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.	:	

REPLY MEMORANDUM OF LAW IN FURTHER 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., and Jos. M. Troffa Landscape and Mason Supply, Inc. (the "Corporation," collectively, "Defendants"), by their attorneys, Farrell Fritz, P.C., respectfully submit this Reply Memorandum of Law in further support of their motion for summary judgment.

PRELIMINARY STATEMENT

Jonathan dismally failed to identify any issue of fact precluding dismissal of his claim for misappropriation of corporate opportunity under the six-year statute of limitations. There is no triable issue of fact that Jonathan's claim accrued on December 7, 2006, when Joseph executed the Contract of Sale for the Compost Yard[1] in his own name, rather than in the name of the Corporation (*Rosenblum v Rosenblum*, 2022 NY Slip Op 30237[U], *5 [Sup Ct, NY County 2022] ["The signing of the contract, not the closing, is the usurpation of the corporate opportunity" for accrual purposes]; *In re Fischer*, 259 BR 23, 31 [Bankr EDNY 2001] [for accrual purposes "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"]). There also is no triable issue of fact that Jonathan sued nearly ten years later, on June 27, 2016 (*see* NYSCEF Doc. Nos. 1 and 2).

In opposition, Jonathan fumbles for a theory – any theory – to avoid the statute of limitations, including the fraud-discovery rule and equitable estoppel. As a matter of law, neither theory excuses the untimeliness of Jonathan's remaining claim. Jonathan's papers are filled with recklessly conclusory statements devoid of evidentiary support, particularly his wild-eyed theory that the Contract of Sale was "cancelled." For the reasons below, the Court should grant summary judgment dismissing the Amended Complaint in full under CPLR § 213 (7).

[1] Undefined terms have the meaning in Joseph's opening papers.

ARGUMENT

Point I

JONATHAN'S REMAINING CAUSE OF ACTION IS BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS

In his opening brief, Joseph demonstrated that Jonathan's Fourth Cause of Action accrued no later than December 7, 2006, the date of the Contract of Sale for the Compost Yard pursuant to which Joseph took for himself the alleged corporate opportunity (*see* Memorandum of Law in Support of Motion for Summary Judgment, dated September 28, 2022 ["Joseph Br."], at 8-12; *Rosenblum*, 2022 NY Slip Op 30237[U], *5; *In re Fischer*, 259 BR at 31; *Cont. Indus. Group, Inc. v Ustuntas*, 2020 NY Slip Op 34344[U], *7 [Sup Ct, NY County 2020] ["The accrual of a cause of action for diversion of a corporate opportunity is on the date when the corporate opportunity was first diverted"]). Jonathan commenced this action on June 27, 2016, nearly ten years later (*see* NYSCEF Doc. Nos. 1 and 2).

Although Joseph briefed these cases in great detail in his moving papers (*see* Joseph Br. at 8-12), in his opposition papers, Jonathan ignored them all, declining to address even one of them (*see* Memorandum of Law in Opposition to Motion for Summary Judgment, dated November 9, 2022 ["Jonathan Br."], at 1-20). Because Jonathan does not dispute Joseph's several cases holding that a claim for misappropriation of a corporate real estate opportunity occurs on the signing of the contract of sale, not the closing, Jonathan necessarily concedes that those cases are controlling and indistinguishable (*see e.g. ESRT 501 Seventh Ave., LLC v Regine, Ltd.*, 206 AD3d 448, 449 [1st Dept 2022] ["In opposition, defendant did not dispute plaintiff's assertions . . . and therefore failed to raise a triable issue of fact"]; *Augustine v City of New York*, 188 AD3d 969, 973 [2d Dept 2020] ["plaintiffs failed to raise a triable issue of fact as they did not address or specifically oppose that branch of the motion"]).

Although Jonathan argues that the purported usurpation of the corporate opportunity occurred when Joseph closed title in March 2013 (*see* Joseph Br. at 9-11), he offers no legal authority or evidentiary facts to support this proposition. Under New York law, "a party appearing in opposition to a motion for summary judgment must lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact" (*see Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose" (*id.*).

Jonathan's theory that Jonathan's usurpation claim accrued at closing, aside from directly conflicting with *Rosenblum*, *Fischer*, and *Ustuntas*, is based upon a newly-invented theory of Jonathan's counsel that the Contract of Sale Joseph attached to his moving papers is allegedly not a "true copy" or is inauthentic (*see* Affirmation of Linda U. Margolin in Opposition to Motion for Summary Judgment, dated November 9, 2022 [the "Margolin Aff."], ¶ 17). Margolin attaches to her Affirmation a copy of the Contract of Sale, identical to the copy attached to Joseph's moving papers, except that her copy tacks on three additional pages at the end (*see* Margolin Aff., Ex. 4; Affirmation of Peter A. Mahler in Support of Motion for Summary Judgment, dated September 28, 2022 ["Mahler Aff."], Ex. H). These three additional pages, which are not referenced in the Contract of Sale, consist of a rider to mortgage, a metes-and-bounds description, and a municipal land survey (*see* Margolin Aff., Ex. 4). The two versions of the contract, the one attached by Defendants, on the one hand, and one attached by Margolin, on the other, are identical with the exception of the three insignificant pages contained in Jonathan's copy (*compare* Mahler Aff., Ex. H; *with* Margolin Aff., Ex. 4).

For two reasons, Jonathan's counsel's attempt to impugn the admissibility of the Contract of Sale based on the alleged absence of three immaterial attachments at the end – which have no

impact upon the substance of the Contract of Sale, or most importantly, the date of its execution – is insufficient to raise a triable issue on the statute of limitations question.

First, under New York law, an "immaterial issue of fact . . . does not preclude summary judgment" (*Devlin v Sony Corp. of Am.*, 237 AD2d 201, 201 [1st Dept 1997]). Thus, where, as here, there is no dispute as to the material terms of the contract, the existence of the contract, or the fact that a contract was entered into on December 7, 2006, Jonathan's reference to the three irrelevant pages attached to the end of the Contract of Sale do not raise a triable issue of fact.

Second, an unsupported statement by an attorney, without more, has no probative or evidentiary value whatsoever (*see United Specialty Ins. v Columbia Cas. Co.*, 186 AD3d 650, 651 [2d Dept 2020] [defendant's attorney's affirmation "was not based upon personal knowledge and, thus, was of no probative or evidentiary significance"]; *Currie v Wilhouski*, 93 AD3d 816, 817 [2d Dept 2012]). Although Margolin attempts to qualify her experience in dealing with real estate transactions as a basis to give weight to her opinion as to the authenticity of the Contract of Sale (Margolin Aff., page 5 ["I have been practicing law for over 46 years; during that time, I have done real estate transactional work . . ."]), Margolin is not an expert on the authenticity of documents. She is just another attorney attempting to raise triable issues of fact to avoid summary judgment.

Hoping to raise a triable issue where none exists, Jonathan's counsel also speculates, without any evidentiary support, that the Contract of Sale for the Compost Yard was at some point before the closing "cancelled" (Margolin Aff., ¶¶ 5, 30, 31). Jonathan's counsel's supposition that the Contract of Sale might have been cancelled is the rankest of "surmise, conjecture, or speculation," utterly insufficient to raise a triable issue of fact (*Doe v Purchase Coll. State Univ. of New York*, 192 AD3d 1100, 1103 [2d Dept 2021]; *see Velez-Santiago v State Univ. of New York*

at Stony Brook, 170 AD3d 1182, 1183 [2d Dept 2019] [a contention based on "no evidence . . . comprised of nothing more than surmise, conjecture, [or] speculation" is insufficient] [quotations omitted]). Of course, Margolin's fanciful guesswork that the Contract of Sale was cancelled is of "no probative or evidentiary significance" (*United Specialty Ins.*, 186 AD3d at 651). Moreover, after full discovery, Jonathan has not, and cannot, present any evidence to support his conclusory allegation that the Contract of Sale was "cancelled."

In any event, this subject is thoroughly addressed and conclusively refuted in the accompanying Reply Affidavit of Joseph M. Troffa, sworn to December 1, 2022 ("Troffa Reply Aff."). As explained therein, the notion that the Contract of Sale was cancelled is incontrovertibly disproven by the real estate transfer documents, *i.e.* the Real Property Transfer Report, Form RP-5217, that both sides to the Compost Yard transaction executed at closing, in which the parties acknowledged that the transaction was done pursuant to the "**Sale Contract Date: 12/7/06**" (Troffa Reply Aff., Ex. B). Not only does the Real Property Transfer Report, Form RP-5217 explicitly reference the Contract of Sale, but the final sale price number for the Compost Yard listed on Form RP-5217 matches the exact sale price number on the Contract of Sale (*compare id.*; *with* NYSCEF Doc. No. 351 at 1, Troffa Reply Aff., ¶¶ 15-16).

Jonathan's counsel's pure surmise, conjecture, or speculation is similarly refuted by a downpayment check issued to "Michael Strauss, as Attorney" for the sellers of the Compost Yard for the purchase of the Compost Yard just 15 days prior to the execution of the Contract of Sale (Troffa Reply Aff., Ex. A). Michael Strauss both endorsed the check, as evidenced by the reverse side of the downpayment check, which states "For Deposit Only Michael R. Strauss Escrow Account Suffolk County National Bank *******00328" and "Deposited by Michael Strauss Escrow Acct *******00328" and held the $10,000 downpayment check in his escrow account

until the transaction closed in March 2013, at which time the $10,000 was credited towards the purchase price, as evidenced by the Closing Statement (*see* NYSCEF Doc. No. 352 ["CREDITS TO PURCHASER(S) Down Payment $10,000"]). Thus, at the closing, the Contract of Sale was, and remained, the operative document governing the terms of the deal. And so, the Contract of Sale was anything but "cancelled."

Based upon the foregoing, there is no triable issue of fact that the Compost Yard misappropriation of corporate opportunity claim accrued in December 2006, not in March 2013, as Jonathan contends (*see e.g. Rosenblum*, 2022 NY Slip Op 30237[U], *5; *In re Fischer*, 259 BR at 31; *Cont. Indus. Group, Inc.*, 2020 NY Slip Op. 34344[U], *7). Therefore, the Court should dismiss what remains of the Amended Complaint in its entirety with prejudice as time barred.

Point II

NEITHER THE FRAUD DISCOVERY RULE NOR EQUITABLE ESTOPPEL CAN SALVAGE JONATHAN'S CLAIM

A. The Fraud Discovery Rule is Inapplicable to Jonathan's Usurpation Claim

Under CPLR § 213 (8), an action based upon fraud must be commenced within six years from the date of accrual or "two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." In opposition, Jonathan appears to argue that the two-year fraud-discovery rule tolls the statute of limitations period because Joseph allegedly failed to disclose to Jonathan that the Compost Yard would be acquired by Joseph, individually and that the rent payments ultimately would be credited toward the purchase price for the Compost Yard (*see* Jonathan Br. at 15 and 16 [referring to alleged "fraud" and "deception"]). Contrary to Jonathan's argument, the fraud-discovery rule is inapplicable as a matter of law.

First, the fraud discovery rule applies only to fraud-based claims (*see e.g. DiRaimondo v Calhoun*, 131 AD3d 1194, 1197 [2d Dept 2015] ["courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims"] [quotations and ellipses omitted]). Here, Jonathan failed to plead any facts establishing any fraud or misrepresentations by Joseph (*see* Mahler Aff., Ex. A).

Second, where, as here, a claim is based on "waste or diversion of assets or other injury to property," the alleged fraud is "deemed only incidental to the claim asserted" (*Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 120–21 [1st Dept 1985], *affd* 67 NY2d 981 [1986]). As explained by the Appellate Division in *Powers Mercantile Corp.*,

> Thus, courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims.

(*see id.*). Therefore, the fraud discovery rule is inapplicable.

Third, even pretending the fraud-discovery rule applies, Jonathan pleads no facts establishing that he could not, with reasonable diligence, have discovered the Contract of Sale earlier than June 2014, two years before he filed suit. Were Jonathan seeking to avail himself of the discovery rule, he would have needed to make an evidentiary showing in this regard (*see Gonik v Israel Discount Bank of New York*, 80 AD3d 437, 438 [1st Dept 2011] ["The discovery rule … is inapplicable here because plaintiff has failed to allege sufficient facts that she could not, with reasonable diligence, have discovered the fraud earlier than September 2008"] [citations omitted]; *Doukas v Ballard*, 2013 WL 2129137 at *3 [Sup Ct, Suffolk County 2013, Emerson, J.], *affd* 135 AD3d 896 [2d Dept 2016] ["plaintiffs have failed to allege sufficient facts that they could not, with reasonable diligence, have discovered the purported fraud earlier than April 2009"]). On the

contrary, here, Jonathan's own Affidavit in Support of Summary Judgment, sworn to on March 1, 2022, establishes that he had unrestricted access to the Corporation's records, and in fact did, discover "in or around 2013 . . . a letter in the Corporation's files which memorialized the terms of the purchase agreement" (Mahler Aff., Ex. M, ¶ 15). Therefore, Jonathan has not and cannot raise a triable issue of fact under the fraud discovery rule.

B. Equitable Estoppel is Inapplicable to Jonathan's Usurpation Claim

Jonathan argues that Defendants are "estopped" from invoking the statute of limitations defense (Jonathan Br. at 14-18). A plaintiff asserting equitable estoppel must allege that it "was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). Equitable estoppel is a thin reed indeed, rarely applicable, and requiring a heavy pleading and evidentiary burden. For the reasons below, Jonathan fails to raise a triable issue of fact as to equitable estoppel.

First, where the "complaint itself does not refer to or even raise any facts alleging conduct to which the doctrine would be applicable, the plaintiff cannot raise it in opposition to the defendant's motion" (*Reiner v Jaeger*, 50 AD3d 761, 762 [2d Dept 2008]). Put differently, "equitable estoppel is unavailable" where, as here, a party fails "to assert it in their complaint" (*Anderson Co. v Devine*, 202 AD2d 382, 382–83 [2d Dept 1994]; *Stafford v Bickford*, 159 AD2d 456, 457 [1st Dept 1990] [rejecting plaintiff's argument "in view of the absence of any claim of estoppel in the pleadings"]). Here, the Amended Complaint has no allegations regarding an equitable estoppel or acts of deception or concealment after the initial alleged wrongdoing that in any way induced Jonathan to refrain from bringing suit earlier (*see* Mahler Aff., Ex. A).

Second, to raise a "triable issue of fact as to the applicability of the doctrine of equitable estoppel," a party must "present evidence of an affirmative act of misconduct or misrepresentation

. . . that occurred within the limitations period and prevented them from timely commencing this action" (*Savo v City of New York*, 208 AD3d 1377, 1379 [2d Dept 2022]; *Bd. of Mgrs. of 23-23 Condo. v 210th Place Realty, LLC*, 185 AD3d 890, 891 [2d Dept 2020]; *E. Midtown Plaza Hous. Co. v City of New York*, 218 AD2d 628, 628 [1st Dept 1995] [this "extraordinary remedy is only applicable in circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse"]). Equitable estoppel "does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis of plaintiff's underlying substantive cause of action" (*Kaufman v Cohen*, 307 AD2d 113, 122 [1st Dept 2003]; *Duberstein v Natl. Med. Health Card Sys., Inc.*, 37 AD3d 209, 210 [1st Dept 2007] ["equitable estoppel was unavailable because the claimed misrepresentation or concealment was not separate and distinct from the acts underlying the action itself"]).

Here, Jonathan submits absolutely no evidence suggesting that Joseph took any affirmative steps to conceal from him either the Lease or the Contract of Sale, much less that such concealment was intended to prevent Jonathan from bringing suit. Jonathan has not – because he cannot – present evidence showing that Jonathan was "lulled into inaction by [Joseph] in order to allow the statute of limitations to lapse" (*E. Midtown Plaza Hous. Co.*, 218 AD2d at 628). Indeed, it is the very same wrongful act – Joseph's purported misappropriation from the Corporation of an alleged corporate opportunity, *i.e.* the purchase of the Compost Yard in his own name – which forms the basis of the estoppel argument and the single remaining claim for diversion of a corporate opportunity (*see* Jonathan Br. at 17-18 ["[w]hether 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"]). The only conduct that Jonathan relies upon is the exact conduct that

constitutes the purported usurpation and misappropriation of corporate opportunity, *i.e.* entering into the Lease and the Contract of Sale. Plaintiff failed to assert any conduct on the part of Joseph *after* he entered into the Lease or the Contract of Sale for the Compost Yard that caused Jonathan to refrain from filing a timely action.

Jonathan argues that his delay in filing this action was caused by Joseph's alleged failure to advise Jonathan of his intent to take title to the Compost Yard in his own name (Jonathan Br. at 17). But "mere silence or failure to disclose the wrongdoing is insufficient" for equitable estoppel (*Zoe G. v Frederick F.G.*, 208 AD2d 675, 675–76 [2d Dept 1994] [emphasis added]; *Cruz v United Fedn. of Teachers*, 128 AD3d 526, 527 [1st Dept 2015]). Jonathan's reliance on *Gen. Stencils, Inc. v* Chiappa is misplaced because there, unlike here, the defendant affirmatively and carefully concealed her alleged misconduct (18 NY2d 125, 128 [1966]). As set forth above, Jonathan has not established a single affirmative action taken by Joseph to conceal from Jonathan that he entered into the Lease or the Contract of Sale or that he took ownership of the Compost Yard in his own name. Rather, Jonathan had unfettered access to the Corporation's records and could have discovered the terms of the Contract of Sale at an earlier date (Mahler Aff., Ex. M, ¶ 15).

Jonathan's attempt to rely upon the alleged fiduciary relationship between him and his father to invoke equitable estoppel is unavailing. Even assuming the existence of a fiduciary relationship between Joseph and Jonathan, because Plaintiff failed "to establish that subsequent and specific actions by [Joseph] somehow kept [Jonathan] from timely bringing suit," equitable estoppel does not lie (*DiCenzo on Behalf of DiCenzo v Mone*, 200 AD3d 1162, 1166 [3d Dept 2021] [quotations and brackets omitted]). Because Jonathan has not established any "subsequent and specific actions" (*id.*) by Joseph that kept Jonathan from timely bringing suit, Jonathan has not presented any evidence raising a triable issue of fact as to equitable estoppel.

Point III

JOSEPH'S MOTION IS PROCEDURALLY PROPER

A. The Law of the Case is Inapplicable

Jonathan argues that Joseph's motion is barred by the law of the case because the Court purportedly "addressed Defendants' claims" regarding untimeliness in Defendants' cross-motion for summary judgment (Jonathan Br. at 7). But Jonathan admits that the law of the case doctrine applies only "to determinations which were necessarily resolved on the merits in the prior order'" (Jonathan Br. at 7 [quotations omitted]; *see e.g. Aurora Loan Servs., LLC v Dorfman*, 170 AD3d 786, 787 [2d Dept 2019] ["The doctrine of law of the case applies only to legal determinations that were necessarily resolved on the merits in a prior decision, and to the same questions presented in the same case"] [quotations and brackets omitted]).

Here, the Court "did not resolve on the merits" (*In re Doman*, 150 AD3d 994, 995 [2d Dept 2017]), "did not decide" (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717, 718 [2d Dept 2012]), and "did not address the merits of the parties' current arguments" (*Lehman v N. Greenwich Landscaping, LLC*, 65 AD3d 1293, 1294 [2d Dept 2009]), regarding the statute of limitations. On August 2, 2022, the Hon. Jerry Garguilo issued a Short Form Order denying both sides partial summary judgment (*see* Mahler Aff., Ex. O), determining only that there were issues of fact concerning potential liability and damages for diversion of corporate opportunity claim.

Although Joseph briefly argued in his memoranda of law that the six-year statute of limitations barred the Fourth Cause of Action (*see* NYSCEF Doc. Nos. 326 at 19-20 and 336 at 12-13), the Court never reached the merits, denying the motion solely on procedural grounds because the statute-of-limitations defense was not "specified in the Notice of Cross Motion pursuant to CPLR 2214 (a)" (Mahler Aff., Ex. O at 11; *compare* NYSCEF Doc. No. 291). The

Court explicitly ruled that Joseph's statute-of-limitations defense "may be renewed" (Mahler Aff., Ex. O at 11). Accordingly, law of the case does not apply because the prior Order "did not resolve on the merits" Joseph's defense of statute of limitations (*In re Doman*, 150 AD3d at 995).

B. Joseph's Summary Judgment Motion is Substantively Valid and the Granting of the Motion Will Eliminate a Burden On the Courts

Under New York law, "a subsequent summary judgment motion may be properly entertained when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts" (*Old Crompond Rd., LLC v County of Westchester*, 201 AD3d 806, 808 [2d Dept 2022]; *Graham v City of New York*, 136 AD3d 747, 748 [2d Dept 2016] [same]). A motion is not an impermissible "successive motion" where there is "sufficient justification to move again" (*MTGLQ Invs., LP v Collado*, 183 AD3d 414, 414 [1st Dept 2020] [holding that "the motion court did not improvidently exercise its discretion in reviewing the successive motion for summary judgment where that motion clearly enhanced judicial efficiency"] [quotations omitted]).

As explained in Joseph's opening brief, the summary judgment motion is substantively valid as it relates to Joseph's argument that Jonathan's single remaining claim is barred by the six-year statute of limitations. In fact, a disposition granting Joseph's motion will put an end to this long-running feud between father and son, and thus, "eliminate an unnecessary burden on the resources of the courts" (*Aurora Loan Servs., LLC v Yogev*, 194 AD3d 996, 997 [2d Dept 2021]).

In addition, as explained in Point III.A above, the Court in its prior decision on the parties' summary judgment motions granted Joseph leave to renew the motion with respect to Joseph's argument that the six-year statute of limitations partially bars Jonathan's single remaining claim (Mahler Aff., Ex. O at 11). Courts have discretion, in a proper case, such as this, to "give advance permission to a movant to make a successive motion" (*Corvino v Schineller*, 168 AD3d 812, 813

[2d Dept 2019]; *Bank of Am., N.A. v Geenangela Enter., LLC*, 61 Misc 3d 1203[A], *2 [Sup Ct, Suffolk County 2018] [the Court "granted the parties the right to successive summary judgment motions" and the "authorized motion herein furthers the ends of justice, eliminates a burden on court resources required by a trial and is dispositive of the single issue remaining before the court"]).

Having dodged an adjudication on the merits the first time, a second motion should be of no surprise because the Court clearly contemplated that Joseph would bring another motion seeking to dismiss the Fourth Cause of Action based upon the statute of limitations (*see* Mahler Aff., Ex. O at 11). Indeed, Jonathan does not dispute, nor can he, that New York courts allow parties to file a successive motion for summary judgment where the motion is both substantively valid and the "granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts" (*Fuller v Nesbitt*, 116 AD3d 999, 1000 [2d Dept 2014]). That is precisely the case here, where the Court explicitly declined to reach the merits of Joseph's statute-of-limitations defense on the prior motion and explicitly ruled that Joseph's statute-of-limitations defense "may be renewed" (Mahler Aff., Ex. O at 11).

CONCLUSION

For all of the foregoing reasons, the Court should: (i) grant summary judgment dismissing the Amended Complaint as barred by the applicable six-year statute of limitations; and (ii) award such other and further relief as the Court deems just and proper.

Dated: December 2, 2022

FARRELL FRITZ, P.C.

By: s/ *Franklin C. McRoberts*

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CERTIFICATION OF COUNSEL

The foregoing Reply 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 4,198. This certification complies Rule 17 of the Commercial Division Rules.

/s/ *Franklin C. McRoberts*