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 Seq. Nos. 010 and 011
-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 AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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Defendants Joseph M. Troffa ("Joseph"), Laura J. Troffa ("Laura"), Jos. M. Troffa Materials Corporation, NIMT Enterprises, LLC ("NIMT"), L.J.T. Development Enterprises, Inc. ("L.J.T."), and Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation," collectively, "Defendants"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Memorandum of Law in opposition to the motion for summary judgement of Plaintiff Jonathan Troffa ("Jonathan" or "Plaintiff") and in support of Defendants' cross-motion for summary judgement.

PRELIMINARY STATEMENT

After suing his own father, then having his case unceremoniously dismissed almost entirely, Jonathan now moves for summary judgment on the one remaining sliver of his Fourth Cause of Action. In this remaining sliver, Jonathan asks for judgment on both liability and damages against Joseph for his alleged "misappropriation" from the Corporation of an alleged "corporate opportunity" when Joseph purchased in his own name, in 2013, a 1.78-acre, former toxic waste dump in East Setauket known as the "Compost Yard." Astoundingly, Jonathon also asks for judgment against Joseph, Laura, and NIMT on liability for rent payments the Corporation made for use of the Compost Yard after Joseph bought the land in 2013, including rent payments the Court-appointed receiver, Hon. Joseph Covello, expressly approved with Jonathan's own express co-approval.

Dooming his motion, simultaneously entitling Joseph to cross-summary judgment, Jonathan fails to even address (thus necessarily failing to satisfy his own *prima facie* burden as movant) the applicable legal standards New York courts apply to determine whether an asset constitutes a "corporate opportunity": the "tangible expectancy" or alternative "line-of-business" tests. Had Jonathan attempted to apply those tests, he would have failed both.

Under the "tangible expectancy" test, the undisputed documentary evidence establishes that the Corporation had not the slightest expectation of acquiring the Compost Yard because it was never a party to any agreement for the purchase of the Compost Yard. The undisputed evidence establishes that Joseph personally entered into the purchase/lease agreement for the Compost Yard, and Joseph sub-leased the Compost Yard to the Corporation, which used the premises for its business and paid rent, just as it did for each and every other parcel of land upon which it operated its business (*see* Point I.A.).

Under the alternative "line-of-business" test, the undisputed evidence demonstrates that ownership of Compost Yard was neither necessary nor essential for its business because, for the entirety of its existence, from 1976 to 2017, the Corporation never, ***ever***, owned a parcel of real estate, always leasing from others the properties on which it operated, including from Joseph personally, NIMT, and LJT (*see* Point I.B.). Under either of these tests, the Court should grant Joseph summary judgment because there is no triable issue of fact that the Compost Yard was not, and never was, a "corporate opportunity."

If the Court declines to grant Joseph summary judgment, then the Court should, at a minimum, deny Jonathan summary judgment. On branch "1" of Jonathan's motion for liability against Joseph for the Compost Yard, there are triable issues of fact whether Joseph disclosed, and whether Jonathan knew of and consented to, Joseph's purchase of the Compost Yard, which would be an absolute defense to a claim of self-dealing. On branch "2" of Jonathan's motion for damages for the Compost Yard, there are triable issues of fact as to the amount because Jonathan's submissions utterly ignore the fact that NIMT and Joseph personally – as carefully detailed in Joseph's affidavit – paid no less than $116,628 towards the total purchase price of $390,000 for the Compost Yard. On branch "3" of Jonathan's motion against Joseph, Laura, and NIMT for

liability for alleged Compost Yard rent payments to NIMT after Joseph bought the land in 2013, there are, at a minimum, triable issues whether approval of those payments under the auspices of this very Court by the receiver, Justice Covello, defeats liability (*see* Point II).

As a fallback to the corporate opportunity doctrine, Jonathan argues that the Corporation, though its payment of rent for the Compost Yard, became holder of "equitable title." This doctrine is inapplicable as a matter of law because: (i) the Corporation was not a party to either the Lease or the Contract of Sale; and (ii) under New York law a tenant, through rent payments alone, cannot magically become holder of "equitable title" (*see* Point III).

If the Court does not dismiss the Fourth Cause of Action in full, then the Court should hold the claim time-barred in part insofar as Jonathan seeks damages based on alleged rent / alleged installment payments the Corporation made towards the purchase price for the Compost Yard before June 27, 2010, more than six years before Jonathan filed suit (*see* Point IV).

Lastly, the Court should dismiss the lawsuit as against Defendant Jos. M. Troffa Materials Corporation. The Amended Complaint does not allege a single paragraph of alleged wrongful conduct against this entity, simply lumping it into alleged wrongdoing committed by others, constituting classic impermissible group pleading (*see* Point V).

STATEMENT OF THE FACTS

For a full recitation of all relevant facts, Defendants respectfully refer the Court to the accompanying Affidavit of Joseph M. Troffa (the "Troffa Aff."), sworn to April 11, 2022, the Affidavit of James E. Danowski (the "Danowski Aff."), sworn to April 11, 2022, and the Affirmation of Peter A. Mahler (the "Mahler Aff."), dated April 12, 2022.

The Corporation

For over 40 years, the Corporation operated as a wholesale and retail landscape and masonry supply business in East Setauket, New York (Troffa Aff., ¶ 19). Joseph was the sole shareholder until 1995, when he gifted Jonathan, then barely out of high school, half the stock in the business, which Joseph founded and singlehandedly grew into a thriving enterprise (*id.*, ¶ 25). Unfortunately, as a likely result of Joseph's highly contentious divorce with Jonathan's mother, a rift between Joseph and his son proved too deep, making it impossible for Joseph and Jonathan to be business partners (Troffa Aff., ¶¶ 26-27).

In its long history, beginning in 1976, when Joseph incorporated it, until 2017, when this Court dissolved it, the Corporation never owned any real property (*id*., ¶ 28). At all times during the entirety of its existence, the Corporation operated at its East Setauket location on land it leased from other individuals and entities, eventually totaling six parcels (*id*., ¶ 29). In a series of transactions beginning in 1980, Joseph, NIMT, and L.J.T. purchased the six contiguous parcels on which the Corporation operated (*id.*, ¶ 32). The six parcels are identified in Exhibit A as: (i) Main #1 ("Parcel # 1"); (ii) LJT #2 ("Parcel # 2") (iii) Brick #3 ("Parcel # 3"); (iv) Yard #4 ("Parcel # 4"); (v) Taxi #5 ("Parcel # 5"); and (vi) Compost #6 ("Parcel # 6") (*id.*, ¶¶ 31, 41-69, Ex. A). Three of the properties are held by NIMT, which is owned 99% by Laura and 1% by Jonathan; two are held by L.J.T., which is owned 100% by Laura, and the last parcel – the Compost Yard – is owned by Joseph personally (*id.*, ¶¶ 37-38). The Corporation did not pay any of the costs to acquire or improve any of the properties (*id.*, ¶ 34). Jonathan also never contributed finically, or otherwise, to the acquisition, maintenance, or improvement of the properties (*id.*, ¶ 35).

The Compost Yard and the Lease Agreement

The Compost Yard, the last of the six acquired properties, was originally owned by Laurence E. Schreiber ("Schreiber") (*id.*, ¶ 69). In November 1998, Joseph ***personally*** entered into a 15-year lease agreement with Schreiber (the "Lease") (*id.*, ¶ 70, Ex. H). The Corporation is not a party to the Lease, neither as tenant, nor as guarantor (*see id.*). Joseph ***personally*** assumed all liability under the Lease (*id.*). Jonathan discussed with Joseph and knew of the existence of the Lease and of the fact that Joseph ***personally***, rather than the Corporation, was the lessee under the Lease (Troffa Aff., ¶ 74).

Under the Lease, Joseph had an option to purchase the Compost Yard on the following terms:

> Tenant shall have the right to purchase said property after the one hundred twentieth (120) month by giving the Landlord ninety (90) days notice prior to purchasing same. The purchase price shall be the total amount of money that the Landlord would have received under the lease of Three Hundred Ninety Thousand ($390,000.00) and a credit shall be provided to the Tenant for any monthly payments other than real estate taxes. . . .

(Ex. 75, Ex. H Rider to Lease, ¶ 6).

The Corporation's Sub-Lease of the Compost Yard

Joseph, as sole tenant under the Lease, sub-leased the Compost Yard to the Corporation, which utilized the premises for its business, which was strictly limited to the sale of landscaping and masonry supplies (*id.*, ¶ 86). Jonathan was well aware that Joseph personally entered into the Lease Agreement with Schreiber (*id.*, ¶ 87). The Corporation paid rent for the Compost Yard, just as it did for every one of the other five parcels that it utilized for its business (*id.*, ¶ 86). The Corporation made rent payments directly to Schreiber, rather than Joseph, as permitted under the Lease (*id.*, ¶ 88). Specifically, the Lease provides:

> If this Lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than Tenant the Landlord may collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved . . . .

(*id.*, ¶ 90, Ex. H, ¶ 9).

The Corporation's direct payment of rent for the Compost Yard to Schreiber did not change Joseph's status as the sole lessee under the Lease, with the option to purchase the Compost Yard (Troffa Aff., ¶ 90).

Additionally, although the Corporation sub-leased the Compost Yard and was responsible for making rent payments, every month between 1998 and 2005, Joseph ***personally*** paid exactly 50% of the rent money owed under the Lease directly to Schreiber, to help the Corporation through difficult financial times (*id.*, ¶¶ 94-96). During this period, Joseph ***personally*** paid exactly $67,000 in rent payments to Schreiber during this seven-year period (*id.*).

Environmental Contamination and the Foreclosure Proceeding

Although Joseph long desired to exercise his option to purchase the Compost Yard for many years, two liability issues prevented him from doing so. First, the 1.78 acres of land that make up the Compost Yard were part of a much larger, 30-acre contaminated landfill owned by Schreiber, formerly owned and operated by Suffolk Materials Mining Corp. (*id.*, ¶ 78). The United States Environmental Protection Agency ("EPA") designated the landfill as a Superfund Site (*id.*, Ex. I). The contaminated property had to undergo extensive remediation work, including capping with a clay material of the entire 30-acre site (*see id.*, ¶ 79). Under the Superfund statute, known as CERCLA, the owner of the Compost Yard faced potential strict liability for any contamination on site, risking great financial exposure, including liability and responsibility for remediation expenses (*id.*, ¶ 80).

Second, the 30-acre property containing the Compost Yard was also the subject of a foreclosure proceeding and, thus, Schreiber was unable to covey title to Joseph in accordance with the lease/purchase agreement (*id.*, ¶¶ 82-83).

The Contract of Sale and the Closing

On or about December 7, 2006, Joseph, as purchaser, ***personally*** entered into a Contract of Sale with Schreiber and his son, Ronald Schreiber ("Ronald") (collectively, the "Schreibers"), as sellers, to purchase the Compost Yard for $184,876, equal to the balance then-remaining under the Lease (the "Contract of Sale") (Troffa Aff., ¶ 97, Ex. J). Joseph, as purchaser, ***personally*** assumed all liability under the Contract of Sale (*id.*, ¶ 100, Ex. J). The Corporation is not a party to the Contract of Sale, did not guarantee payment of any portion of the purchase price, and assumed no liability under the Contract of Sale (*id.*). In fact, Section 28 (h) of the Contract of Sale explicitly states that the Contract of Sale "is intended for the exclusive benefit of the parties hereto and, except as otherwise expressly provided herein, *shall not be for the benefit of, and shall not create any rights in, or be enforceable by, and [sic] other person or entity*" (*id.*, ¶ 99, Ex. J [emphasis added]). At no point was a sale of the Compost Yard to the Corporation contemplated (*id.*, ¶ 141). Indeed, at the time of execution of the Contract of Sale, Laura, on behalf of NIMT (***not the Corporation***), made the $10,000 down payment for the Compost Yard (*see id.*, ¶ 101, Ex. K).

Joseph intended to close on the sale of the Compost Yard when he entered into the Contract of Sale (*see* Troffa Aff., ¶ 104). However, because of the remaining issues with the Compost Yard, *i.e.*, its Superfund Site designation and the Schreibers' negotiations with government agencies with regard to their remediation efforts, the closing of the Compost Yard sale transaction did not take place until March 12, 2013, at which time Joseph ***personally*** paid the $39,628 balance of the purchase price (*id.*, ¶ 104-107, Exs. L and M). The deed ("Deed") to the Compost Yard was duly

recorded in the Suffolk County Clerk's Office (*id.*, ¶ 112, Ex. N) on April 19, 2013. The Deed reflects that Joseph is the sole title owner of the Compost Yard (*id.*).

In sum, together with (i) the $67,000 Joseph paid in rent under the Lease, (ii) the $10,000 NIMT paid as a downpayment, and (iii) the $39,628 Joseph paid in cash at the closing (*id.*, ¶ 110), Joseph paid ***at least $116,628*** towards the total Compost Yard purchase price of $390,000. Jonathan's papers ignore these three amounts paid by Joseph and NIMT.

NIMT also paid all closing costs associated with the closing of the Compost Yard (*see* Troffa Aff., ¶ 111). The Corporation made no payments whatsoever at closing (*id.*). NIMT took deductions on the 2013 partnership tax return, which reduced the income reported by each shareholder, including Jonathan who was a 1% owner of NIMT (*id.*).

Jonathan's Knowledge of the Corporation's Rent Payments Before Closing

From 1998 to 2017, at all times before, during, and after the closing of the Compost Yard sale in March 2013, the Corporation either sub-leased or direct leased the Compost Yard from Joseph personally (*id.*, ¶ 113). Jonathan, a shareholder, had knowledge that the Corporation made rent payments to Schreiber because he signed and approved various rent checks made out to Schreiber, including (i) Check No. 8117, dated January 5, 2007; (ii) Check No. 16649, dated January 6, 2008; and (iii) Check No. 14020, dated July 28, 2008, to name a few (*id.*, ¶ 114, Ex. O).

In addition, the Corporation's rent payments from 1998 through 2012 were taken as deductions on the Corporation's tax returns, thus impacting each shareholder's taxable income that had to be reported on their respective K-1s (*id.*, ¶ 115). Despite Jonathan's allegations in his moving papers, Jonathan, fully aware of the fact that the Corporation was making rent payments, took this deduction each year beginning in 1998 (*see id.*).

After the sale of the Compost Yard, the Corporation continued to make rent payment for its use of the Compost Yard. The Corporation's rent payments were made to NIMT and were recorded as rent expenses by the Corporation (*id.*, ¶ 116). The Corporation incurred a tax benefit of deducting rent payments as a business expense (*id.*, ¶ 117). All rental payments were taken as a deduction on the Corporation's tax returns each year, thereby reducing the taxable income each Shareholder had to report from their respective K-1s (*id.*). Jonathan had knowledge of this and took this deduction each year starting in 1998 (*id.*).

Jonathan's Knowledge of the Corporation's Rent Payments After Closing

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 ("BCL"), and appointed the Hon. Joseph Covello as receiver to wind up the Corporation's affairs (Mahler Aff., ¶¶ 17, 19, Ex. 9). From the time of the Receiver's appointment as receiver in July 2017, until the time of his discharge in June 2019, Justice Covello, Jonathan, and Joseph together carefully reviewed and approved every payment the Corporation made, including each and every one of the monthly rent payments the Corporation made to NIMT for the Corporation's use of the Compost Yard (*see* Troffa Aff., ¶ 125). The Corporation's payments were specifically signed by Jonathan and Joseph (*see id.*, ¶ 126).

The Acquisition of the Compost Yard Was Not a Corporate Opportunity

In sum, Jonathan undoubtedly knew that the Corporation was not in the realty-owing business and never intended to acquire any real property, including the Compost Yard (*see id.*, ¶ 131). Jonathan knew that the Corporation paid rent for the Compost Yard, just as it did for every one of the other parcels of land that the Corporation utilized for its business operation (*see id.*, ¶

32). Jonathan knew that the Corporation occupied and leased business premises owned by separate entities (*see id.*, ¶ 134). Jonathan knew that the Compost Yard was purchased by Joseph individually and that the Corporation had no reasonable expectation of acquiring the Compost Yard (*see id.*, ¶¶ 135-36). Lastly, Jonathan knew that the Corporation neither entered into any agreement to lease or purchase the Compost Yard (or any other realty on which it operated its business) nor engaged in negotiations to acquire the Compost Yard for itself (*see id.*, ¶¶ 137-38).

ARGUMENT

Point I

THE COURT SHOULD DISMISS THE FOURTH CAUSE OF ACTION BECAUSE THE COMPOST YARD WAS NOT, UNDER EITHER APPLICABLE TEST, A "CORPORATE OPPORTUNITY"

"The doctrine of 'corporate opportunity' provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit any opportunity that should be deemed an asset of the corporation" (*Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989] [citations omitted]). "Just what constitutes a corporate opportunity and whether the sale of [Compost Yard] is a 'corporate opportunity' are the critical inquiries herein" (*id.* at 247). New York courts have developed two tests to determine whether a venture constitutes a "corporate opportunity": (i) the "tangible expectancy" test; and (ii) the "line-of-business" test (*Lee v Manchester Real Estate and Const., LLC*, 118 AD3d 627, 628 [1st Dept 2014] ["[N]o one test alone is consistently sufficient to address what constitutes a corporate opportunity in every case"] [internal quotations omitted]).

As explained below, under either test, the undisputed record evidence demonstrates that Joseph's purchase of the Compost Yard was not a corporate opportunity of the Corporation, therefore, the Court should grant Joseph's cross-motion for summary judgment. At a minimum,

because Jonathan's moving papers declined to even mention either legal test under the corporate opportunity doctrine, the Court should deny his motion, regardless of the sufficiency of Joseph's opposition (*see e.g. Londono v Dalen, LLC*, ___ AD3d ___, 2022 NY Slip Op 02259, *1 [2d Dept Apr. 6, 2022] ["Since A & L failed to establish its *prima facie* entitlement to judgment as a matter of law, the Supreme Court properly denied its motion for summary judgment . . . regardless of the sufficiency of the opposition papers"]).

A. <u>The Corporation Never Had a Tangible Expectancy of Owning the Compost Yard</u>

Under the "tangible expectancy," test, "[a]n 'interest' or 'tangible expectancy' has been explained as something . . . more certain than a 'desire' or a 'hope' (*Alexander & Alexander of New York, Inc. v Fritzen*, 147 AD2d at 247-48). The tangible expectancy test "clearly expresses the judgment that the corporate opportunity doctrine should not be used to bar corporate directors from purchasing any property which might be useful to the corporation, but only to prevent their acquisition of property which the corporation needs or is seeking . . . ." (*Burg v Horn*, 380 F2d 897, 899 [2d Cir 1967]). "The degree of likelihood of realization from the opportunity is . . . the key to whether an expectancy is tangible" (*Abbott Redmont Thinlite Corp. v Redmont*, 475 F2d 85, 89 [2d Cir 1973]).

The Second Department often applies the tangible expectancy test to dismiss claims for breach of fiduciary duty, including for disputed real property acquisitions (*see e.g. Morales v Galeazzi*, 72 AD3d 765, 766 [2d Dept 2010] ["Here, no diversion occurred, as the record reflects that DRTC had no tangible expectation of purchasing the 2003 property. Accordingly, a constructive trust should not have been imposed"] [citations omitted]; *Gesuale v Tully*, 178 AD2d 631, 631 [2d Dept 1991] ["We agree with the trial court that Review, whose facilities and expertise were limited to water shipment, had no tangible expectancy of participation in the Haulage bid . .

. . Thus, the complaint was properly dismissed"]; *Olde Kraft Co., Ltd. v Davidian*, 128 AD2d 689, 690 [2d Dept 1987] ["There is no evidence on the record . . . to indicate that the plaintiffs were, at any time prior to the purchase of the premises . . ., interested in buying the building for themselves, and summary judgment dismissing the cause of action for usurpation of a corporate opportunity was, therefore, appropriate"]; *O'Hayer v de St. Aubin*, 30 AD2d 419, 427 [2d Dept 1968] ["It is clear that both the appellant and Ovide, Jr. treated the acquisition of the stock . . . as a personal rather than as a corporate enterprise. The appellant for many years did nothing to correct the wrong" and, therefore, "we find no tangible expectancy belonging to either Vesta or Underwear with which Ovide, Jr. interfered"]).

There is no better guide for how the Court should rule against Jonathan than *Samantha Enters., Inc. v Elizabeth St., Inc.* (5 AD3d 280, 280 [1st Dept 2004]). In *Samantha*, a general partner sued on behalf of the general partnership the other 50% partner seeking "imposition of a constructive trust, declaratory and other equitable relief and reformation of a 2003 deed conveying certain property . . . on the theory that [he] usurped the general partnership's opportunity to purchase downtown Manhattan real estate" (*id.*).

In the plaintiff-general partner's appeal brief in *Samantha*, he argued that the defendant breached his fiduciary duties to the entity by purchasing the property in his own name because he purportedly: (i) acknowledged in writing that the partnership was the intended purchaser of the property; (ii) instructed the seller of the property to identify the partnership as the buyer of the property; (iii) expended partnership funds to negotiate the contract of sale; and (iv) successfully relied on these actions in a separate lawsuit against the seller for specific performance to compel the sale of the property (Brief for Plaintiff-Appellant, 2004 WL 5472046, *7-*8).

Rejecting plaintiff's arguments, which relied on considerably greater factual detail than Jonathan's here, the *Samantha* Court concluded, "There is, however, no evidence that the general partnership had a 'tangible expectancy' of purchasing the subject realty or that such purchase would have been consistent with its appropriately defined purpose. Accordingly, there is no basis to conclude that defendant breached a fiduciary duty to the general partnership" (*id*. at 280). Accordingly, the Court held that, "Summary judgment was . . . properly granted, and the notice of pendency properly canceled" (*id.*).

Here, as in *Samantha*, there is "no evidence that the [Corporation] had a 'tangible expectancy' of purchasing the subject realty" (*id.*). There are no triable issues of fact that:

- that the Corporation never once, in all of its existence from 1976 to 2017, owned real estate (Troffa Aff., ¶¶ 28, 36, 134, 136);
- that in 1998, Joseph ***personally*** entered into the Lease with Schreiber for the Compost Yard, which contained the lease/purchase option (Troffa Aff., ¶ 70, Ex. H);
- the Corporation was not party to the Lease (*id.*);
- that Joseph sub-leased the Compost Yard to the Corporation; (*id.*, ¶ 86);
- that in 2006, Joseph ***personally*** entered into the Contract of Sale (Troffa Aff., ¶ 97, Ex. J);
- that the Corporation was not a party to the Contract of Sale (*id.*);
- the Corporation is not, and was prohibited from being, a party to or third-party beneficiary of, the Contract of Sale (*id.*, ¶ 99, Ex. J);
- that the Corporation did not pay, nor guarantee payment of, any portion of the downpayment, cash at closing, or closing costs, and assumed no liability under the Contract of Sale (*id.*, ¶ 100).

Critically, and conveniently omitted from Jonathan's papers, is that: (i) from 1998 to 2005, Joseph ***personally*** paid $67,000 in rent for the Compost Yard which was applied towards the purchase price of the Compost Yard (*id.*, ¶ 96); (ii) in 2006, when the Contact of Sale was executed, Laura, on behalf of NIMT, paid the $10,000 downpayment (*see id.*, ¶ 101); and (iii) in 2013, at closing, Joseph ***personally*** paid the $39,628 balance of the purchase price with personal funds (*see id.*, ¶ 109, Exs. J, K, L, and M).

Jonathan deceives this Court when he says there was "never any question that the Corporation had the power and right to own real property: the certificate of incorporation provides that one of the explicit purposes for which the Corporation was formed was '[t]to purchase, receive, lease or otherwise acquire and . . . own . . . land'" (NYSCEF Doc. No. 287 at 7). The Certificate of Incorporation, which is in the record, contains no such language (*see* NYSCEF Doc. No. 281). Accordingly, as in *Samantha*, there is "no evidence" that "purchase" of the Compost Yard "would have been consistent with [the Corporation']s appropriately defined purpose" (5 AD3d at 280).

In sum, Jonathan has not, because he cannot, establish that the acquisition of the Compost Yard was a corporate opportunity. For the entirety of its existence, the Corporation was never in the realty-owing business and it never intended to acquire any real property, including the Compost Yard (Troffa Aff., ¶¶ 131, 136-138). Rather, the Corporation's business was strictly limited to the sale of landscaping and masonry supplies (*see id.*, ¶¶ 19, 136). The Court should deny Jonathan summary judgment and grant Joseph cross-summary judgment dismissing the Amended Complaint.

B. The Compost Yard Was Not Necessary or Essential to the Corporation's Business

The alternative "line-of-business" test asks whether an opportunity "is the same as or is 'necessary' for, or 'essential' to, the line of business of the corporation" (*Alexander & Alexander of New York, Inc.*, 147 AD2d at 248). Under this test, "[i]f the opportunity is the same as or related to the employer's line of business and the consequences of deprivation are so severe as to threaten the viability of the enterprise, the officer or employee is deemed to have violated his fiduciary responsibility" (*id.*; see e.g. *Coastal Sheet Metal Corp. v Vassallo*, 75 AD3d 422, 423 [1st Dept 2010] [former president's incorporation of a competing business did not usurp employer's corporate opportunity because the new company's business of purchasing certain machinery was neither "necessary" for nor "essential" to the employer's line of business]).

Here, there is no triable issue of fact that the Compost Yard was not necessary to the viability of the Corporation. The undisputed evidence shows that the Corporation, for over 40 years, operated strictly as a wholesale and retail landscape and masonry supply business (Troffa Aff., ¶¶ 19, 136), and *never* owned or purchased any realty in its own name (Troffa Aff., ¶ 28). At all times from its inception until its judicial dissolution, the Corporation operated its business upon six separate properties it leased from third parties, each of which was ultimately purchased by Joseph or Laura, individually, or through separate entities owned by them (*id.*, ¶ 11, 36, 41-74).

The opportunity to purchase the Compost Yard was not "necessary for" or "essential to" the Corporation's line of business such that "the consequences of deprivation [were] so severe as to threaten the viability of the enterprise" (*Alexander & Alexander of NY, Inc.*, 147 AD2d at 248). After the closing on the purchase of the Compost Yard in March 2013, the Corporation continued to successfully operate its business upon the leased premises – as it has done for 42 years – until it was judicially dissolved (Troffa Aff., ¶¶ 118-128). Jonathan nowhere alleges that failing to

acquire ownership of the Compost Yard threatened the viability of the Corporation. Simply put, owning realty was not within the scope of – much less necessary or essential to – the Corporation's business.

Point II

IF THE COURT DOES NOT GRANT JOSEPH CROSS-SUMMARY JUDGMENT, IT SHOULD HOLD THAT TRIABLE ISSUES OF FACT PRECLUDE THE GRANT OF SUMMARY JUDGMENT TO JONATHAN

As explained in Point I above, the Court should grant Joseph cross-summary judgment because there is no triable issue of fact the Compost Yard was never a "corporation opportunity" of the Corporation. If the Court declines to grant Joseph summary judgment, then it should, at a minimum, deny Jonathan summary judgment because there are triable issues of fact on both liability and damages.

As to Branch "1" of Jonathan's motion, seeking a judgment against Joseph on liability for his acquisition of the Compost Yard (NYSCEF Doc. No. 270 at 1), there is a triable issue of fact whether Joseph disclosed to Jonathan, and thus, whether Jonathan was aware, declined to object, and/or acquiesced in the fact that Joseph was acquiring the property for himself, rather than for the Corporation. Joseph swears that his son knew at all times that Joseph personally would acquire the land, but Jonathan denies this was the case (*compare* Troffa Aff., ¶ 12 ["Jonathan knew since the late 1990s that I planned to, and that I eventually would, endeavor to purchase the Compost Yard in my own name"]; *with* NYSCEF Doc. No. 271, ¶ 18 ["My father never asked me for my consent, or told me, that he was going to acquire the Compost Yard in his own name"]).

These conflicting affidavits raise, at a minimum, a triable issue whether Jonathan is shielded by agreement of the parties from a claim of self-dealing (*see e.g. Sterling Fifth Assoc. v Carpentille Corp., Inc.*, 9 AD3d 261, 263 [1st Dept 2004] ["partners may include in their

partnership agreement any agreement they wish, and, if the asserted self-dealing was actually contemplated and authorized, it would not, *ipso facto,* be impermissible and deemed wrongful"] [citation and quotations omitted]).

As to branch "2" of Jonathan's motion, seeking a judgment on damages for Joseph's acquisition of the Compost Yard "in the amount of $355,372, plus interest" (NYSCEF Doc. No. 270 at 1), Jonathan's damage computation fails to account for Joseph and NIMT's payments towards to the purchase price of the Compost Yard in three different ways: (i) every month between 1998 and 2005, Joseph personally paid exactly 50% of the rent money owed under the Lease totaling $67,000; (ii) in 2006, upon execution of the Contract of Sale, Laura, on behalf of NIMT, paid the $10,000 downpayment; and (iii) at closing in 2013, Joseph personally paid the $39,628 balance of the purchase price (Troffa Aff., ¶¶ 96, 101, 109, 110 and Exs. K and M). Jonathan thus "fail[ed] to make a showing of entitlement to judgment as a matter of law on the issue of damages" because he "failed to adduce competent evidence proving the exact amount of damages" and "[t]he record does not permit precise determination of the amount of the money judgment" to which he would allegedly be entitled, precluding summary judgment on damages (*8109 Pizzeria of New York, Inc. v Polo Pizza One Corp.*, 67 AD3d 627, 629 [2d Dept 2009]).

As to branch "3" of Jonathan's motion, seeking a judgment on liability for payment of rent payments made post-closing of the Contract of Sale from the Corporation to NIMT, there is, at a minimum, an issue of fact as to whether the tri-partite approval of those rent payments by Court-appointed receiver Justice Covello, Jonathan, and Joseph, rendered those payments "actually contemplated and authorized" (*see e.g. Sterling Fifth Assoc. v Carpentille Corp., Inc.*, 9 AD3d at 263), and, therefore, shielded from any post-hoc claim for breach of fiduciary duty.

Point III

AS A NON-PARTY TO BOTH THE LEASE AND CONTRACT OF SALE, THE CORPORATION DID NOT ACQUIRE "EQUITABLE TITLE" TO THE COMPOST YARD

As an apparent fallback to the corporate opportunity doctrine, Jonathan argues that the Corporation obtained "equitable title" to the Compost Yard, essentially asserting that the Corporation's leasehold interest magically converted into a fee simple interest from of its payment of monthly rents from 1998 to 2013 (*see* NYSCEF Doc. No. 287 at 10). The case law upon which Jonathan relies is distinguishable for two fundamental reasons.

First, Jonathan's cases all require – as an essential element of the "equitable title" doctrine – that the plaintiff was an actual party / signatory to the land sale contract at issue (*see e.g. Russell v Pisana*, 164 AD3d 704, 705 [2d Dept 2018] ["The execution of a contract for the purchase of real estate and the making of a partial payment" is what "gives the contract vendee equitable title to the property"] [quotations omitted]; *Madero v Henness*, 200 AD2d 917, 918 [3d Dept 1994] ["The parties entered into a land contract" and plaintiff "paid almost one third of the $75,000 purchase price" and "over 40 of the 100 principal payments called for by the contract"]; *Ladone v Ladone*, 121 AD2d 512, 514 [2d Dept 1986] ["when Ann Marie Ladone signed the contract to purchase the real estate in question, she was immediately vested with equitable title therein"]).

Here, in contrast, there is no triable issue of fact that Jonathan was not a party or signatory to either the Lease or the Contract of Sale; that distinction belongs to Joseph alone, who was the actual tenant to the Lease, and contract vendee to the Contract of Sale (*see* Troffa Aff., ¶¶ and Exs. H and J). Jonathan submits absolutely *no* evidence to the contrary.

Second, a tenant does not, simply by paying rent under lease, become a "contract vendee" entitled to invoke the "equitable title" doctrine (*see e.g. NYCTL 1998-2 Tr. v Michael Holdings,*

Inc., 77 AD3d 805, 806 [2d Dept 2010] ["A tenant is . . . not a contract vendee with equitable title to the property and an equitable lien in the amount of the consideration it allegedly paid"]). Here, there is no triable issue of fact that the Corporation was no more than a sub-tenant to Joseph (*see* Troffa Aff., ¶¶ 86, 90-91, 113, 121 and Exs. H and J). Jonathan knew the Corporation was making monthly rent payments to Schreiber – he signed and approved rent checks clearly identified as "Rent" (*see* Troffa Aff., Ex. O). Jonathan does not cite, and cannot cite, a single case holding that mere payment of rent converts one into an "equitable title" holder. For this additional reason, the Court should deny Jonathan summary judgment.

Point IV

THE SIX-YEAR STATUTE OF LIMITATIONS PARTIALLY BARS THE FOURTH CAUSE OF ACTION

A six-year statute of limitations applies to actions "by or on behalf of a corporation against a present or former director, officer or stockholder . . . to recover damages for waste or for an injury to property" (CPLR § 213 [7]).

Here, Jonathan commenced this lawsuit on June 27, 2016 (*see* Mahler Aff., Ex. 1). CPLR § 213 (7) bars economic recovery for any alleged events, transactions, or damages pre-dating June 27, 2010, more than six years before Jonathan filed suit. It is obvious from Jonathan's papers that a substantial part of his alleged damages pre-date June 27, 2010, in fact, according to Jonathan himself, they date back to either 1999 or 1998 (*see e.g.* NYSCEF Doc. No. 287 at 9 ["The Corporation began making payments to the seller, the Schreibers, in 1999"]; NYSCEF Doc. No. 278 [reciting "Prepayments" for the Compost Yard dating back to "11/1/98"]). Therefore, if the Court does not grant Joseph total summary judgment, the Court should grant him partial summary judgment ruling that any alleged damages based upon rent payments the Corporation made prior to June 27, 2010 are barred by the six-year statute of limitations (*see e.g. Toscano v Toscano*, 285

AD2d 590, 591 [2d Dept 2001] [holding time barred "so much of the fourth cause of action as was predicated upon acts which occurred more than six years prior to commencement of the action"]).

Point V

THE COURT SHOULD DISMISS AS TO JOS. M. TROFFA MATERIALS CORPORATION

In his caption, Jonathan names as a defendant an entity named Jos. M. Troffa Materials Corporation (*see* Mahler Aff., Ex. 3). The Amended Complaint itself, however, lacks any particularized facts about, or alleged wrongdoing by, Jos. M. Troffa Materials Corporation (*see id*.). There is no allegation that Jos. M. Troffa Materials Corporation participated in any way in the Compost Yard transaction (*see id*.). In fact, Jonathan's moving papers do not mention this entity at all (*see* NYSCEF Doc. Nos. 271, 274, 287, and 288).

New York law does not permit "group pleading" of generic allegations of wrongdoing against multiple defendants without any differentiation or particularize facts (*see e.g. Principia Partners LLC v Swap Fin. Group, LLC*, 194 AD3d 584, 584 [1st Dept 2021] ["The complaint failed to distinguish between the entities and was an improper group pleading"]; *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 [1st Dept 2008] ["Dismissal was warranted also because the . . . complaint refers to 'certain plaintiffs,' 'various plaintiffs,' and 'the Del Valle Defendants,' which . . . makes it impossible to determine which plaintiffs relied on alleged misstatements and which defendants made the misstatements"]). Jonathan's attempt to hold Jos. M. Troffa Materials Corporation liable – apparently for the alleged wrongdoing of other defendants – is classic impermissible group pleading. Therefore, if the Court does not dismiss the Amended Complaint in full, it should, at a minimum, dismiss it as to Jos. M. Troffa Materials Corporation.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court: (i) grant Defendants' cross-motion for summary judgment; (ii) deny Jonathan's motion for summary judgment; (iii) alternatively, apply the six-year statute of limitations to Plaintiff's claim for money damages; and (iv) award such other and further relief as the Court deems just, equitable, and proper.

Dated: April 12, 2022

FARRELL FRITZ, P.C.

By: /s/ *Peter A. Mahler*

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CERTIFICATE OF COUNSEL

The foregoing Memorandum of Law in Opposition to Motion and in Support of Cross-Motion for Summary Judgment was prepared by computer using Microsoft Word. The total number of words in the document, excluding the caption, the Table of Contents, the Table of Authorities and the signature block, is 6,356. This certification complies with Section 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court.

/s/ *Peter A. Mahler*
Peter A. Mahler