SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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

Plaintiffs,

-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.

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Index No. 609510/2016
(Garguilo, J.)

Motion Seq. No. 12

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT AND RELEVANT HISTORY OF THE CASE

Plaintiff Jonathan Troffa ("Jonathan") in his derivative capacity on behalf of Jos. M. Troffa Landscape & Mason Supply, Inc. (the "Corporation"), respectfully submits this Memorandum of Law in opposition to the motion of Defendants Joseph M. Troffa ("Joseph"), Laura J. Troffa ("Laura"), Jos. M. Troffa Materials Corporation, NIMT Enterprises, LLC ("NIMT"), L.J.T. Development Enterprises, Inc., and Jos. M. Troffa Landscape and Mason Supply, Inc. (collectively, "Defendants"), for summary judgment pursuant to CPLR 3212.

After motion practice in 2017, Jonathan's lawsuit was reduced to one remaining cause of action—a derivative claim, the focus of which is a certain 1.78-acre vacant parcel of real property that has been referred to throughout this case as the "Compost Yard." In 2018, Jonathan sought discovery from Defendants, and from non-parties via subpoenas, with respect to this claim. The non-party subpoenas specifically sought documents related to the 2013 acquisition by Joseph, individually, of the Compost Yard, and were served on the accountants who worked for the Corporation and Joseph, and the law firm that had represented Joseph when he acquired the Compost Yard. Defendants resisted the discovery and moved to quash the subpoenas on statute of limitations grounds, arguing that the derivative claim was barred by a three-year statute of limitations, and that therefore, Jonathan's June 2016 filing of the complaint had come too late to attack the claims related to the Compost Yard, on which Joseph had closed in March of 2013. *See* NYSCEF Doc. No. 207.[1] Although this Court ruled in Defendants' favor, (NYSCEF Doc. No. 208), the Second Department thereafter reversed on March 3, 2021, on the

[1] All references to documents previously e-filed in this case shall be cited as "NYSCEF Doc. No. [#]" and any specific page citations to those documents will be to the electronic page of that document.

basis that a six-year statute of limitations applied to Jonathan's derivative claim. *See* NYSCEF Doc. No. 261.

Later in 2021, documents were produced pursuant to the reinstated subpoenas. Based on these documents, Jonathan moved for partial summary judgment earlier this year. Defendants opposed Jonathan's motion and cross-moved for summary judgment dismissing Jonathan's fourth cause of action in full.

Defendants' cross-motion relied on Joseph's affidavit, sworn to on April 11, 2022 (the "Joseph Aff.") (NYSCEF Doc. No. 308), which focused on two exhibits. One was an unsigned lease for the Compost Yard that named Joseph as the tenant. (NYSCEF Doc. No. 316). As a matter of law, the lease was an installment purchase contract which after 15 years would result in the purchase price of $390,000 for the Compost Yard having been paid by monthly "rent" payments over that period of time. The other document was a 2006 signed contract for the Compost Yard in which Joseph was the purchaser, stating that the purchase price was $184,876, and calling for a closing date on or about January 2, 2007. (NYSCEF Doc. No. 318). Joseph argued that these documents definitively disproved Jonathan's claim that the Corporation had been the lessee and had been deprived of the right to own the Compost Yard, and that he was therefore entitled to summary judgment dismissing Jonathan's derivative claim because he had not usurped a corporate opportunity. The Court determined that there were disputed material issues of fact with respect to whether the Corporation was the tenant or the contract vendee of the Compost Yard, and whether Jonathan knew that Joseph intended to purchase the Compost Yard in his own name, and that Joseph had failed to make a prima facie case that there was no corporate opportunity at issue. It denied both the motion and the cross-motion on August 2, 2022. (NYSCEF Doc. No. 337).

Defendants have now switched gears, and raise an argument that was available to them before but that they never made. Using exactly the same documents and the same affidavit by Joseph, they now make a second, successive motion for summary judgment, arguing that Joseph's usurpation of the corporate opportunity occurred at a date that makes Jonathan's derivative claim time-barred by the six-year statute of limitations.

STATEMENT OF FACTS

We refer the Court to the accompanying affirmation of Linda U. Margolin, Esq., dated November 9, 2022 (the "Margolin Aff."), and the affidavit of Jonathan Troffa, sworn to on March 1, 2022 (NYSCEF Doc. No. 271), submitted on the earlier motion, for a more complete statement of the facts. Jonathan's March 1, 2022 affidavit is annexed as Exhibit 1 to the accompanying affidavit of Jonathan, sworn to on November 9, 2022 (the "Jonathan Aff.").

Jonathan received his shares in the Corporation in 1995. (Jonathan Aff., Ex. 1, ¶ 5). From that time until the Corporation's dissolution in 2017, Joseph and Jonathan were equal partners in the company, each owning 50% of the Corporation's stock. (*Id.*, ¶¶ 5-10). Since its inception and at all relevant times, the Corporation was a close corporation. (*Id.*). Joseph was an officer and director of the Corporation. (*Id.*, ¶ 8). Laura, Joseph's wife, was also an officer of the Corporation, although not a shareholder; Laura was also the 99% member of NIMT. (*Id.*, ¶¶ 9, 21).

In March 2013, Joseph acquired the "Compost Yard," using as a credit against the $390,000 purchase price payments totaling $355,372, which had been made by the Corporation over the previous 15 years. (Margolin Aff., Ex. 4 at Bates Nos. 1-2). Documents obtained via the non-party subpoena to the accountants showed that the Corporation had booked these payments as "rent" that was paid to "Schreiber" (the owner of the Compost Yard prior to the

2013 closing);[2] an agreement had existed making these payments installment payments on a land purchase agreement. In his March 1, 2022 affidavit, Jonathan averred that the lessee under this agreement was the Corporation, and that the Corporation was entitled to damages resulting from Joseph's usurpation of this corporate opportunity. (Jonathan Aff., Ex. 1, ¶¶ 14, 25). The Joseph Aff. claimed that "Jonathan always knew" that the lessee was Joseph personally and that Joseph intended to take title in his own name; Joseph also claimed that he had subleased the Compost Yard property to the Corporation, but produced no document to substantiate this claim.

Making use of the credit created by the Corporation's payments, Joseph paid sellers only $39,628 at the 2013 closing, and took the Compost Yard in his own name. (Margolin Aff., Ex. 4 at Bates Nos. 1-2; Jonathan Aff., Ex. 1, ¶ 22). After closing title, Joseph caused the Corporation to continue making rental payments on the Compost Yard for the several years leading up to the Corporation's dissolution in 2017, and continuing for some time under the receivership that followed the dissolution. (Jonathan Aff., Ex. 1, ¶¶ 20, 23, 24).

Jonathan's derivative claim encompasses three different ways in which Joseph breached his fiduciary duty to the Corporation: (1) misappropriating the Corporation's opportunity to own the Compost Yard, which occurred when Joseph closed title in March 2013; (2) taking credit for the Corporation's "rent" payments over 15 years to reduce what he had to pay for the Compost Yard by almost 90%; and (3) causing the Corporation thereafter to pay rent for the Compost Yard to NIMT, owned 99% by his wife, Laura.

[2] Paragraph 28 of Plaintiff's Rule 19-a statement on its motion for partial summary judgment (NYSCEF Doc. No. 288) read as follows: "For years preceding the time that Joseph took title to the Compost Yard, the Corporation's financial records showed that the monthly payments to the Schreibers with respect to the Compost yard were denominated 'rent.' Margolin Aff. ¶27, Exs. 9 and 9a." Defendants indicated that this paragraph was "undisputed" in their Response to Plaintiff's Rule 19-a Statement (NYSCEF Doc. No. 325).

In the earlier summary judgment motion in this case, Joseph, in the Joseph Aff., implicitly claimed that the 2013 closing took place pursuant to the 2006 contract, asserting that the 2013 closing was the "long-delayed" closing of the 2006 contract which he asserted also "ratified the lease," but providing no documentary proof to support this claim. The 2006 contract was touted by Joseph as evidence showing that there was no corporate opportunity for him to usurp in 2013. In its decision earlier this year, the Court ruled that Joseph had not made a prima facie case that there was no corporate opportunity, and that there were disputed issues of fact over who was the lessee and entitled to the purchase of the Compost Yard, and whether Joseph told Jonathan that he was the lessee and intended to purchase the property.[3]

Joseph's present motion attempts to circumvent that ruling by making a new argument that the six-year statute of limitations bars Jonathan's derivative claim based on the date of the unsigned lease, and based on the date of the 2006 contract; both documents are claimed to be triggers for the beginning of a six-year statute of limitations barring Jonathan's derivative claim.

This argument clearly could have been made as part of Defendants' earlier motion; they do not rely on any new documents, and even the affidavit from Joseph is the same one used on the earlier motion. As discussed below, the law of the case doctrine and the rule of practice barring successive motions for summary judgment both render Defendants' present motion improper.

[3] The Joseph Aff. supporting Defendants' second motion for summary judgment has already been determined only to create a disputed issue of fact about what Jonathan had been informed of, not to resolve that issue. The wording of the Joseph Aff. on this topic is conveniently and entirely conclusory—stating what Joseph claims Jonathan "knew" or "has always known," as opposed to stating the ***facts*** of what Joseph told Jonathan, or providing documents that Joseph factually claims to have provided to Jonathan.

Moreover, the documentary material produced pursuant to the non-party subpoena to Joseph's counsel for the 2013 Compost Yard acquisition show that although this motion (and Defendants', prior cross-motion) rely on a supposedly "true and correct copy" of the 2006 contract, the document they rely on is no such thing because it omits several pages. One of the omitted pages directly contradicts Joseph's claim that he was individually the lessee and intended purchaser of the Compost Yard. These documents also show that the terms of the 2006 contract differed substantially from the transaction closed in 2013, and that sellers' own counsel calculated the amount due at closing pursuant to the lease option to purchase, not the 2006 contract. Thus, the 2013 closing was the closing of the lease/purchase transaction, not, as the Joseph Aff. claims, the "long delayed closing" of the deal described in the 2006 contract.

The argument below also shows that based on the doctrine of equitable estoppel, no ruling may be made on this motion that the statute of limitations bars Jonathan's derivative claims. If at trial Jonathan's version of events is credited, then Defendants are equitably estopped from asserting the statute of limitations because Joseph failed to inform Jonathan and kept secret the details of the lease/purchase agreement—and the 2006 contract—that supposedly triggered the beginning of the statute of limitations period.

POINT I

DEFENDANTS' ATTEMPT TO RELITIGATE THE ISSUES PREVIOUSLY DETERMINED BY THIS COURT IN ITS AUGUST 2, 2022 ORDER ARE BARRED BY THE DOCTRINE OF LAW OF THE CASE AND THE PROHIBITION AGAINST SUCCESSIVE SUMMARY JUDGMENT MOTIONS

In support of its motion, Defendants seek to relitigate the issues which were determined by this Court in its August 2, 2022 order, by setting forth essentially the same purported material undisputed facts that were before the Court on the prior motions for summary judgment.

Defendants' motion is barred by the doctrine of the law of the case and the prohibition against successive summary judgment motions.

The Court of Appeals has explained the doctrine of the law of the case as follows:

> The law of the case doctrine is part of a larger family of kindred concepts, which includes res judicata (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a "full and fair"" opportunity to litigate the initial determination.

People v. Evans, 94 N.Y.2d 499, 502 (2000). The doctrine seeks to "'prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding,'" and applies "to determinations which were necessarily resolved on the merits in the prior order." *Hampton Val. Farms, Inc., v. Flower & Medalie*, 40 A.D.3d 699, 701 (2d Dep't 2007).

Here, the Court already addressed Defendants' claims that Joseph was individually the lessee, intended purchaser and contract vendee of the Compost Yard and that Jonathan knew for many years that Joseph intended to purchase the Compost Yard in his own name, finding that these facts were disputed. Jonathan's motion for summary judgment and Defendants' cross-motion for summary judgment having been brought to a conclusion, no other summary judgment motion may be predicated upon the same facts. Accordingly, Defendants' arguments are barred by the doctrine of law of the case, and may not be considered again now.

Defendants' present motion also violates the rule prohibiting successive motions for summary judgment. Although Defendants' motion raises a wholly new argument regarding the statute of limitations, it provides no justification for a second motion, and it is obvious, given that the second motion uses the same documents and same affidavit as the first, this argument could have been raised previously. Accordingly, Defendants' attempt to move for summary judgment a second time should not be entertained.

It is black letter law that successive motions for summary judgment must be denied absent "a showing of newly discovered evidence or other sufficient justification." *Jones v. 636 Holding Corp.*, 73 A.D.3d 409, 409 (1st Dep't 2010); *see also, Sutter v. Wakefern Food Corp.*, 69 A.D.3d 844, 845 (2d Dep't 2010); *B & N Props., LLC v. Elmar Assocs., LLC*, 51 A.D.3d 831, 832 (2d Dep't 2008) "[S]uccessive motions for summary judgment should not be made based upon facts or ***arguments*** which could have been submitted on the original motion for summary judgment." *Capuano v. Platzner Intl. Group*, 5 A.D.3d 620, 621 (2d Dep't 2004) (emphasis supplied). "Hence, if the facts or arguments now advanced could have been submitted in support of the original motion for summary judgment, the successive motion should not be permitted." *MLCFC 2007-9 ACR Master SPE, LLC v. Camp Waubeeka, LLC*, 123 A.D.3d 1269, 1271 (3d Dep't 2014) (internal citation omitted).

In *Phoenix Four, Inc. v. Albertini*, 245 A.D.2d 166 (1st Dep't 1997), the First Department affirmed a trial court's denial of a successive motion for summary judgment because the application "was based on matters that could have been but were not raised in an earlier summary judgment motion." *Id*. at 167. In so holding, the First Department explained, "***Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment***." *Id*. (internal citations and quotations omitted) (emphasis supplied).

Here, Defendants have utterly failed to address the presumptive bar to their successive motion for summary judgment. They are not entitled to rely on the permission from the Court to make the motion, as they were cautioned by the Court not to make a frivolous motion. Their motion papers are bereft of any newly discovered evidence; the statute of limitations defense

relies on documents—and Joseph's affidavit—that were used to support their prior summary judgment motion. Indeed, Joseph previously stated in an affidavit submitted to the court in June of this year that all of the "Corporation's files and business records" were in "the possession, custody, and control" of Joseph and his wife, Laura. (Margolin Aff., Ex. 1, ¶ 11). Defendants have provided absolutely no reason for failing to present their new statute of limitations argument as part of their earlier summary judgment motion. Defendants' failure to make this argument then, which is not dependent on any newly discovered evidence, should not be rewarded with a second bite at the summary judgment apple.

POINT II

THE STATUTE OF LIMITATIONS BEGAN TO RUN WHEN JOSEPH CLOSED ON THE COMPOST YARD, NOT WHEN HE ENTERED INTO THE PURPORTED CONTRACT OF SALE DATED DECEMBER 7, 2006

As we demonstrated *supra* in Point I, Defendants' motion ought to be denied out of hand because it is barred by the doctrine of law of the case and is a second, successive motion for summary judgment. In the event that this Court nonetheless determines to consider the Defendants' second summary judgment on the merits, it should find that the statute of limitations began to run when Joseph closed on the Compost Yard, taking it in his own name and taking credit for the "rent" that the Corporation had been paying the Schreibers for well over a decade.

Joseph claims that the six-year statute of limitations for Jonathan's claim that Joseph diverted a corporate opportunity began to run when Joseph personally entered into the contract of sale dated December 7, 2006, and that there is no triable issue of fact with respect to this contract. He is incorrect. There are issues of fact which preclude the Court from granting summary judgment on this issue in favor of Joseph, one of which is whether the contract dated December 7, 2007, is actually the contract under which Joseph and the Schreibers closed. As

counsel for Jonathan points out in her affirmation, there is substantial evidence in the file of the law firm of Cohen, Warren, Meyer & Gitter, P.C., the successor firm of Cohen & Warren, P.C. ("Cohen & Warren"), that it was not. (Margolin Aff., ¶¶ 24-29; Ex. 4).

Cohen & Warren represented Joseph when he purchased the Compost Yard in 2013. In April 2021, pursuant to the revived subpoena, Cohen & Warren provided a copy of "their entire file" in connection with the purchase of the Compost Yard by Joseph. Their "entire file" consisted of 1,151 pages. (*Id*., Ex. 4).

Included in the documents provided by Cohen & Warren was a three-page unsigned lease for the Compost Yard between "Laurence Schreiber" and an unnamed tenant. (*Id*., Ex. 4 at 284-86). This unsigned lease was for a fifteen-year term to begin on November 1, 1998, and it called for a total rent over 15 years of $390,000 with an option to purchase after 10 years for the amount of rent paid to date, plus enough to add up to $390,000. Although Joseph is continuing to argue that there is no triable issue of fact that he personally entered into the lease with the Schreibers for the Compost Yard in 1998, this Court found otherwise. In its decision and order dated August 2, 2022, this Court stated:

> The Defendants have failed to submit the original Lease between Joseph and the Schreibers which would show that Joseph was the tenant. Considering the importance of the Lease in this action, the Court declines to rely solely upon Joseph's affidavit which states that the unsigned and undated Draft Lease is a true copy of the Lease, to determine whether secondary evidence will suffice.

(NYSCE Doc. No. 337).

The Cohen & Warren file also contains twelve pages that are a copy of a real estate contract dated December 7, 2006, between "Laurence Schrieber & Ronald Schrieber" as seller and Joseph Troffa as purchaser. (Margolin Aff., Ex. 4 at Bates Nos. 287-98). This is the contract that Joseph is now claiming was in effect with respect to his closing of title to the

Compost Yard in 2013. Defendants contend that Joseph's execution of the December 7, 2006 contract is the latest the Corporation's opportunity to acquire the Compost Yard could have been diverted and have submitted a copy of this contract with this motion. In his affirmation dated September 28, 2022 (the "Mahler Aff.") (NYSCEF Doc. No. 343), Defendants' counsel asserts that Exhibit H to his affirmation is a "true and complete" copy of the December 7, 2006 contract.[4] Counsel is mistaken. A comparison of the contract in the Cohen & Warren file with the "true copy" of the contract included in Defendants' motion papers, reveals that Defendants' copy of the contract is missing numerous paragraphs and pages, one of which directly contradicts Joseph's claim that he was individually the lessee and intended purchaser of the Compost Yard. The space in the printed portion of the 2006 contract for the description of the property being sold refers to "Schedule A." The copy of the 2006 contract in the Cohen & Warren file contains a metes-and-bounds legal description (Margolin Aff., Ex. 4 at Bates No. 296), which is presumably Schedule A, and a survey (*Id*. at Bates No. 297) on which the property at issue has been outlined. The page containing the metes-and-bounds legal description states the following, with emphasis added, before the metes-and-bounds description:

> THIS SURVEY IS NOT TO BE USED FOR LAND TRANSFER PURPOSES
> THE ONLY PURPOSE OF THIS MAP IS FOR DETERMINATION OF AREA
> ***TO BE LEASED TO TROFFA LANDSCAPING*** FOR STORAGE PURPOSES
>
> IN ORDER FOR A LAND TRANSFER TO BE PERFORMED A LAND
> DIVISION MAP MUST BE FILED WITH THE TOWN OF BROOKHAVEN
>
> LEGAL DESCRIPTION OF ***PROPOSED LEASE PARCEL***

Id. at Bates No. 296.

[4] Joseph makes the identical statement about Exhibit J in the Joseph Aff. Exhibit J was provided to the Court with Defendants' prior summary judgment motion (NYSCEF Doc. No. 318) and is identical to Exhibit H submitted on this motion.

The language "to be leased to Troffa Landscaping" quoted above can only be explained as a reference to the Corporation, which has the full name of "JOS. M. TROFFA LANDSCAPE AND MASON SUPPLY, INC."

These documents also show that the 2013 closing was the closing of the lease/purchase transaction provided for by the earlier lease/purchase agreement, not, as the Joseph Aff. claims, the "long delayed closing" of the deal described in the 2006 contract.

The terms of the December 7, 2006 contract of sale for the Compost Yard do not match the terms of the sales transaction that closed on March 12, 2013, as set out in the closing statement prepared for Joseph. (*Id*. at Bates Nos. 1-2). The printed form portion of the December 7, 2006 real estate contract in the Cohen & Warren file calls for a closing on or about January 2, 2007. (*Id*. at Bates No. 289). The contract purchase price is $184,876, not $390,000. (*Id*. at Bates No. 287). The contract calls for $74,876 to be paid at closing, with seller taking back a purchase money mortgage for the balance of the purchase price; the 2013 closing did not involve a purchase money mortgage. (*Id*. at Bates Nos. 1-2, 287). There is also a rider to the contract, specifying among other things that "This sale is subject to Seller obtaining a partial release of mortgage from the current mortgage holder for no consideration." (*Id*. at Bates No. 294).

The Joseph Aff. claims that environmental contamination issues prevented him from closing on his purchase of the Compost Yard "on or about January 2, 2007." However, Joseph has not supplied any documents to corroborate his story that a closing for the 2006 contract was delayed because it was subject to environmental constraints or that seller had to clear up contamination issues before closing. The documents in the Cohen & Warren file show, instead,

that the 2006 contract never closed because seller was unable to obtain the partial release of the mortgage to which the contract was subject.

Bates No. 277 from the Cohen & Warren file (*Id.* , Ex. 4) is a letter from the sellers' attorney, Michael Strauss, to Barry Warren, Joseph's attorney, stating Schreiber had only just "got clearance" for the mortgage release that would enable Sellers to deliver title in accordance with the contract. The letter reads in pertinent part:

> My client just got clearance from UPS Capital to release the 1.8 acres for $50,000. Joseph Troffa probably owes somewhere between $42,000 and $45,000 and my client will make up the difference.
>
> Assuming you want to get prepared for closing, James Winkler had run a title report at the end of 2006 with Excel Abstract if you wish to utilize them to update it.

Thus, the sellers had not been able to fulfill the condition to which the 2006 contract was subject; without the release from the mortgagee, the sellers had not been able to deliver title in accordance with the 2006 contract. The Rider to the contract Paragraph 4 specified the purchaser's options at that point:

> In the event that Seller (2) is unable to convey title in accordance with the terms of this Contract, Purchaser's sole remedy shall be to either (1) accept such title as Seller(s) is able to convey without abatement in the purchase price, or (2) cancel this Agreement and receive a refund of the down payment, together with the net cost of any title examination actually made, and upon such refund this Contract shall be null and void, without further rights or liabilities in favor of or against either contracting party. Purchaser(s) shall be deemed to have complied with the provisions hereof if, within a reasonable time prior to closing, the Purchaser(s) causes a copy of the title report to be sent to the Seller(s) setting forth the aforementioned objections to title.

(*Id*. at Bates Nos. 292-93).

The documentary evidence from the Cohen & Warren file shows that contrary to Joseph's story, the 2006 contract never closed because of Sellers' inability to convey title free of

an underlying mortgage, and was canceled. This cancellation did not affect the lease, which included a purchase option for $390,000, and is as a matter of law an installment purchase agreement. This is confirmed by a letter Michael Strauss, the attorney for the Sellers, wrote to Cohen & Warren a week before the closing (Id. at Bates No. 147), discussing how much was owed considering the "rent" payments made to date; the letter begins, "As we have discussed, the balance due ***under the lease with the option to buy*** . . .." (Emphasis added).

Contrary to Joseph's story, the transaction contemplated by the 2006 contract never closed and in accordance with its terms, the contract became null and void. Once the 2006 contract became null and void, there could no longer be any diversion of a corporate opportunity stemming from that contract. Instead, the opportunity to purchase the Compost Yard, with the bulk of the consideration supplied by rent payments that the Corporation had already made to the Schreibers, remained pursuant to the lease/purchase agreement. The usurpation of this purchase opportunity did not occur until Joseph closed title on March 12, 2013.

POINT III

JOSEPH'S OMISSIONS AND MISREPRESENTATIONS ESTOP HIM FROM ASSERTING A STATUTE OF LIMITATIONS DEFENSE

Even if the six-year statute of limitations for diversion of a corporate opportunity began to run on some date prior to 2013,[5] Joseph is equitably estopped from asserting a statute of

[5] While Joseph does not explicitly argue for an earlier date, as we noted *supra*, he does claim that there is no triable issue of fact that he personally entered into the lease for the Compost Yard with the Schreibers in 1998, which he claims gave him the option to purchase the Compost Yard. Joseph's claim that there is no triable issue of fact with respect to the purported lease is simply incorrect and contrary to this Court's order dated August 2, 2022 (NYSCEF Doc. No. 337). In that order, at page 11, the Court stated: "[c]onsidering the importance of the Lease in this action, the Court decline[d] to rely solely upon Joseph's affidavit which states that the unsigned and undated Draft Lease is a true copy of the Lease, to determine whether secondary evidence will suffice."

limitations defense because Joseph's affirmative wrongdoing prevented Jonathan from timely filing his claim of diversion of corporate opportunity.

"It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action." *Simcuski v. Saeli*, 44 NY2d 442, 448-49 (1978). "Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing – a carefully concealed crime here – which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding." *General Stencils, Inc. v. Chiappai*, 18 N.Y.2d 125, 128 (1966).

A plaintiff seeking to rely on the doctrine of equitable estoppel must be able to show an act of deception, "separate from the ones for which they sue, on which an equitable estoppel could be based." *Corsello v. Verizon*, 18 N.Y.3d 777, 789 (2012). The doctrine of equitable estoppel "requires proof that the defendant made an actual misrepresentation or, if a fiduciary, concealed facts which he was required to disclose, that the plaintiff relied on the misrepresentation and that the reliance caused plaintiff to delay bringing timely action." *See Kaufman v. Cohen*, 307 A.D.2d 113, 122 (1st Dep't 2003)(internal quotation marks and citations omitted).

Jonathan has met this burden. He states in his March 1, 2022 affidavit that in or about 1999, Joseph explained to him that the Corporation would be leasing the Compost Yard from the Schreibers. (Jonathan Aff., Ex. 1, ¶ 14). What Jonathan did not know, and what Joseph never told him, was that an agreement existed under which the "rent" that the Corporation was paying

to the Schreibers was being applied to pay down the purchase price for the Compost Yard.[6] (*Id.*). Joseph's affidavit uses conclusory language—"Jonathan always knew"—to avoid stating what he did or did not tell Jonathan.

More deception occurred when Joseph acquired the Compost Yard in his own name in March 2013 with a final payment to the Schreibers of $39,628.[7] At that time, Joseph misled Jonathan about the real beneficial ownership of the property; he assured Jonathan that he was taking it for the Corporation. (Jonathan Aff., Ex. 1, ¶ 18; Ex. 3, ¶ 16). Jonathan did not question Joseph taking title of the Compost Yard in his own name because Joseph had repeatedly told Jonathan, beginning in or about 1997, that "we," meaning the Corporation, would be acquiring the various properties on which the Corporation conducted its business operations for the benefit of the Corporation, but titling those properties in other entities. (Jonathan Aff, Ex. 3, ¶¶ 9-13). Joseph told Jonathan that the title of the properties would be put in the names of entities other than the Corporation for liability and/or tax purposes, and Jonathan did not question Joseph's motives in putting the title of these properties in those entities. (*Id.*, ¶ 13).

The principle that a wrongdoer may not take refuge behind the shield of his wrongful conduct is well established. *See* *General Stencils*, 18 N.Y.2d 125. Thus, a guilty party may not use the statute of limitations where he has concealed his conduct. *See id.* Silence can also be used as an element of equitable estoppel where a party has a duty to speak and fails to do so in

[6] In or around 2013, Jonathan discovered a letter in the Corporation's files which memorialized the terms of that purchase agreement. (Jonathan Aff., Ex. 1, ¶ 15 and Exhibit A thereto). In this letter, Joseph confirmed the purchase price of $390,000, and set forth payment of the balance then due, $257,000, with payments of $2,254 per month.

[7] Nearly all the other funds for the purchase of the Compost Yard came from the Corporation; these were the so-called "rent" payments the Corporation had made to the Schreibers over the years.

order to deceive. *See* *Fisher Bros. Sales v. United Trading Co. Desarollo y Comercio*, 191 A.D.2d 310, 311-12 (1st Dep't 1993).

It was not until late 2015 or early 2016, that Joseph told Jonathan that he was not holding the properties on which the Corporation conducted its business, including the Compost Yard, for the benefit of the Corporation. (Jonathan Aff., Ex. 3, ¶ 15). Up until that time, Jonathan trusted Joseph. (*Id.*). He had no idea that Joseph's true intention in titling the properties in entities other than the Corporation was to keep those properties for himself. (*Id.*, ¶¶ 13, 21). Jonathan has stated that had Joseph been forthright and revealed his true intentions, he would have objected to Joseph's use of the Corporation's funds to buy the Compost Yard and insisted that the Corporation buy the Compost Yard in its own name. (*Id.*, ¶ 21).

"The principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism. The United States Supreme Court has espoused the doctrine in these terms: To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *General Stencils*, 18 N.Y.2d at 128. This principle is especially relevant here because Joseph owed both Jonathan and the Corporation a fiduciary duty. *See* *Quadrozzi v. Estate of Quadrozzi*, 99 A.D.3d 688, 691 (2d Dep't 2012) (defendants were estopped from raising the statute of limitations defense where a fiduciary relationship existed between the parties and the defendant failed to disclose a fact which he was duty bound to disclose).

Whether Joseph's wrongful act triggering the statute of limitations was entering into a lease in 1998, or the purported contract of sale for the Compost Yard in his own name on

December 7, 2006, (neither of which Jonathan admits), Joseph kept Jonathan from timely bringing suit by failing to reveal the installment purchase and by stating at a later time that although the Compost Yard would be acquired in the name of another entity or Joseph personally, it would be held for the Corporation. Jonathan had every reason to believe and trust Joseph, who not only owed a fiduciary duty, but was his father. These misrepresentations were made to Jonathan for the purpose of inducing him to acquiesce in and not assert his legal rights to object to, the misappropriation of the Compost Yard, and Joseph either had the intent, or at least the expectation of such a result, where he knew all of the time that he had no intention of holding the Compost Yard for the Corporation and that Jonathan reasonably trusted him.

Accordingly, Defendants should be estopped from relying on the statute of limitations. *See* *BWA Corp. v. Alltrans Express U.S.A.*, 112 A.D.2d 850, 853 (1st Dep't 1985).

POINT IV

THE SIX-YEAR STATUTE OF LIMITATIONS DOES NOT PARTIALLY BAR JONATHAN'S REMAINING CAUSE OF ACTION

Joseph argues in the alternative that if this Court does not find that Jonathan's remaining cause of action is barred in its entirety by the six-year statute of limitations, that same statute of limitations should bar Jonathan from recovering damages based on the monthly rent/installment payments the Corporation made towards the purchase price of the Compost Yard before June 27, 2010, which is six years before Jonathan commenced this action. This argument evidences Defendants' fundamental misunderstanding of the nature of the damages sought by Jonathan and should be rejected.

Jonathan is not seeking to recover the monthly rent/installment payments the Corporation made to the Schreibers for the Compost Yard. Rather, he is seeking to recover the amount of

waste caused by Joseph when he took title of the Compost Yard in his own name, $355,372. The Corporation was damaged in that amount when Joseph usurped the credit against the $390,000 purchase price caused by the making of the monthly rent/installment payments, which were denominated "advance payments" on the closing statement (Margolin Aff., Ex. 4 at Bates Nos. 1-2).

POINT V

JONATHAN DOES NOT DISPUTE THAT HIS REMAINING CAUSE OF ACTION IS GOVERNED BY A SIX-YEAR STATUTE OF LIMITATIONS

Defendants inexplicably devote an entire point of their memorandum of law to arguing that pursuant to the Appellate Division's Decision and Order in this matter, dated March 3, 2021 (NYSCEF Doc. No. 258), Jonathan's remaining cause of action, consisting of his derivative claims, is governed by a six-year statute of limitations. Jonathan does not dispute that this Court is bound by the decision of the Appellate Division and agrees that six years is the correct statute of limitations for this cause of action.

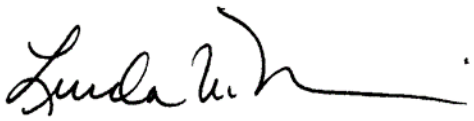
CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that the Court should deny Defendants' motion for summary judgment in its entirety, and grant Plaintiffs any additional relief the Court deems just and proper.

Dated: Islandia, New York
November 9, 2022

Respectfully submitted,

MARGOLINBESUNDER LLP



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WORD COUNT STATEMENT

I hereby certify that the foregoing document complies with the word count limit as set forth in Part 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court.

The total number of words in the foregoing document, exclusive of the caption, table of contents, signature block, and this Statement, is 6,154.

Dated: Islandia, New York
November 9, 2022

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