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. 012
-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 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 support of their motion for an Order, pursuant to CPLR 3212, and pursuant to the mandate of the Appellate Division – Second Department in its Decision and Order, dated March 3, 2021, ruling that, as applicable to this action, "CPLR 213 (7) provides for a six-year statute of limitations in 'an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith'" (*Troffa v Troffa*, 192 AD3d 718, 720 [2d Dept 2021]):

(i) Dismissing in its entirety with prejudice the Fourth Cause of Action in the Verified Amended Complaint, dated August 16, 2016, pled as a "Derivative Action," as barred by the six-year statute of limitations;

(ii) In the alternative, partially dismissing with prejudice the Fourth Cause of Action insofar as it seeks to recover for any payments made by or on behalf of Plaintiff Jos. M. Troffa Landscape and Mason Supply, Inc. for the 1.78-acre parcel of real property at 70 A Comsewogue Road, East Setauket, New York, known as the "Compost Yard," prior to June 27, 2010, more than six years before commencement of this lawsuit on June 27, 2016, as barred by the six-year statute of limitations; and

(iii) Awarding such other and further relief as the Court deems just and proper.

PRELIMINARY STATEMENT

Following the near total dismissal of his claims, what currently remains of this long drawn out duel between father and son is a single cause of action by Plaintiff Jonathan Troffa ("Jonathan") alleging that his father, Joseph, misappropriated from the Corporation an alleged "corporate opportunity" when in 2006 – a decade before Jonathan sued – Joseph entered into a Contract of Sale to purchase in his own name, and finally did purchase in 2013, a 1.78-acre, former toxic waste dump in East Setauket known as the "Compost Yard." The Court should dismiss what is left of this action and finally bring an end to this bitter family dispute because Jonathan's Fourth Cause of Action is barred by the six-year statute of limitations.

First, the Appellate Division – Second Department has already determined that Jonathan's shareholder derivative claim alleging misappropriation of corporate opportunity is governed by a six-year statute of limitations. Under the doctrine of the law of the case, Jonathan is barred from re-litigating the applicability of the six-year statute of limitations to his Fourth Cause of Action, and the only unresolved question, therefore, is the date of accrual of the claim (*see* Point I).

Second, because Jonathan's Fourth Cause of Action accrued no later than December 7, 2006, when Joseph personally entered into the Contract of Sale with the Schreibers to purchase the Compost Yard in his own name, and at that moment committed the alleged act of diverting the asset or alleged opportunity from the Corporation to himself, the claim is barred by the six-year statute of limitations. Under New York law, a claim of diversion of corporate opportunity from misappropriation of a parcel of land accrues upon the date on the first act of diversion – the execution of the contract of sale – not when the closing occurs (*see* Point II).

Third, if the Court declines to grant Joseph summary judgment dismissing the Fourth Cause of Action in its entirety, then the Court should, at a minimum, dismiss the claim as 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 III).

For these reasons, as set forth in full detail below, the Court should grant Defendants' motion and dismiss the Amended Complaint in its entirety.

STATEMENT OF THE FACTS

The Corporation

The Corporation was a landscape and mason supply business founded by Joseph in or around 1975, consisting until its dissolution of three main segments, bulk materials, ready-mix and hard goods (Affirmation of Peter A. Mahler in Support of Motion for Summary Judgment, dated September 28, 2022 ["Mahler Aff."], Ex. A, ¶ 16). Joseph and his only son, Jonathan, were equal 50% shareholders of the Corporation (*id.*, ¶¶ 20-21). Jonathan became a shareholder of the Corporation in 1995, when Joseph 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.*, ¶ 19; Mahler Aff., Ex. N, ¶ 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 (*see* Mahler Aff., Ex. N, ¶¶ 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 real property it leased from other individuals and entities who owned the land, eventually totaling six parcels (*id*., ¶ 29; Mahler Aff., Ex. A, ¶ 26). 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).

Three of the properties are owned by NIMT, which is owned 99% by Laura and 1% by Jonathan; two are owned by L.J.T., which is owned 100% by Laura; and the sixth and final parcel – the Compost Yard – is owned by Joseph personally (*id.*, ¶¶ 28-70, 97-112).

The Compost Yard and the Lease Agreement

Originally, the Compost Yard was owned by Laurence Schreiber and Ronald Schreiber (the "Schreibers") (*id.*, ¶ 69). Joseph wanted to purchase the Compost Yard, but because of the long-time presence of environmental contamination onsite, which would require extensive remediation work, Joseph entered into a 15-year lease agreement with the Schreibers in November 1998 (*id.*, ¶¶ 70-77). The Lease gave Joseph the right to "purchase said property after the one hundred twentieth (120) month," with a credit towards the purchase price for rent payments made during Joseph's tenancy (the "Lease") (*id.*). The Corporation was not a party to the Lease (*id.*, ¶ 85).

The Corporation's Sub-Lease of the Compost Yard

The Corporation utilized the Compost Yard for its business, which was strictly limited to the sale of landscaping and masonry supplies (*id.*, ¶ 86). In consideration of its use of the Compost Yard, the Corporation paid rent, 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 the Schreibers, rather than Joseph, as was permitted under the Lease (*id.*, ¶ 88, 90).

Additionally, although the Corporation was responsible for making rent payments, every month between 1998 and 2005, Joseph personally paid 50% of the rent money owed under the Lease directly to Schreiber, to help the Corporation through difficult financial times (*id.*, ¶¶ 94-96).

The Downpayment, the Contract of Sale, and the Closing

On November 21, 2006, in connection with Joseph's purchase of the Compost Yard in his own name, Joseph caused NIMT, a company co-owned 99% by Laura and 1% by Jonathan, to tender a downpayment check for Joseph's purchase of the Compost Yard in the amount of $10,000 to Michael Strauss, as Attorney for the Schreibers (*see* Mahler Aff., Ex. G). The check states on its face, "On Contract Schreiber to Troffa," and the amount matches exactly the downpayment amount recited in the ensuing real estate purchase contract (*see* Mahler Aff., Ex. H at 1).

On or about December 7, 2006, Joseph, as purchaser, personally entered into a Contract of Sale with the Schreibers, as sellers, for Joseph to purchase the Compost Yard in his own name for $184,876, equal to the balance then-remaining rents owed under the Lease (the "Contract of Sale") (Mahler Aff., Ex. N, ¶ 97; Mahler Aff., Ex. H).

Although Joseph intended to close on his purchase of the Compost Yard promptly upon entering into the Contract of Sale, two liability issues – the presence of environmental contamination onsite resulting in a Superfund designation, and the ongoing pendency of a mortgage foreclosure proceeding – prevented Joseph from doing so (*see* Mahler Aff., Ex. N, ¶¶ 77-84, 104-105). As a result, the closing of the Compost Yard 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). On April 19, 2013, the deed to the Compost Yard (the "Deed") was recorded in the Suffolk County Clerk's Office (Mahler Aff., Ex. J).

The Appellate Division's Mandate

On March 3, 2021, in a prior appeal by Jonathan, the Appellate Division – Second Department ruled that the six-year statute of limitations contained in CPLR § 213 (7) governed Jonathan's sole remaining claim – the Fourth Cause of Action (Mahler Aff., Ex. K at 2).

The Prior Summary Judgment Motions

On March 2, 2022, Jonathan filed a motion for partial summary judgment on liability on his remaining claim for alleged misappropriation by Joseph from the Corporation of an alleged "corporate opportunity," *i.e.*, the purchase of the Compost Yard (*see* NYSCEF Doc. Nos. 270-288).

On April 12, 2022, Joseph filed a cross-motion for partial summary judgment dismissing the remaining claim in the Amended Complaint on its merits (*see* NYSCEF Doc. Nos. 291- 326).

On August 2, 2022, the Hon. Jerry Garguilo issued the Order denying both Jonathan's and Joseph's motions for partial summary judgment (Mahler Aff., Ex. O).

The Court denied Joseph's cross-motion to dismiss the Fourth Cause of Action solely on procedural grounds, not on the merits, explicitly granting Joseph leave to "renew" the motion, stating that the Court denied the cross-motion solely because dismissal based upon the statute of limitations was, in the Court's view, not "specified in the Notice of Cross Motion pursuant to CPLR 2214 (a)" (Mahler Aff., Ex. O at 11).

Point I

THE DOCTRINE OF LAW OF THE CASE BARS RELITIGATION OF THE APPLICABLE STATUTE OF LIMITATIONS

Legal determinations by an appeals court receive the most authoritative law-of-the-case treatment available under New York law. "An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court and operates to foreclose reexamination of the question absent a showing of subsequent evidence or change of law" (*Norton v Town of Islip*, 167 AD3d 624, 626 [2d Dept 2018] [quotations, brackets, and ellipses omitted]).

The Appellate Division regularly holds both lower courts and itself bound by its prior decisions under the doctrine of law of the case (*see e.g. Matter of Koegel*, 184 AD3d 764, 765 [2d Dept 2020] [holding that reconsideration of whether "extrinsic evidence could cure a defect in the acknowledgment of a prenuptial agreement" is barred by the doctrine of the law of the case because it was "previously raised and decided against the appellant on the prior appeal in this matter"]; *Salvaggio v Am. Exp. Bank, FSB*, 129 AD3d 816, 817 [2d Dept 2015] ["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"]). The Appellate Division frequently affirms orders that comply with this rule of appellate procedure (*see e.g. Suffolk Cnty. Water Auth. v H.T. Schneider, Inc.*, 288 AD2d 297, 298 [2d Dept 2001] ["the Supreme Court correctly followed the precedents established by this court in the cases cited above, and that, particularly in light of our prior decision in Suffolk County Water Auth. v. H.T. Schneider, Inc., and in the absence of any showing that there has been an intervening change in the applicable law, this court is bound by the doctrine of law of the case to affirm"]), and reverses ones that do not (*see e.g. Jewish Press, Inc. v New York City Dept. of Educ.*, 190 AD3d 737, 738 [2d Dept 2021] ["Our prior decision and order was law of the case and binding on the Supreme Court. However, the court failed to conduct further proceedings . . . in accordance with our decision and order. Accordingly, we reverse the judgment . . . "] [citation omitted]).

In its Decision and Order, dated March 3, 2021, the Appellate Division held that "CPLR 213 (7) provides for a six-year statute of limitations in an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover

damages for waste or for an injury to property or for an accounting in conjunction therewith" (Mahler Aff., Ex. K at 2 [internal quotations omitted]).

Accordingly, Jonathan's Fourth Cause of Action is governed by the six-year statute of limitations. As explained in Point II below, under the doctrine of the law of the case, Jonathan's remaining claim is time barred because he commenced this action on June 27, 2016, nearly ten years after the accrual of his claim in December 2006.

Point II

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

As explained in Point I, 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]; *Toscano v Toscano*, 285 AD2d 590, 591 [2d Dept 2001]; Mahler Aff., Ex. K).

A claim for breach of fiduciary duty accrues when the claim becomes enforceable, "*i.e.*, when all elements of the tort can be truthfully alleged in a complaint" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Under New York law, "[t]he accrual of a cause of action for diversion of a corporate opportunity is on the date when the corporate opportunity was first diverted" (*Continental Indus. Group, Inc. v Ustuntas*, 2020 WL 7781692, at *7 [Sup Ct, NY County Dec. 31, 2020] [Masley, J.]).

In *Continental Indus. Group, Inc.*, the claim of diversion was based upon "CIG's allegation that Ustuntas," an employee of CIG, "misappropriated CIG's corporate opportunity to invest" in two other businesses, "defendants Marcham and Plasmar" (*id.*). "Specifically," the Court explained, "CIG alleges that, in 2004, while Ustuntas was CIG's employee, he personally took advantage of an opportunity to purchase shares in CIG's customer, defendant Plasmar, without

informing CIG of the opportunity. CIG asserts that such a purchase by its employee was a usurpation of a corporate opportunity" (*id.*). The Court ruled, "The claim, if actionable, accrued in 2004, on the date the alleged corporate opportunity was allegedly usurped. . . . Therefore, the seventh cause of action that alleges usurpation and misappropriation of corporate opportunity . . . is dismissed" (*id.*).

Where, as here, a claim of diversion of corporate opportunity is based upon misappropriation of a parcel of real estate, ***"[t]he signing of the contract, not the closing, is the usurpation of the corporate opportunity***" (*Rosenblum v Rosenblum*, 2022 NY Slip Op 30237[U], *5 [Sup Ct, NY County 2022] [emphasis added] [holding that because the contract of sale was entered into prior to the execution of the settlement agreement and because the signing of the contract constituted the usurpation of the corporate opportunity, the defendant released her claims relating to this transaction]; *In re Fischer* (259 BR 23, 31 [Bankr ED NY 2001], *affd in part, revd in part on other grounds* 2001 WL 1923359 [ED NY Aug. 21, 2001]).

Applying this rule of law, in *In re Fischer*, a "contract to purchase the Hotel Property was signed, and the down payment made, on July 16, 1981," though the plaintiff took "the position that its claim against Fischer with respect to the Hotel Property accrued on February 14, 1984, when the sale of the property to Fischer closed, rather than on July 16, 1981" (*In re Fischer*, 259 BR at 31). The Court rejected the argument that the date of closing was the accrual date, holding instead that the Council's claims are time-barred because "as a conceptual matter, Fischer diverted a corporate opportunity, if he did so, ***when he entered into the contract to buy the Hotel Property, not when the closing occurred***" (*id.* [emphasis added]).

Based upon this principle, in *Skorr v Skorr Steel Co., Inc.* (8 Misc 3d 1021[A] [Sup Ct, Nassau County 2005], *affd*, 29 AD3d 594, 595 [2d Dept 2006]), the petitioner commenced a

proceeding to recover damages for an alleged diversion of a corporate opportunity arising out of a loan made by Skorr Steel Co. which respondents then used to purchase the real estate immediately adjacent to Skorr Steel's business (*see id.*). In petitioner's appeal brief, she argued that the purchase of the property by respondents was a diversion of corporate opportunity that accrued long after the date of the underlying transaction – the October 1995 loan – because subsequent damages accrued based upon later actions surrounding the loan (Respondents' Reply Brief, 2005 WL 8141751, *9). Rejecting petitioner's argument, the Court held – and the Second Department affirmed – that petitioner's claim accrued at the time of the loan, not the date of the closing of the real estate transaction for which the loan was used, writing, "Leanora may not attack the loan made by Steel to Industrial Metals and Joseph in October 1995 as a diversion of corporate funds since this is a transaction which took place more than six years prior to the commencement of this action" (*Skorr*, 8 Misc 3d 1021[A], *2).

Here, there is no triable issue of fact Joseph personally entered into the Lease with the Schreibers for the Compost Yard in 1998, which gave Joseph the option to purchase the Compost Yard (Mahler Aff., Ex. N, ¶ 70). There is no triable issue of fact that on December 7, 2006, Joseph personally entered into the Contract of Sale with the Schreibers to purchase the Compost Yard in his own name for $184,876, equal to the balance then-remaining under the Lease (*see* Mahler Aff., Ex. F). Finally, there is no triable issue of fact that, at the time of execution of the Contract of Sale, Laura, on behalf of Joseph, issued a check from the account of NIMT (not the Corporation) for the $10,000 downpayment for the Compost Yard to the Schreibers' counsel, Michael Strauss (*see* Mahler Aff., Ex. M).

Thus, "the corporate opportunity was first diverted" no later than December 7, 2006 (*Continental Indus. Group, Inc. v Ustuntas*, 2020 WL 7781692, at *7 [Sup Ct, New York County

Dec. 31, 2020]). It is irrelevant that the closing occurred later: "The signing of the contract, not the closing, is the usurpation of the corporate opportunity" (*Rosenblum v Rosenblum*, 2022 NY Slip Op 30237[U], *5; *In re Fischer*, 259 BR at 31). Therefore, there is no triable issue of fact that Jonathan's Fourth Cause of Action accrued no later than December 7, 2006, the date of the Contract of Sale by which Joseph took for himself the corporate opportunity Joseph allegedly should have offered to the Corporation (*see* Mahler Aff., Exs. G and H).

Lastly, Jonathan's counsel made numerous judicial admissions that Jonathan's claim accrued no later than the date of the Contract of Sale. Ms. Margolin, under penalty of perjury, stated as follows:

- "As a matter of law, the Corporation became the equitable owner of the Compost Yard beginning with its very first 'rent' payment" beginning in November 1998 (Mahler Aff., Ex. L, ¶ 5).
- "The Court should take note of Exhibit A to the accompanying affidavit of Jonathan Troffa, which is a letter, dated in 2004 and addressed to Jim Winkler and signed by Joseph as President of the Corporation on Corporation letterhead. This document memorializes the land contract for the purchase of the Compost Yard and confirms that the agreement was entered into by the Corporation" . . . (Mahler Aff., Ex. L, ¶ 21 [citation omitted]; *compare* Mahler Aff., Ex. F).
- "The land contract actually dated from 1999, when . . . the Corporation first began paying to the Schreibers what Joseph claimed was 'rent' for the Compost Yard . . . . Exhibit 6 is a memo on the Corporation's letterhead dated 10/20/99, with the notation at the top, 'RE: SCHREIBER LEASE, As per Jim Danowski.' The document shows 'original' and 'revised' totals for periodic payments, each of

which adds up to 390, presumably $390,000, since the amounts totaled are shown elsewhere in the memo to represent thousands of dollars" . . . "Both [Exhibits 5 and 6] show that the transaction was always conceived of as resulting in the purchase of the property, not its rental" (Mahler Aff., Ex. L, ¶ 22; *compare* Mahler Aff., Ex. E).

- "The undisputable evidence leads inexorably to the conclusion that the Corporation, having entered into the agreement and having paid 90% of the purchase price, and having occupied and used the Compost Yard in its own business for at least 14 years" before the 2013 closing "was already the equitable owner of the Compost Yard and had already paid 90% of the purchase price" (Mahler Aff., Ex. L, ¶ 28).

In sum, the purported diversion of corporate opportunity occurred, and Jonathan's Fourth Cause of Action accrued, with Joseph's execution of the Contract of Sale and tender of the $10,000 downpayment for the Compost Yard in December 2006 (*see* Mahler Aff., Exs. G and H; *Continental Indus. Group, Inc. v Ustuntas*, 2020 WL 7781692, at *7 ["The accrual of a cause of action for diversion of a corporate opportunity is on the date when the corporate opportunity was first diverted"]; *Rosenblum v Rosenblum*, 2022 NY Slip Op 30237[U], *5 ["The signing of the contract, not the closing, is the usurpation of the corporate opportunity"]). Accordingly, because Jonathan commenced this action on June 27, 2016 (*see* Mahler Aff., Ex. A), nearly ten years after the accrual of his claim (*see* Mahler Aff., Exs. G and H), the Court should hold that the statute of limitations bars in its entirety Jonathan's single remaining claim.

Point III

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

Alternatively, if the Court finds that Jonathan's Fourth Cause of Action is not entirely barred by the statute of limitations, then the Court should hold that the claim is time barred in part insofar as Jonathan seeks damages based on alleged monthly rent / 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.

Jonathan commenced this lawsuit on June 27, 2016 (*see* Mahler Aff., Ex. A). 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. Jonathan's prior motion papers demonstrate that the vast majority of his alleged damages pre-date June 27, 2010, in fact, according to Jonathan himself, they date back to 1998 or 1999 (*see e.g.* Mahler Aff., Ex. L, ¶ 5 ["the Corporation became the equitable owner of the Compost Yard beginning with its very first 'rent' payment" beginning in November 1998"]; *id.*, ¶ 24 ["Joseph received credit for a $10,000 'downpayment' and 'prepayments' made beginning 11/1/98 and ending in 2012"]; Mahler Aff., Ex. I at 1 [reciting "Prepayments" for the Compost Yard from monthly rent payments from "11/1/98" to "2/12/12"]).

Therefore, if the Court does not grant Joseph summary judgment dismissing the Fourth Cause of Action in full, then the Court should grant partial summary judgment holding that any alleged damages based upon monthly rent / installment payments the Corporation made prior to June 27, 2010 are barred by the six-year statute of limitations (*see e.g. Toscano*, 285 AD2d at 591 [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"]).

CONCLUSION

For all of the foregoing reasons, the Court should issue an Order: (i) dismissing in full with prejudice the Fourth Cause of Action as barred by the applicable six-year statute of limitations; (ii) alternatively, dismissing in part with prejudice the Fourth Cause of Action insofar as it seeks to recover for any payments made towards the Compost Yard prior to June 27, 2010, more than six years before commencement of this lawsuit on June 27, 2016, as barred by the applicable six-year statute of limitations; and (iii) awarding such other and further relief as the Court deems just and proper.

Dated: September 28, 2022

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CERTIFICATION OF COUNSEL

The foregoing Memorandum of Law in Support was prepared by computer using Microsoft Word. The total number of words in the document, excluding the caption, Table of Contents, Table of Authorities, and signature block is 4,180. This certification complies Rule 17 of the Commercial Division Rules.

/s/ *Peter A. Mahler*