacant parcel of land known as the "Compost Yard" – was so integral to Jonathan's case that he attached the deed to his own pleading. The danger in Jonathan attaching the deed to his pleading, of course, was that it pinpointed for the Motion Court precisely when the statute of limitations began to run.

In baseball, a batter is called out after three strikes. If that were the rule in litigation, this appeal would not be before the Court. In the first of a series of four decisions, the Motion Court granted Joseph dismissal of Jonathan's First Cause of Action for breach of fiduciary duty seeking money damages for the Compost Yard sale as barred by the applicable three-year statute of limitations under CPLR 214 (4). Then, the Motion Court denied Jonathan leave to reargue dismissal of the Compost Yard claim, explicitly rejecting Jonathan's argument that the claim was "derivative" for purposes of the six-year statute of limitations under CPLR 213 (7). Then, the Motion Court denied Jonathan leave to amend his pleading to attempt, for a third time, to revive his stale claim by pleading a fraud claim for damages based upon the Compost Yard transaction. Critically, Jonathan either did not appeal, or withdrew his appeals, of all three decisions.

Three strikes should have been an "out." But not for Jonathan, who insisted on taking a fourth swing by issuing non-party subpoenas seeking discovery of the dismissed Compost Yard claim. In a fourth decision – the only one before the Court in this appeal – the Motion Court, in a Short Form Order, dated September 25, 2018 (the "Subpoena Decision"), granted Joseph's motion quashing three Subpoenas *Duces Tecum* (the "Subpoenas") served by Jonathan upon two non-party law firms and a non-party accountant seeking documents concerning the previously-dismissed Compost Yard transaction. In the Subpoena Decision, the Motion Court rejected

Jonathan's attempt to re-characterize, yet again, his dismissed First Cause of Action for money damages for breach of fiduciary duty as "derivative" for the sole purpose of extending the statute of limitations from three years to six.

The Motion Court's holding is unassailable. No matter which characterization or label Jonathan attempted to apply to the Compost Yard transaction, it is barred by the three-year statute of limitations. The Motion Court already reached that holding in crystal-clear, well-grounded terms. Jonathan's decision not to appeal the Motion Court's dismissal of the Compost Yard claim has consequences. As argued below, the Court should affirm the Motion Court's decision quashing the Subpoenas under CPLR 214 (4) (*see* Point I), the doctrine of the law of the case (*see* Point II), and well-settled common-law principles prohibiting a plaintiff from clothing an otherwise-untimely legal claim in equitable language to try to extend the statute of limitations (*see* Point III). Lastly, the Court should award Joseph the costs of this appeal for being forced by Jonathan to file the Respondents' Appendix (*see* Point IV).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Motion Court providently exercised its broad discretion to oversee discovery by quashing three Subpoenas seeking documents concerning a real property transaction the Motion Court repeatedly ruled was barred by the statute of limitations and dismissed in full from the Amended Complaint?

The Motion Court correctly held that the Compost Yard transaction was barred by the three-year statute of limitations applicable to claims for breach of fiduciary duty that are legal in nature, and based upon that holding, quashed the Subpoenas. The standard of review of a decision quashing a subpoena is whether the Motion Court "providently exercised its discretion" (*Hudson City Sav. Bank v 59 Sands Point, LLC*, 153 AD3d 613, 614 [2d Dept 2017]).

2. Whether the doctrine of the law of the case barred Jonathan from relitigating, for a fourth time, the statute of limitations applicable to his thrice-dismissed claim seeking money damages for the Compost Yard transaction?

The doctrine of the law of the case barred Jonathan from relitigating the statute of limitations applicable to the dismissed Compost Yard transaction. The Motion Court did not reach this issue. The standard of review of a decision barring relitigation based upon the law of the case is whether the Motion Court "providently exercised its discretion" (*Coccia v Liotti*, 129 AD3d 763, 764 [2d Dept 2015]).

3. Whether New York common-law principles prohibited Jonathan from attempting to transform his untimely legal claim for money damages for breach of fiduciary duty based upon the dismissed Compost Yard transaction by re-labeling the claim, post-dismissal, as "derivative," yet changing none of its substance, for the sole purpose of attempting to extend the statute of limitations from three years to six?

Well-settled New York common-law principles prohibited Jonathan from dressing up his claim for damages for the dismissed Compost Yard transaction in equitable language for the sole purpose of attempting to extend the statute of limitations. The Motion Court did not reach this issue. The standard of review is whether the Motion Court "providently exercised its discretion" (*Hudson City Sav. Bank v 59 Sands Point, LLC*, 153 AD3d at 613).

4. Whether the Court should, pursuant to CPLR 5528 and 22 NYCRR 1250.7, award Joseph costs for this appeal as a sanction for Jonathan's filing of an incomplete Appendix, forcing Joseph to prepare and file a Respondents' Appendix?

The Court should award Joseph the costs of this appeal.

COUNTER-STATEMENT OF THE FACTS

The Corporation

The Corporation, now judicially dissolved and wound up, for over 40 years was a wholesale and retail landscape and masonry supply business in East Setauket, New York (A-15, 17-18). Joseph and his son, Jonathan, were the sole, equal shareholders of the Corporation (A-18-19). Jonathan paid nothing for his 50% interest in the business, established by Joseph before Jonathan was born (RA8).

The Six Properties on Which the Corporation Operated for Decades

For the entirety of its existence, from 1975 to 2017, the Corporation never owned any realty, always operating upon and leasing six parcels of land eventually owned by Joseph and his wife, Defendant-Respondent Laura Troffa ("Laura") (A-19-22, RA8-9). Joseph and Laura, through entities they owned,[1] acquired the properties beginning in 1980 (A-40). They acquired two of the properties long before Jonathan was a shareholder of the Corporation (A-40). They acquired all of the properties more than three years before Jonathan filed suit (A-40). Until Jonathan filed this lawsuit, he never once questioned the propriety of his father and stepmother's land purchases.

[1] Jonathan also is a member, along with Joseph and Laura, of NIMT Enterprises, LLC, a limited liability company which, Jonathan admits in his own pleading, owns half the properties (A-19-20).

The Compost Yard

The Compost Yard was the last of the six acquired properties. On March 12, 2013, more than three years before Jonathan filed this lawsuit (A-10), pursuant to a Lease/Purchase Agreement dated in or around 1999 (A-21), Joseph purchased the Compost Yard, a 1.78-acre, vacant parcel contiguous to the others (A-34-38). The Compost Yard was leased by the Corporation before, during, and after the Lease/Purchase Agreement (A-21).

The Amended Complaint

Jonathan's Verified Amended Complaint (the "Amended Complaint"), alleges four claims: (i) a First Cause of Action for breach of fiduciary duty seeking money damages and 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 (A-15-38).

The Motion to Dismiss: Strike One

In September 2016, Joseph filed a motion to partially dismiss the Complaint, or in the alternative, the Amended Complaint (RA1-20, 26-47, 48-70). On January 11, 2017, the Motion Court issued a Short Form Order (the "Dismissal Decision") construing Joseph's motion to dismiss as directed against the Amended Complaint (A-41). The Motion 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, including the alleged "misappropriation" by Joseph and Laura of six real property transactions involving small tracts of land on which the Corporation operated, including two property sales that occurred in 1980 and 1993, before Jonathan even became a shareholder of the Corporation (A-42).

The Motion 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.

(A-42).

The Motion Court dismissed the Second Cause of Action for constructive trust in its entirety for failure to allege the essential elements of the claim (A-42). The Motion 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 (A-42). Finally, the Motion Court denied Joseph's motion to dismiss the Fourth Cause of Action brought derivatively insofar as it allowed Jonathan to maintain as a derivative claim the First Cause of Action for alleged breach of fiduciary duty occurring after June 27, 2013 unrelated to the real property acquisitions (A-42-43). Jonathan did not appeal from the Dismissal Decision (A-9).

What currently remains of the Amended Complaint is the following: (i) the First Cause of Action for breach of fiduciary duty for alleged wrongful conduct not involving the Compost Yard on or after June 27, 2013; and (ii) the Fourth Cause of Action for derivative liability incorporating those same, miscellaneous claims (A-

15-30, 39-43). The only surviving post-June 27, 2013 allegations involve alleged payments of "exorbitant" rent, "removal" of Jonathan as a signatory on the Corporation's credit card account, purchase of "equipment" including a "phone system" without "Jonathan's consent," payment of "excessive compensation," misappropriation of "a computer, certain files, a printer" and "miscellaneous office supplies," and payment of "personal expenses" (A-15-30).

The Reargument Motions: Strike Two

In February 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 (RA73-87). Jonathan argued that his fiduciary duty claim was *either* (a) "based on fraud," *or* (b) "equitable in nature," *or* (c) "brought derivatively," and therefore, "governed by the six-year statute of limitations provided in CPLR 213 (7)" (RA73-87, 151-152).

Joseph filed a cross-motion for leave to reargue the Dismissal Decision, pointing out that the Motion Court made a typographical error in a decretal paragraph wherein it stated that only the "first five real estate purchases" were time barred (RA106-114, A-42). A real property deed in the record proved that the sixth transaction, the Compost Yard, closed title on March 12, 2013, so it also was barred by the three-year statute of limitations (A-34-38).

On May 17, 2017, the Motion Court issued a Short Form Order (the "Reargument Decision") denying Jonathan's motion and granting Joseph's cross-motion to reargue (RA157-158). The Motion Court ruled that Jonathan "failed to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law" (RA157). With respect to Joseph's cross-motion, the Motion Court held "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" (RA157-158). The Motion Court amended the Dismissal Decision with 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" (RA158).

On June 14, 2017, Jonathan filed a Notice of Appeal of the Reargument Decision (RA159-167). Jonathan framed the issue on appeal as: "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 (RA162). On December 6, 2017, Jonathan withdrew his appeal of the Reargument Decision (RA229-230).

The Motion to Amend: Strike Three

In June 2017, Jonathan filed a motion for leave to file a proposed Second Amended Verified Complaint (the "Second Amended Complaint") for the sole

purpose of negating the Motion Court's prior rulings on the statute of limitations (RA168-182, 183-187). Masquerading as a motion for leave to amend, Jonathan's motion effectively sought to re-reargue the Dismissal and Reargument Decisions (RA183-187). The proposed First and Second Causes of Action tried anew to concoct fraud and breach of fiduciary duty claims for Joseph's acquisition of the Compost Yard (RA172-176). The proposed Third and Fourth Causes of Action tried anew to concoct claims of corporate waste and an accounting for Joseph's acquisition of the Compost Yard (RA176-180).

On February 7, 2018, the Motion Court issued a Short Form Order (the "Amendment Decision") denying Jonathan's motion for leave to file the Second Amended Complaint (RA231-233). The Motion Court found that "plaintiff is merely using this new motion as a further attempt to reargue the prior motion to dismiss and the motion to reargue" (RA232), that "plaintiff is seeking to utilize the fraud and corporate waste claims in order to bypass the statute of limitations" (RA232), 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" (RA232).

The Motion Court ruled that all of the proposed new claims either were "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 (RA233). The Motion 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, supra*). 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 Corporation 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 (RA233).

On March 9, 2018, Jonathan filed a Notice of Appeal of the Amendment Decision (RA234-243). On September 11, 2018, Jonathan withdrew his appeal of the Amendment Decision (RA229).

The Motion to Quash: Strike Four

On July 11, 2018, in an attempt to bypass Joseph's non-production of documents concerning the dismissed Compost Yard transaction in response to Jonathan's discovery demands (RA244, 262, 272-273), Jonathan served Subpoenas upon the Strauss Firm and Cohen Firm (A-50-53, 54-57). The Strauss Firm was the attorney for the sellers in connection with Joseph's purchase of the Compost Yard (A-12). The Cohen Firm was the attorney for Joseph in connection with his purchase of the Compost Yard (A-12). The Subpoenas sought both law firms' "entire file (including paper copies and electronically stored information) in connection with the purchase of the [Compost Yard] by Joseph Troffa" (A-52, 56).

On July 17, 2018, Jonathan served the third Subpoena at issue in this appeal on the Cullen Firm, the Corporation's outside accountants, his second such Subpoena to the Cullen Firm (A-58-61; RA21-25).

On August 13, 2018, with the Motion Court's permission, Joseph filed a motion to quash and for a protective order relieving the Strauss Firm, the Cohen Firm, and the Cullen Firm of any obligation to comply with the Subpoenas (A-6-14). Joseph argued that the Motion Court's prior orders prohibited Jonathan from seeking discovery concerning the thrice-dismissed Compost Yard claim.

On September 25, 2018, the Motion Court issued the Subpoena Decision (A-4-5). The Motion Court rejected Jonathan's attempt to obtain disclosure concerning

the dismissed Compost Yard transaction, ruling the transaction untimely for a fourth time, and quashing the Subpoenas in full (A-4). The Motion Court explained:

> Defendants contend that law of the case precludes this discovery inasmuch as the court determined that the second cause of action was time-barred. That cause of action alleged that Defendant Joseph Troffa breached his fiduciary duty to the corporation by purchasing the compost yard. Defendants further claim that Plaintiff is attempting to re-litigate the statute of limitations for the compost yard sale. Defendants also argue that the six-year statute of limitations for shareholder derivative claims under CPLR 213 (7) does not apply to the dismissed compost yard purchase. Plaintiff is attempting to recast the compost yard transaction as a derivative, equitable cause of action to revive the claim after dismissal (A-5).

Mandated by the Dismissal Decision, Reargument Decision, and Amendment Decision addressing the same transaction and statute of limitations, the Motion Court held:

> The N.Y. Civil Practice Law and Rules does not specify a limitations period for breach of fiduciary duty . . . but the New York courts have held that such claims are governed by either a three-year statute of limitations when monetary relief is sought or a six-year statute of limitations when equitable relief is sought (*see Carlingford Center Point Assoc. v MR Realty Assoc.*, 4 AD3d 179, 179-80, 772 NYS2d 273 [1st Dept 2004] [three-year statute of limitations applied to a breach of fiduciary duty claim seeking monetary damages]). Inasmuch as the second cause of action seeks monetary damages for Defendant Joseph Troffa's alleged breach of fiduciary duty upon his purchase of the compost yard it is time-barred. Therefore,

> Plaintiff is not entitled to discovery related to the purchase of the compost yard.
>
> Accordingly, Defendants' motion to quash the subpoena and for a protective order is GRANTED (A-5).

Appellant's Inadequate and Misleading Appendix

On October 22, 2018, Jonathan filed a Notice of Appeal of the Subpoena Decision (A-3-5). On November 27, 2018, Jonathan perfected his appeal using the Appendix method (A-1-114). Joseph's moving papers before the Motion Court contained 35 exhibits vital to demonstrating why the protracted proceedings, motions, and prior orders addressing the limitations period applicable to the Compost Yard transaction bound the Motion Court to adhere to those earlier determinations and quash the Subpoenas (A-8-14). Jonathan elected in his Appendix, however, to exclude all but eight of those exhibits, omitting vital documents such as the Reargument Decision and the Amendment Decision (A-8-62).

On December 12, 2018, Joseph's counsel sent Jonathan's counsel a letter, which it later filed on the NYSCEF docket in this appeal, explaining the inadequacy of Jonathan's Appendix and requesting that Jonathan supplement the Appendix (*see* App. Div. NYSCEF Doc. No. 5, Ex. A thereto). On January 11, 2019, Jonathan's counsel sent a letter refusing to do so:

> Your demand is . . . a meritless effort to impose unnecessary costs on my client. If you wish to make a "law

> of the case" argument, you need only the orders of the Court which you purport constitute the "law of the case." You have cited two orders, none of which decided the statute of limitations on a shareholder's derivative action. Moreover, you do not need hundreds of pages of superfluous papers and exhibits just because you added them to your original motion papers. If you believe your "law of the case" argument may be raised on our appeal, and you need dozens of exhibits to make the argument, you are welcome to submit a supplemental appendix. CPLR 5528 (b) contemplates as much. . . .
>
> Accordingly, we will not accede to your demand that we submit a supplemental appendix with useless and irrelevant documents.

Thus Joseph was forced to file and pay for a Respondents' Appendix (RA1-285).

ARGUMENT

Point I

THE MOTION COURT CORRECTLY HELD THAT JONATHAN'S CLAIM FOR BREACH OF FIDUCIARY DUTY WAS PRIMARILY MONETARY IN NATURE, THUS SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS, AND BASED UPON THAT HOLDING, QUASHED THE SUBPOENAS SEEKING DOCUMENTS CONCERNING THE 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" 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] [quotations omitted]). "Should the movant meet this burden, the subpoenaing party

must then establish that the discovery sought is material and necessary" (*id.*). "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]).

Applying these standards, Joseph met his "initial burden" in support of his motion to quash by showing that the statute of limitations barred the previously-dismissed Compost Yard transaction, rendering the Subpoenas "utterly irrelevant to any proper inquiry," and the futility of the Subpoenas "inevitable or obvious" (*Hudson City Sav. Bank v 59 Sands Point, LLC*, 153 AD3d at 613). In opposition, Jonathan "failed to establish that the requested disclosure was material and necessary" to the stray remaining allegations in the Amended Complaint (*id.*).

Under New York law, the applicable statute of limitations for breach of fiduciary duty depends upon whether the claim seeks "primarily" legal or equitable relief (*Romanoff v Romanoff*, 148 AD3d 614, 616 [1st Dept 2017]). A fiduciary duty claim is deemed "legal in nature" where it "primarily seeks damages," and a request for an equitable remedy "is incidental to that relief" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Where a fiduciary duty claim is predominantly legal, the applicable statute of limitations is three years running from the date of the breach (*see* CPLR 214 [4]; *Elmakies v Sunshine*, 113 AD3d 814, 815 [2d Dept 2014]; *Weiss v TD Waterhouse*, 45 AD3d 763, 764 [2d Dept 2007]).

Here, as the Motion Court held in both the Dismissal Decision (A-42), and the Reargument Decision (RA158), from which Jonathan did not appeal (RA229-230, A-114), Jonathan's First Cause of Action for breach of fiduciary duty sought primarily monetary relief: he demanded that Joseph and his co-defendants "return and pay back to the Corporation" damages in the form of "profits they derived, for which they were unjustly enriched to the Corporation's detriment, for wasting Corporation assets, and for self-dealing," to repay "excessive and unauthorized compensation" and pay "punitive damages" (A-24-25). The only arguably "equitable" component of the First Cause of Action for breach of fiduciary duty was its ancillary request for an accounting, which the Motion Court, in the Dismissal Decision, dismissed from the Amended Complaint (A-43 ["defendants' motion . . . to dismiss the amended complaint is granted [as] to . . . an accounting in the first cause of action"]). As the Motion Court correctly held in the Dismissal Decision and Reargument Decision, the First Cause of Action was primarily monetary in nature, so a three-year statute of limitations applied (*see Elmakies v Sunshine*, 113 AD3d at 815; A-42, RA158).

Jonathan filed the Complaint on June 27, 2016 (A-42). Under the applicable three-year statute of limitations, any alleged transactions before June 27, 2013, were time barred, including the Compost Yard transaction, which closed title on March 12, 2013 (A-21, 27, 34-38). In the Subpoena Decision — as mandated by the earlier

Dismissal Decision and Reargument Decision both dismissing the Compost Yard transaction based upon the applicable three-year statute of limitations (A-42, RA158) — the Motion Court correctly held:

> Inasmuch as the [first] cause of action seeks monetary damages for Defendant Joseph Troffa's alleged breach of fiduciary duty upon his purchase of the compost yard it is time-barred. Therefore, Plaintiff is not entitled to discovery related to the purchase of the compost yard.
>
> Accordingly, Defendants' motion to quash the subpoena and for a protective order is GRANTED (A-5).

The Motion Court's holding was correct. This Court should affirm.

Point II

THE DOCTRINE OF THE LAW OF THE CASE BARRED JONATHAN FROM RELITIGATING THE STATUTE OF LIMITATIONS FOR THE DISMISSED TIME-BARRED COMPOST YARD TRANSACTION

Jonathan's appeal singularly depends upon CPLR 213 (7), the statute of limitations for shareholder derivative claims (*see* Brief for Plaintiff-Appellant ["Appellant's Br."] at 6-11). The record shows that Jonathan unsuccessfully asked the Motion Court – three times – to apply the six-year statute of limitations for shareholder derivative actions under CPLR 213 (7) to the Compost Yard transaction. Each time, the Motion Court rejected Jonathan's argument.

First, in opposition to Joseph's dismissal motion, Jonathan argued that a "shareholder derivative action, regardless of theory underlying the claim, is governed by the six year statute of limitations provided in CPLR 213 (7)," so the

Motion Court should hold that each and every one of the "monetary claims asserted" in the Amended Complaint – including the Compost Yard claim – was "subject to a six-year statute of limitations" (RA35-36).

Despite Jonathan's explicit request to apply a six-year statute of limitations under CPLR 213 (7) to the Compost Yard sale, the Motion Court dismissed on the merits all allegations in the Amended Complaint concerning the Compost Yard under CPLR 214 (4) (A-43 ["*ORDERED* that defendants' motion (002) to dismiss the amended complaint is granted to the extent that allegations of breach of fiduciary duty and loyalty which occurred before June 27, 2013 . . . are dismissed"]).

Second, in support of Jonathan's reargument motion, he argued:

> While acknowledging that the claims are sought derivatively, the Court limited these claims to three years. A shareholder derivative action, regardless of the theory underlying the claim, is governed by the six-year statute of limitations provided in CPLR 213 (7). . . .
>
> This Court overlooked the statutes and applicable law . . .
>
> All of the claims brought in the Amended Complaint were brought derivatively. All claims are subject, at minimum, to a six-year statute of limitations. To the extent any claims were limited to three years in the Fourth Cause of Action, they must be modified to six years (RA151-152).

Rather than grant *Jonathan* reargument, the Motion Court held that he "failed to demonstrate that the Court overlooked or misapprehended the relevant facts or

misapplied any controlling principle of law," then granted *Joseph* reargument, holding in unassailably clear language that the Motion Court's dismissal under the applicable three-year statute of limitations applied to the Compost Yard (RA157, 158 ["*ORDERED* that . . . all six real estate purchases . . . are barred by the applicable statute of limitations"] [quotations omitted]). Jonathan withdrew his appeal of the Reargument Decision (RA229-230).

Third, in support of Jonathan's motion for leave to file the Second Amended Complaint, he argued:

> The statute of limitations for shareholder's derivative action is six years. *See* CPLR 213 (7); *N. Fork Preserve, Inc. v. Kaplan*, 31 A.D.3d 403, 405 (2d Dept. 2006); *Toscano v. Toscano,* 285 A.D.2d 590 (2d Dept. 2001). For corporate waste the statute is also six years. *See* CPLR 213 (7). A proceeding to compel an accounting by a fiduciary is governed by a six-year statute of limitations (*see* CPLR 213 [1]). None of the Causes of Action are time-barred (RA226).

Notwithstanding Jonathan's third attempt to rely upon CPLR 213 (7), the Motion Court denied Jonathan leave to amend, holding that the proposed pleading was "palpably insufficient as a matter of law," that it "already ruled" Joseph's "acquisition of the compost yard" was "barred by the three-year statute of limitations," and that Jonathan's motion to replead was just another attempt to "bypass the statute of limitations" (RA232). Jonathan withdrew his appeal from the Amendment Decision (RA229).

"The doctrine of the law of the case" holds that "when an issue is once judicially determined, that should be the end of the matter" (*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 law of the case applies to decisions granting motions to dismiss under CPLR 3211 (*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]).

The law of the case 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"]).

The law of the case 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 . . . claim was governed by a three-year statute of limitations"]).

Based upon these authorities, the subject of the Subpoenas – the Compost Yard transaction – was fully and finally dismissed from the Amended Complaint and is no longer part of this lawsuit (A-50-53, 54-57, 58-61). Dismissal of the Compost Yard transaction under CPLR 3211 (a) (5) was a pure "legal determination" that was "necessarily resolved on the merits" (*Strujan v Glencord Bldg. Corp.*, 137 AD3d at 1253; A-39-43, RA157-158, 231-233).

Finally, where, as here, a party 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 661, 663 [2d Dept 2016]). Jonathan chose not to appeal, or withdrew his appeals, from all three decisions (A-9, RA159, 167, 229, 230, 234-243, A-114). Therefore, the Motion Court correctly quashed the Subpoenas based upon its prior decisions that the Compost Yard sale was barred by the three-year statute of limitations. The Court should affirm.

Point III

NEW YORK LAW BARS JONATHAN FROM RELABELING HIS CLAIM AS EQUITABLE TO EXTEND THE STATUTE OF LIMITATIONS

Aside from the insurmountable bar of CPLR 214 (4) (*see* Point I), and the doctrine of the law of the case (*see* Point II), it is well-settled that "an equitable remedy . . . is not available to enforce a legal right that is itself barred by the statute of limitations" (*Benedict v Whitman Breed Abbott & Morgan*, 77 AD3d 867, 869 [2d Dept 2010]; *MRI Broadway Rental, Inc. v U.S. Min. Prods. Co.*, 242 AD2d 440, 444 [1st Dept 1997], *affd* 92 NY2d 421 [1998]).

Where "the legal right to enforce" a claim is "barred by the statute of limitations," a plaintiff "cannot seek [an] equitable remedy" to attempt to "enforce that time-barred legal right" (*In re Estate of Thomas*, 124 AD3d 1235, 1240 [4th Dept 2015]). If an equitable claim is "not essential" to the complaint "except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name" and apply the shorter of two potentially applicable statutes of limitations (*Block 2829 Realty Corp. v Community Preservation Corp.*, 148 AD3d 567 [1st Dept 2017] [quotations omitted]).

Courts will apply the shorter of two potentially applicable statutes of limitations where a claim with a longer limitations period "adds nothing" to a complaint (*Garber v Ravitch*, 186 AD2d 361, 362 [1st Dept 1992]), "the only purpose it serves in the complaint is to avoid the Statute of Limitations" (*Gold Sun*

Shipping Ltd. v Ionian Transp. Inc., 245 AD2d 420, 421 [2d Dept 1997]), or where it "would be used as a means to litigate stale claims" (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120 [1st Dept 1985], *affd* 67 NY2d 981 [1986]).

Applying these principles, there is no denying that Jonathan's Fourth Cause of Action, styled "Derivative Action," is an "equitable" claim. "Under New York and Delaware law, [a] shareholder derivative suit is a uniquely equitable remedy" (*Ameritrans Capital Corp. v XL Specialty Ins. Co.*, 2016 WL 3475108, at *5 [Del Super Ct June 15, 2016]; *see Moyal v Sleppin*, 139 AD3d 605 [1st Dept 2016] ["the claims brought in his capacity as a shareholder were derivative and therefore equitable in nature"]; *Caprer v Nussbaum*, 36 AD3d 176, 187 [2d Dept 2006] ["the derivative action originated at common law as an equitable proceeding"]).

Moreover, a mere glance at the Fourth Cause of Action reveals that it is simply a shell claim in which Jonathan repleads the dismissed First through Third Causes of Action under another label through the guise of incorporation by reference (*see* A-29; *compare* A-24-28). Jonathan admits that the Fourth Cause of Action merely repackaged the three claims that preceded it, including the Compost Yard: "The Amended Complaint incorporated all of its allegations into the derivative action, the Fourth Cause of Action" (Appellant's Br. at 5; *see also* A-63 ["The Amended Complaint asserts all of the allegations contained in the original Complaint, but asserts them derivatively as an additional Fourth Cause of Action"]).

Finally, the parties already heavily litigated, and the Court necessarily decided, that the "essence" of the First Cause of Action for breach of fiduciary duty, through which Jonathan attempted to plead a viable claim of damages for the Compost Yard, was "legal," not "equitable" in nature, and so subject to a three-year, not six-year, statute of limitations (A-41-42 [ruling that "look[ing] to the essence of the claim and not to the form in which it is pleaded," the "substantive remedy sought" in the First Cause of Action, including as to the Compost Yard, was "monetary damages" with "equitable relief" being merely "incidental"]).

In sum, when "classifying a cause of action for statute of limitations purposes, the controlling consideration is not the form in which the cause of action is stated, but its substance," not "the characterization of those allegations by the parties" (*Faiella v Tysens Park Apts., LLC*, 110 AD3d 1028, 1028 [2d Dept 2013] [quotations omitted]; *Tong v Target, Inc.*, 83 AD3d 1046, 1046 [2d Dept 2011] [quotations omitted]). The Fourth Cause of Action was, as Jonathan himself admits, a mere change in the form of his earlier, direct claims (Appellant's Br. at 5; *see also* A-63). By already dismissing the First through Third Causes of Action in the Amended Complaint, including all substantive allegations concerning the Compost Yard sale, the Court necessarily also dismissed the Fourth Cause of Action insofar as it relied upon those same allegations via incorporation by reference (A-39-43, RA157-158).

Point IV

THE COURT SHOULD AWARD JOSEPH COSTS INCLUDING FOR FILING THE RESPONDENTS' APPENDIX

When an appellant perfects using the appendix method, the appendix must include "such parts of the record on appeal as are necessary to consider the questions involved," including parts an appellant "reasonably assumes will be relied upon by the respondent" (CPLR 5528 [a] [5]; *see* 22 NYCRR 1250.7 [d] [1] [v]).

"An appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal," including "the issues which will be raised by the appellant and the respondent" (*Joyce Lan Zhen Zhao v Na Chan*, 157 AD3d 878, 879 [2d Dept 2018] [quotations omitted]; *Diana v DeLisa*, 151 AD3d 806, 808 [2d Dept 2017] [citations and quotations omitted]). Noncompliance with these principles is sanctionable (*see* CPLR 5528 [e]).

In *Wilson v Wilson* (128 AD3d 1326, 1327-28 [4th Dept 2015]), the Court ruled that "because the appendix provided by defendant . . . failed to include such parts of the record on appeal as are necessary to consider the questions involved, including those parts the appellant reasonably assumes will be relied upon by the respondent," "we sanction defendant by imposing costs equal to the amount incurred by plaintiff in the preparation and submission of his own appendix to defend this appeal" (quotations omitted).

Jonathan knew the Appendix violated these principles (*see* App. Div. NYSCEF Doc. No. 5, Ex. A thereto). In his Appellant's Brief, Jonathan acknowledged Joseph's principal argument below that the extensive prior proceedings, orders, and withdrawn appeals by Jonathan barred the Motion Court from deviating from its prior holdings that the Compost Yard transaction was barred by a three-year statute of limitations (*see* Appellant's Br. at 3-4 [referring to the "Law of the Case"]).

The Appendix omitted all but eight of the 35 exhibits Joseph relied upon in the proceedings below to show why the extensive prior proceedings barred Jonathan from using non-party subpoenas to relitigate the statute of limitations (*see* A-8-14). "These omissions inhibit this Court's ability to render an informed decision on the merits of the appeal" (*Zutrau v ICE Sys., Inc.*, 128 AD3d 1058, 1059 [2d Dept 2015]). Jonathan refused to supplement his Appendix (*see supra* at 17-18). The Court should "sanction [Jonathan] by imposing costs equal to the amount incurred by [Joseph] in the preparation and submission of his own appendix to defend this appeal" (*Wilson v Wilson*, 128 AD3d at 1327-28).

CONCLUSION

For all of the foregoing reasons, the Court should: (i) affirm the Short Form Order of the Hon. Jerry Garguilo, dated September 25, 2018, quashing the Subpoenas and issuing a protective order; (ii) sanction Jonathan for filing an incomplete Appendix by awarding Joseph the costs of this appeal; (iii) and award Joseph such other and further relief as the Court deems just and proper.

Dated: February 25, 2019

FARRELL FRITZ, P.C.

By: _____

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