SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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| In the Matter of the Application of Mark Rozof, Linda Rozof-Guber, and Judith Teitell, General Partners,<br><br>Petitioners,<br><br>For the Judicial Winding Up of 392 1st Street Company, a Domestic Partnership, Pursuant to Section 68 of the Partnership Law,<br><br>- and -<br><br>Arthur Rozof, as a General Partner and in his Representative Capacity as Executor of the Estate of Edna Rozof, General Partner, deceased,<br><br>Respondents. | Index No.: 525611/2019<br><br>Pt. 16 (Ruchelsman, J.S.C.) |

**RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION AND IN SUPPORT OF HIS MOTION TO DISMISS**

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**Rules**

Respondent Arthur Rozof ("Arthur"), by his attorneys, respectfully submits this memorandum in opposition to the Petition, and in support of his motion for an Order dismissing the Petition pursuant to CPLR 3211.

## I. PRELIMINARY STATEMENT

This special proceeding "for the judicial winding up" of a partnership, 392 First Street Company (the "Partnership"), is nothing more than the waste of judicial time and resources. As set forth below, in the Affidavit of Arthur Rozof, sworn to on November 1, 2022 (the "Rozof Aff.") and the Affirmation of Jay Fialkoff, affirmed on November 1, 2022 (the "Fialkoff Aff.") submitted herewith, the Partnership is not winding up and Petitioners' assertions that it has been winding up in the eleven years after Edna Rozof's death in 2011 is false. The Partnership's operations have not changed substantially since 2011.

Moreover, Petitioners' actions belie their claim that the Partnership is in dissolution. They have acted, and continue to act, as though they have complete control and can do whatever they want regardless of Arthur's objections. They retained counsel, hired a real estate broker, solicited bids, and negotiated a contract of sale to sell the Partnership's sole asset, real property located at 392 First Street, Brooklyn. Significantly, Arthur did not interfere with his siblings' sales efforts. In fact, until receiving documents subpoenaed from Petitioners' broker in a related action, Arthur did not even know that a purchaser had been identified because his siblings refused to update Arthur on the status of their sale efforts. As such, Petitioners have failed to make an adequate showing for the judicial intervention that they seek.

In addition, the Partnership has always been run as part of a single-family enterprise, and it was the intention of the original shareholders that an agreement entered into in 1954 (the "1954 Agreement"), when the majority of the properties owned by the enterprise were purchased, govern all the properties. Thus, the Partnership property is subject to the 1954 Agreement, which limits transfers of the ownership interests in the Company by providing each owner a right of first refusal to purchase a disposing owner's interest for a nominal amount. Thus, Petitioners are not entitled to dispose of the property owned by the Partnership as they seek.

Furthermore, as discussed at length below, there have been no prior determinations with respect to the status of the Partnership. Indeed, notwithstanding Petitioners' attempts to persuade him otherwise, Justice Lawrence Knipel, in a prior action pending before him in this Court, declined to make the determination that the Partnership was dissolved.

Finally, as is made clear below, to the extent the Petition states a claim, Petitioners have failed to provide any statutory authority permitting their claims to be brought by a special, essentially summary, proceeding. Critically, this case involves numerous highly disputed facts regarding the history of a family enterprise going back decades and, accordingly, is more appropriately addressed in the form of a declaratory judgment action, not a summary proceeding such as this. Therefore, to the extent the Petition is not denied and dismissed outright, in accordance with CPLR 103, it should be converted to a plenary action seeking a declaration as to the rights and obligations of the parties with respect to the Partnership and the property titled in its name.

The Court is respectfully referred to the Rozof Aff. and the Fialkoff Aff. for a full discussion of the relevant facts in this matter.

## II. BACKGROUND

### A. The Parties

Arthur and Petitioners Mark Rozof ("Mark"), Linda Rozof-Guber ("Linda") and Judith Teitell ("Judith" or "Judy", and together with Mark and Linda, the "Siblings" or "Petitioners"), are adult siblings. (Rozof Aff., ¶ 2.) Their mother, Edna Rozof, died in December of 2011. (*Id.*, ¶ 19.) Arthur is the executor of Edna's estate. (*Id.*)

### B. The Family Enterprise

Since the 1950s, the family has owned and operated various properties in New York City (the "New York City Properties"). When acquired in the 1950s, the New York City Properties were purchased by a closely-held New York domestic corporation that was incorporated on or about December 30, 1953, called D. Karnofsky, Inc. (the "Company"), after the parties' grandfather. (*Id.*, ¶¶ 15-16.)

The Company's shareholders have always been only family, and it was always intended that any sale of the shareholders' interests in the Company be only to other shareholders in the family. In January 1954, the Company's then-shareholders entered into an agreement, to which Arthur and Petitioners are successors (the "1954 Agreement," Exh. A to the Rozof Aff.). That agreement limits transfers of the ownership interests in the Company by providing each owner a right of first refusal to purchase a disposing owner's interest for a nominal amount. *See* Article FIFTH of the 1954 Agreement. (*Id.*, ¶¶ 17-18.)

There are presently outstanding fifty-two (52) authorized shares in the Company, and each share has equal voting power and rights. Presently, the Company's shareholders are Arthur, Mark, Linda, Judith, Edna's estate.[1] Petitioners own a combined thirty-four (34) shares (or a 65.38% interest). Arthur owns or control eighteen (18) shares in the Company (or a 34.61% interest). Edna passed away on December 4, 2011, and left her shares in the Company to Arthur. She also gave him her proxy.[2] (*Id.*, ¶ 19.)

[1] The Company's original shareholders were the parties' mother and father, aunt and uncle (the Hindins), and grandfather. In connection with the resolution of an intra-family dispute (*Hindin v. Rozof*, No. 002226/2004; Sup. Ct., Kings Co.), in or about 2007 the Hindin side of the family gave up all of its interests in the Company. (*Id.*, ¶ 17.)

[2] The Siblings were unhappy with the share of the family business that their mother left to Arthur in her will, and commenced a Kings County Surrogate's Court Action in 2012. The proceedings in Surrogate's Court are active and the matter is unresolved. (*Id.*, ¶ 19.)

Since acquisition of the New York City Properties in the 1950s, the family real estate enterprise has owned and operated the properties, including renting the residential apartments in the buildings thereon. In January 2014 Petitioners having hired a management company (located in Queens) that began managing the properties. Before that, the business operated out of Edna's home in Brooklyn and Arthur managed the buildings from 1981 to December 2013 (from 1981 to 1990 with his mother). Business continued as usual after Edna died in 2011 and continues to this day. (*Id.*, ¶¶ 20-22.)

### C. The First Street Property & Partnership

There is a historical wrinkle for one of the New York City Properties, which is that the property located at 392 First Street, Brooklyn (the "First Street Property") is now titled in the name of the Partnership, rather than in the name of the Company. (*Id.*, ¶ 23.)

Like most of the other New York City Properties, the First Street Property was acquired by the Company in January 1954, subject to the 1954 Agreement. In 1986, the Company's shareholders created the Partnership, with all shareholders designated as partners, for the purpose of being the sponsor of a plan to convert the First Street Property into a cooperative corporation, and transferred the First Street Property to the Partnership as reflected in the deed from the Company to 392 First Street Company. (Exh. B to the Petition.) The transfer was a cashless transaction of $150,000, $140,000 of which was in the form of a mortgage held by the Company. In or about 1990, the plan for conversion was withdrawn. After the withdrawal, ownership was simply not transferred back to the name of the Company and the First Street Property continued to be owned in the name of the Partnership, whose partners continued to be the Company's shareholders. The First Street Property was and still is the Partnership's only asset. (*Id.*, ¶¶ 24-25.)

Although owned in the name of the Partnership, the First Street Property was always, and has continued to be, operated and managed in conjunction with the other New York City Properties that are owned in the Company's name, and it was always part of the singular family enterprise. (*Id.*, ¶ 26.)

As stated above, the Partnership's partners have always been the Company's shareholders and members of the family. Historically, the Partnership ownership interests were treated similarly as ownership of shares in the Company. When a partner died, the interest was treated as though it transferred by inheritance and business continued as usual: when the parties' uncle Jacob Hinden, a partner, died in the 1990s, the business of the Partnership did not change, the Partnership was not dissolved, and his interest was inherited by the Hindin side of the family. (*Id.*, ¶¶ 26-27.)

After Edna died in 2011, the business similarly continued in the regular course as though a Company shareholder had died. Edna's interest in the Partnership was transferred in her will. Between Edna's death in 2011 and the time that Petitioners retained attorneys in the fall of 2015, they did not take the position that the Partnership had dissolved and was winding up, nor did the partners undertake any actions to wind up the Partnership's affairs and business continued as usual. (*Id.*, ¶¶ 5, 28-29.)

Simply stated, the Partnership was never operated separately from the Company and was never treated differently from the Company. No partnership agreement exists, and the Partnership has continually operated as though the Company's governing documents, including the 1954 Agreement with limitations on ownership dispositions, controlled. Arthur and Petitioners recognized it as one business until late 2015, when Petitioners hatched their plan to sell all of the New York City Properties. (*Id.*, ¶¶ 25-30.)

**D. <u>Petitioners' Plan To Liquidate All Of The New York City Properties</u>**

The family enterprise's usual or regular course of business was not, and is not, the sale or exchange of its property. However, in 2015, Arthur learned that Petitioners had adopted a plan to sell all of the New York City Properties. Such a sale is outside the family enterprise's usual and regular course of business. Arthur did not consent to such a sale, and he informed Petitioners of his objection. (*Id.*, ¶¶ 32-33. 35.)

Petitioners engaged a real-estate broker, marketed all of the New York City Properties for sale, took potential purchasers on tours, solicited bids, and negotiated a contract of sale for at least one of the properties (allegedly at market rate). (Exhs G, H, I to the Rozof Aff.) (*Id.*, ¶ 33.)

Arthur did, however, privately state his objection to the sale, and his position that absent his consent they could not sell the New York City Properties. It was then that Petitioners adopted a strategy to differentiate the First Street Property (owned in the name of the Partnership) from the family enterprise, in its attempt to sell that property piecemeal. At that time, Petitioners, for the first time, took the position that the Partnership had dissolved upon Edna's death in 2011 and had been winding up for the four years since her death. This, of course, was belied by the fact that since Edna had died the Partnership took no steps towards winding up its affairs. The purported four year winding up of the Partnership was a baseless claim, and Arthur told Petitioners as much. Nonetheless, Petitioners continued with their plans over Arthur's objection, challenging him to bring an action to dissolve the business. (*Id.*, ¶ 35.)

**E. <u>The Prior Kings County Action</u>**

In response to Petitioners' attempts to sell the properties, on January 6, 2016, Arthur commenced an action in Kings County Supreme Court, entitled *Rozof v. Rozof et al.*, Index No. 500150/2016 (Sup. Ct., Kings Co. 2016) (the "Prior Kings County Action"), seeking a judgment, *inter alia*, declaring that Petitioners could not sell the New York City Properties absent Arthur's consent, and absent his consent any sale would be void. (Rozof Aff., ¶ 36.)

Arthur's first cause of action in the Prior Kings County Action was that the proposed sale of all of the New York City Properties is a transaction within the purview of Business Corporation Law (BCL) 909, the purpose of which is to prevent a business from disposing of all, or substantially all, of its assets without obtaining prior shareholder approval. The statute governs the disposition of all or substantially all of a company's assets if not made in the usual or regular course of the business actually conducted by the company. *Theater District Realty Corp. v. Appleby*, 117 A.D.3d 596 (1st Dept 2014); *Kingson v. Breslin*, 56 A.D.3d 430 (2d Dept 2008); *Vig v. Deka Realty Corp.*, 143 A.D.2d 185 (2d Dept 1988); *Boyer v. Legal Estates, Inc.*, 44 Misc.2d 1065 (Sup. Ct., Kings Co. 1964).[3] Petitioners did not comply with BCL 909's strict statutory notice and vote requirements. Nor do Petitioners have the two-thirds super majority required in order to override Arthur's objection. (Rozof Aff., ¶ 36.)

Arthur's position was that the First Street Property is also subject to BCL 909 because it is part of the single-family enterprise that is controlled by the 1954 Agreement. *Accord*, *Savasta v. 470 Newport Associates*, 180 A.D.2d 624, 626-27 (2d Dept 1992), *aff'd* 82 N.Y.2d 763 (1993). The transfer of ownership to the name of the Partnership was for purposes of the co-op conversion, and after the conversion was abandoned the First Street Property resumed being operated together with the other New York City Properties as part of one business. (Rozof Aff., ¶¶ 24-25.) While Petitioners are attempting to sell the First Street Property separately, BCL 909

[3] *See also Cirillo v. Cirillo*, NYLJ May 16, 1991 pg. 1 (col. 3) vol. 205 (Sup. Ct., N.Y. Co.); *Chiu v. New Silver Palace Restaurant, Inc.*, NYLJ June 3, 1999 pg. 3 (col. 1) vol. 221 (Sup. Ct., NY Co.). *Cf.*, *Katz v. Bregman*, 431 A.2d 1274 (Del. Ch. Ct. 1981) (sale of over 51% of total assets, which generated approximately 45% of net sales, required shareholder approval under Delaware law).

still precludes piece-meal sales when they are part of an overall liquidation plan. *Collins v. Telcoa Int'l Corp.*, 283 A.D.2d 129 (2d Dept 2001) (referee's report Index No. 23796/97, NYLJ 1202475831618, at *9 & 11 (Sup., Queens Co., Nov. 5, 2010)).[4]

Recognizing the wrinkle that the First Street Property is technically owned in the name of the Partnership, Arthur's second cause of action in the Prior Kings County Action was pleaded in the alternative and claimed that, pursuant to Partnership Law 20-21, the First Street Property still could not be sold absent his consent and that any such sale is voidable. (Rozof Aff., ¶ 37.) In short, Partnership Law 21(1) provides that a partnership may recover title to real property if the partner(s) who conveyed title lack authority to bind the partnership under Partnership Law 20(1). Under Partnership Law 20(1), Petitioners lack authority absent Arthur's consent because a sale of the First Street Property is not carrying on in the Partnership's usual way, the partners have not abandoned the business, and a sale would make it impossible to carry on the ordinary business of the Partnership. *See* Partnership Law 20(2) and 20(3); *Beizer v. Bunsis*, 38 A.D.3d 813, 814 (2d Dept 2007); *Matter of Verrazzano Towers, Inc.*, 10 B.R. 387, 406-07 (E.D.N.Y. Bankruptcy 1981); *Mid West Control Corp. v. Burke*, 2 Misc.2d 401 (App. Term, 1st Dept 1955).[5]

Petitioners asserted that they only had "elected to sell the single parcel of property owned by the Partnership as part of the winding-up of its affairs..." (Prior Kings County Action, NYSCEF Doc. No. 14, ¶ 8.) However, the documentary record, as noted above, rebuts that

[4] An analogy to circumstances where Courts see through such gamesmanship is the "step transaction" doctrine in tax cases. *In re Kelly*, 2005 WL 3879099, at *7-8 (N.Y. Div. Tax. App. Dec. 8, 2005).

[5] *See also Macdonald v. Trojan Button-Fastener Co.*, 9 N.Y.S. 383, 386 (Sup. Ct., Rensselaer Co. 1890); *Bender v. Hemstreet*, 12 Misc. 620, (Sup. Ct., Ulster Co. 1895).

characterization of their actions, and confirms that Petitioners planned to liquidate all of the New York City Properties. (*See* Exhs. G-I to the Rozof Aff.) (*Id.*, ¶38.)

Although Arthur asked them to do so, Petitioners did not keep him updated as to the status of their sales efforts. He was not aware of the scope or status of their (and the broker's) sales activity until receiving the subpoenaed documents in the Prior Kings County Action.[6] (*Id.*, ¶ 39.)

On October 17, 2016, Petitioners (the defendants in that action) moved for summary judgment seeking a declaration that they could pursue their course of liquidation, enabling them to try to sell the New York City Properties piece-meal absent Arthur's consent. They claimed that it was not their intent to liquidate in violation of BCL §909. (Fialkoff Aff., ¶ 16.)

Arthur opposed the motion and cross-moved to amend the Complaint. At the oral argument of the motion, Petitioners consented to a declaration that they must comply with BCL §909 and obtain Arthur's consent to a sale of all or substantially all of the assets of the Corporation. (Fialkoff Aff., ¶ 17.) A short form order, granting the motion, and directing settlement of an order and judgment on notice, "whereby Defendants consent to declaration that they must comply with BCL § 909 and obtain Plaintiff's consent to a sale of all or substantially all of the assets of the Corporation" was entered on December 9, 2016 (Exh. F to the Fialkoff Aff., at Ex.A.)

In furtherance of their attempt to strong arm Arthur and sell the First Street Property Petitioners submitted a Proposed Order and Judgment (Exh. F to the Fiakoff Aff.), in which they

[6] It should be noted that while the Petition in this proceeding asserts (Petition at ¶20) that the Siblings' real estate broker "has identified a ready, willing and able purchaser for the Property", this is the identical language that was contained in their 2016 Petition in the Nassau County Proceeding, and as such, Arthur does not know if that is currently true (nor did he know if it was true in 2016). (*Id.*, ¶ 39.)

attempted to have the Court make declarations upon which the Court did not rule, including a declaration that Petitioners, as general partners of the Partnership, may sell the premises as part of the winding up of the Partnership's affairs. Clearly, the short form order, upon which the settle order was based, did not contain such a ruling, nor was such a ruling stated by the Court at oral argument. Instead, counsel attached to his Notice of Settlement a copy of Justice Bucaria's Order. (Fialkoff Aff., ¶ 18.)

In response to Petitioners' strained attempt to obtain a ruling to which they were not entitled, Arthur submitted a counter order which contained only the order that was contained in the short form order, and to which Petitioners had consented, and an affirmation from counsel to the Court explaining why Petitioners' proposed judgment was improper and did not accurately reflect the Court's order. (Prior Kings County Action, NYSCEF Doc. Nos. 116, 118.) (Fialkoff Aff., ¶ 19.)

On September 29, 2017, the Prior Kings County Action resolved upon the entry of an Order & Judgment in the form submitted by Arthur, stating that Petitioners" must comply with Business Corporation Law ("BCL") § 909 and obtain [Arthur]'s consent to a sale of all or substantially all of the assets of Defendant D. Karnofsky Inc. ("Corporation)." (Exh. G to the Fialkoff Aff.) The remaining issues of whether the First Street Property could be sold as part of a "winding up" were not resolved in the Prior Kings County Action, as evidenced by Justice Knipel's refusal to sign the Sibling's attorneys' Proposed Order and Judgment. (*See* Exhs. F, G to the Fialkoff Aff.)

## F. Petitioners Respond To The Prior Kings County Action By Trying To Evade It

In response to the Prior Kings County Action (and prior to the dismissal), Petitioners agreed to manufacture a purported dissolution of the partnership by having Judith sign a withdrawal from the partnership "effective immediately" on February 19, 2016 (six weeks after the Prior Kings County Action was commenced). (Exh. C to the Petition.) Immediately thereafter, Petitioners commenced a special proceeding in Supreme Court, Nassau County that was identical to the present proceeding, under Index No. 601181/2016 (the "Nassau County Proceeding"), by filing a petition (the "Nassau Petition"), the day before their response to the complaint was due in the Prior Kings County Action. In the petition, they sought, exactly as they do here, an order and judgment declaring that that they "be permitted and directed to sell" the First Street Property, for judicial oversight of the winding up of the partnership's affairs, and a final accounting. (Rozof Aff., ¶¶ 31, 40; Fialkoff Aff., ¶ 9.)

Additionally, the day after they commenced the Nassau County Proceeding, Petitioners filed a motion in the Prior Kings County Action to transfer the venue of that action to Nassau County and to dismiss, which was ultimately denied. (Prior Kings County Action, NYSCEF Doc. No. 59.) (Rozof Aff., ¶ 41.)

Arthur then made a motion to dismiss the Nassau County Proceeding or, *inter alia*, to transfer venue to Kings County on March 30, 2016. (Fialkoff Aff., ¶ 10.) On May 31, 2016, the court granted Arthur's motion to transfer venue to Kings County. (Exh. D to the Petition ¶ 34.) In his order on Arthur's motion, Justice Bucaria, in *dicta*, stated that 392 First Street Company, and not the Company, owns the First Street Property. (*Id.*)

On August 31, 2016, the Nassau County Proceeding was transferred to Kings County, and was assigned Index No. 515373/2016. (Petition ¶ 35.) Petitioners filed an RJI in this Court on October 13, 2016, requesting only the appointment of a judge. Justice Knipel was the assigned judge. Thereafter, Petitioners took no steps to renew the Petition, nor did it take any steps to have any determination made on the transferred Petition until their attorney, on

September 13, 2017, and again on November 1, 2017, over a year after the matter was transferred, sent letters to Justice Knipel asking that he rule on the Petition. (Exhs A-B to the Fialkoff Aff.) (Fialkoff Aff., ¶ 12.)

In response to the November 1, 2017 letter, Arthur pointed out that Petitioners had not properly proceeded in Kings County following the transfer from Nassau County, having taken no steps to have the Petition renewed or to have it appear on a calendar for submission before the Court. Arthur outlined the appropriate course for renewal of the Petition, with a new return date and motion sequence number, which would enable it to appear on a motion calendar, would provide me with an opportunity to respond to the Petition, and would then be submitted to the Court. (Exh. C to the Fialkoff Aff.) (*Id.*, ¶ 13.)

Petitioners never did this. Rather, they sent another letter to the Court on November 6, 2017, urging Justice Knipel to decide the Petition based upon *dicta* contained in Justice Bucaria's decision. (Exh. D to the Fialkoff Aff.) Justice Knipel, properly, declined to do so. Petitioners followed up with another letter, in June 2018, asking the Court to decide the Petition. (Exh. E to the Fialkoff Aff.) (*Id.*, ¶ 14.)

Then, over eighteen months later, and almost 4 years after they first sought the requested relief seeking to wind up the purportedly dissolved Partnership, they commenced this new, but identical, proceeding in Kings County. (*Id.*, ¶15.)

**G. <u>Judith is Still Being Treated as a Partner</u>**

Despite Judith's purported withdrawal from Partnership, she has continued to be treated as a full partner to this day. (Rozof Aff., ¶ 5.) Notably, she is a named petitioner in the instant proceeding, and paragraph 6 of the petition states that "At all relevant times she was, and is, a general partner of the Partnership owning 16.35% of the Partnership." And she continues to receive a K-1 from the Partnership. (Exhs. B-D to the Rozof Aff.) The continuation of Judith's treatment as a partner demonstrates that her withdrawal was a mere sham and belies Petitioner's claims that the partnership is in dissolution. Their claims to the contrary are hollow.

## III. THE PETITION SHOULD BE DISMISSED – CPLR 3211

### A. The Petition Fails To State A Claim – CPLR 3211(a)(7)

#### 1. Standard On A CPLR 3211(a)(7) Motion.

The Petition should be dismissed for failure to state a claim. CPLR 3211(a)(7). A motion to dismiss made pursuant to CPLR 3211(a)(7) should be granted when if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint fails to state in some cognizable form any cause of action. *Kassab v. Kasab*, 2016 NY Slip Op 02089 (2d Dept Mar. 23, 2016) (petition failed to state claim for judicial dissolution of a limited liability company); *generally Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

#### 2. Petitioners Have Wrongfully Purported To Dissolve The Partnership In Order To Evade Arthur's Right To Purchase Their Interests.

The Petition seeks a sale of the First Street Property and requests "that the Court supervise the winding up of the Partnership's affairs pursuant to Partnership Law § 68." (Petition, ¶ 38.) Partnership Law 68 provides in pertinent part that, "Unless otherwise agreed the partners who have not wrongfully dissolved the partnership…has the right to wind up the partnership affairs; provided, however, that any partner…upon cause shown, may obtain winding up by the court." "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Partnership Law 60. A dissolved partnership is not terminated until its affairs are wound up. *Yorkes v. Ross*, 142 A.D.2d 642 (2d Dept 1988) (citing Partnership Law 61).

**a. The 1954 Agreement Controls the Entire Family Enterprise.**

Because the First Street Property was, and in the absence of any partnership agreement, remains, subject to the 1954 Agreement, that agreement governs the ability of a partner to cease being associated with the Partnership. Petitioners have wrongfully purported to dissolve the Partnership, and therefore do not have the right to wind up the Partnership's affairs, with or without judicial supervision. *Yoni Tech., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp.2d 195, 212 (S.D.N.Y. 2002) (plaintiff lacked right to unilaterally sell assets because the parties agreed to resolve all disputes relating to the winding up of their affairs under the eyes of a panel of arbitrators).

Petitioners' allegation that the partnership does not have an agreement "covering its affairs, governance, and operations" (Petition, ¶ 22) ignores the 1954 Agreement, which the partners could, and did, adopt and apply to their affairs after title to the First Street Property was transferred to the partnership in a cashless transaction. *Corr v. Hoffman*, 256 N.Y. 254, 272-73 (1931); *Hochberg v. Manhattan Pediatric Dental Group, P.C.*, 41 A.D.3d 202 (1st Dept 2007). This is confirmed by the fact that business continued as usual after Edna died as it did when Petitioners uncle had died. *Accord* Partnership Law 45(2) ("A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.").

The 1954 Agreement, and its restriction on disposing of ownership interests, precludes Petitioners' claim that the partnership dissolved pursuant to Partnership Law 62. *Congel v. Malfitano*, 61 A.D.3d 807, 808-09 (2d Dept 2009); *Dental Health Assocs. v. Zangeneh*, 34 A.D.3d 622, 623-24 (2d Dept 2006); *see also*, *generally*, *Gelman v. Buehler*, 20 N.Y.3d 534, 538-39 (2013), and Petition ¶ 23 (implying that the default provisions of the Partnership Law are inapplicable when there is an agreement amongst partners).

"The rights and obligations of the partners as between themselves arise from and are fixed by their agreement." *Corr*, 256 N.Y. at 272. The 1954 Agreement restricts disposition of ownership interests by granting the non-disposing owner a right of first refusal. Petitioners' allegation under Partnership Law 62 that the partnership dissolved upon Edna's death in 2011 and/or upon Judith's staged withdrawal in February 2016, ignores the agreement. [7]

The fact that the agreement was originally prepared for one type of entity (e.g., a corporation) does not preclude applying the agreement to a different type of entity (e.g., a partnership). *Hochberg*, 41 A.D.3d 202 (in dispute between two dentists who entered into a partnership agreement for the operation of their dental practice, but then converted the practice to a professional corporation, judicial dissolution of the corporation was inappropriate because there was a question of fact whether the dispute must be resolved in accordance with the arbitration clause in the parties' partnership agreement, which the respondent asserted survived incorporation). The question is the parties' intent. *Corr*, 256 N.Y. at 273-75. As explained in Arthur's affidavit, the intent – as manifested by the partners and shareholder's actions for over twenty years, including after the death of a partner – was for the 1954 agreement to control.

To reiterate: the Partnership did not operate separately from the Company. The Company was incorporated in December 1953, purchased the First Street Property in 1954, and the only reason the Company transferred the First Street Property to the Partnership in a cashless transaction was for the Partnership to sponsor a plan to convert that property to a cooperative

[7] If Edna's death caused the dissolution, it would be bizarre for Judith to withdraw from the winding up process. Nor does withdrawing from the winding up process result in dissolution.

corporation. (Rozof Aff., ¶¶ 6, 8, 16, 24, 26, 30.) After the conversion plan was withdrawn, the First Street Property continued to be operated and managed in conjunction with the other New York City Properties (that were held in the Company's name): the Partnership never purchased any other real property, the partners have always been Company shareholders, no separate meetings were held, the Partnership and Company operated out of a single office with the same management, both utilized the same accounting firm, monies were commingled, checks were issued by the Partnership to pay the Company's debts (Exh. E to the Rozof Aff.), all of the New York City Properties were insured under a single policy of insurance, Petitioners wanted to certify that the Partnership was doing business in Manhattan even though it does not own property there (but the Company does), and like the Company the Partnership continued its regular course of business after partners (Petitioners' uncle and Edna) died. (*Id.*, ¶¶ 25-30.)

Petitioners, by their own conduct after Edna passed away, as well as subsequent to Judith's sham withdrawal from the Partnership, have waived their right to terminate the partnership. *Savasta*, 180 A.D.2d at 626-27 (partners waived their right to terminate because they accepted the benefits of the partnership for 22 months after the termination right was triggered). After Edna passed away, and after Judith's "withdrawal", the Partnership continued its usual course of business as part of one family enterprise. Petitioners have leased apartments in the First Street Property, put funds in the building, and written checks on the Partnership checking account with no indication that it is a partnership in dissolution (Exh. E to the Rozof Aff.). The Partnership files tax returns, Judith continues to receive distributions from the Partnership, continues to be identified as a partner on the Partnership's tax returns and receives K-1's from the Partnership. (Rozof Aff., ¶¶ 25-31.)

Further evidence that the "withdrawal" was a complete sham is that Petitioners continue to operate the business as the majority interest holders in the Partnership, completely cutting Arthur out of all decision making. However, if Judith legitimately withdrew, the remaining Siblings would no longer have a majority interest, and thus, they could not be running the business as majority owners. Simply stated, Petitioners' actions belie their claims that Judith withdrew from the Partnership and that the Partnership is dissolved.

**b. Petitioners Wish To Sell Their Interests, And Therefore Triggered Arthur's Right Of First Refusal.**

Partners (like shareholders) may grant each other buy-out rights, *Napoli v. Domnitch*, 18 A.D.2d 707 (2d Dept 1962), and the 1954 Agreement provides Arthur with a right of first refusal to purchase his Siblings' interests. Specifically, the agreement, at article "FIFTH," provides that each owner has a right of first refusal when another owner seeks to transfer their interest (subparagraph "A"), states how each owner may exercise that right (subparagraph "B"), and establishes a formula for valuing the selling price (subparagraph "C"). The selling price is intended to be "a nominal amount" (article FIFTH, at subparagraph "C"). This special proceeding is a wrongful effort to evade Arthur's right to purchase his siblings' interests for a nominal amount.

However, Petitioners have triggered (perhaps inadvertently[8]) Arthur's right to purchase Petitioners' interests in the First Street Property for "a nominal amount." Their concerted effort to purportedly dissolve the Partnership by sending the February 2016 withdrawal notice, followed by commencement of the Nassau County Proceeding, and now this special proceeding that seeks a declaration that the Partnership has dissolved and ordering the winding up of its

[8] *See* Peter A. Mahler and Michael A.H. Schoenberg, "Dissolution Petition Can Unwittingly Trigger Stock Buyback," NYLJ July 21, 2016 (Vol. 236, No. 14).

affairs, indicates that they intend to dispose of their interests and triggered Arthur's right of first refusal. *In re Johnsen v. ACP Distribution, Inc.*, 31 A.D.3d 172 (1st Dept 2006); *In re El-Roh Realty Corp.*, 48 A.D.3d 1190 (4th Dept 2008). If they disagree, the question should be resolved in a plenary action, seeking the relief they seek in the Petition, that is, a declaration as to the status of the Partnership and the parties' rights and responsibilities. CPLR 103; *see also Magid v. Magid*, No. 653440/2015, 2017 WL 6383826 (N.Y. Sup. Ct. Dec. 14, 2017) (holding that summary judgment was not appropriate in plenary action seeking judicial dissolution of partnership where facts were highly disputed).

**3. Even If Dissolved, There Is No Cause For Judicial Oversight.**

The Petition does not allege facts as to why oversight of the winding up process is required. There is discord amongst Arthur and Petitioners. But the Petition lacks anything other than bare and conclusory allegations that Arthur somehow interfered with the sale process. The Petition is silent as to how Arthur "interfered" with the sale. (Petition, ¶ 20.) Arthur merely objected privately to his Siblings, and then sought a judicial declaration of the parties' respective rights by commencing the Prior Kings County Action when they ignored his objections. Notably, he did not move for a preliminary injunction or file a notice of pendency. Moreover, Arthur was not even aware that a purchaser had been identified for the First Street Property until *after* the Nassau County Proceeding was commenced, when the broker produced documents responsive to his subpoena in the Prior Kings County Action. There is no allegation of waste or other business malfeasance requiring a receiver or other judicial intervention to oversee a fair and proper sale. (Rozof Aff., ¶¶ 35, 39.)

Usually, it is the minority owner who needs judicial protection from an unfair winding up procedure adopted by the majority, not the other way around. Petitioners have repeatedly reminded Arthur that they constitute a majority and are in control. If ultimately, they succeed on the merits of the claims between them and Arthur, Petitioners would not need the Court to oversee the sale process.

**4. Justice Bucaria's Decision Does Not Have Preclusive Effect.**

Finally, to the extent Petitioners attempt to argue that Justice Bucaria's decision purporting to deny Arthur's motion to dismiss the Nassau Petition is binding on this court, this argument must fail as well. First, as noted above, Arthur does not and has never disputed that title to the First Street Property is in the name of the Partnership. Thus, Justice Bucaria's gratuitous statement that the First Street Property is owned by the Partnership and not the Company, which was clearly made only for purposes of concluding that a cause of action was stated by the Petitioner in that proceeding, is of no moment. As is made clear above (and in the papers before Justice Bucaria), Arthur's position is that, notwithstanding that the title is in the name of the Partnership, the historical treatment of the Partnership and the First Street Property mandate that it be subject to BCL 909 (as well as the 1954 Agreement) because that is how it was always treated, and how it was intended to be treated.

The law is clear that Justice Bucaria's statements are simply not dispositive by virtue of a collateral estoppel. First, Justice Bucaria's denial of the Nassau Petition, with leave to renew in Kings County, effectively rendered the Nassau Petition and Plaintiff's cross-motion to dismiss the Nassau Petition moot. The Appellate Division, Second Department has made it clear that upon granting the change of venue to a different court, it was not appropriate for Justice Bucaria to take any further action on the Nassau Petition or the dismissal motion. The merits of the Nassau Petition and the dismissal motion were to be left to the Kings County court for review and consideration. *Taylor (Rivera) v. N.Y.C. Transit Auth.*, 131 A.D.2d 460, 461 (2d Dep't 1987) ("[A]s a matter of policy, in order to be consistent with the purposes of the Individual Assignment System, the preferred course in this matter would have been for the court, once having determined to grant the defendant's motion for a change of venue, to have deferred ruling upon the other issues and left their resolution to the Justice to whom the case was to be assigned…"); s*ee also*, *Eljamal v. Weil*, No. 651144/14, 2014 WL 3976780, at *6, 2014 N.Y. Slip Op. 32194(U) (Sup. Ct. N.Y. Co., Aug. 12, 2014).

Furthermore, even if he did gratuitously make determinations on the motion to dismiss the Nassau Petition for failure to state a cause of action, Justice Bucaria did not necessarily take Arthur's arguments with respect to the way the Partnership was historically treated into consideration, because he did not need to for purposes of determining that the Nassau Petition stated a cause of action. Justice Bucaria's conclusion that the Nassau Petition stated a cause of action is not, indeed cannot be deemed to be, a ruling as a matter of law or on the merits of the ultimate factual issue in this case, as it is entirely improper for a court to make rulings on the merits or on factual issues on a motion to dismiss for failure to state a cause of action (*see, e.g. Mayers v. Stone Castle Partners, LLC*, Nos. 650410/2013 , 654075/2013, 2015 WL 1941362, at *4 (Sup. Ct. N.Y. Co. Apr. 28, 2015) (stating that, on a motion to dismiss, "[t]he Court is not permitted to assess the merits of the complaint or any of its factual allegations."); *see also Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114 (1st Dep't 1998); *Long Island Lighting Co. v. Cty. of Suffolk*, 166 A.D.2d 556 (2d Dep't 1990) (affirming a trial court's dismissal under § 3211(a)(6) and remarking that factual disputes should be resolved at trial).

Thus, there is no question that, to the extent that Justice Bucaria did, improperly, assess the merits of the complaint or the defenses, or factual allegations, in determining that the Nassau Petition stated a cause of action, at best, Justice Bucaria's statements were mere *dicta*, which is not binding on this or any court, and do not serve as a basis for a collateral estoppel. *Bobrow v. Bobrow,* 181 A.D.2d 556, 557, 581 N.Y.S. 2d (1st Dep't 1992) ("We reject any suggestion that *dictum* contained in a prior order granting Stephen Bobrow's motion to appoint a receiver for the family partnership, constituted law of the case with respect to his claim for partnership distributions, since the prior order was not a judicial determination of the merits of his claim."); *Silverman v. Sonn*, 212 A.D.2d 430, 433, 622 N.Y.S.2d 711, 712 (1st Dep't 1995) ("Courts favor the resolution of claims on the merits, not on the basis of dictum.").

Finally, as noted above, Justice Knipel, in refusing to sign the Sibling's attorneys' proposed order, was clearly not swayed by Justice Bucaria's decision, tacitly acknowledging that it was not binding on him or this Court.

## IV. <u>IF NOT DISMISSED, THIS SPECIAL PROCEEDING SHOULD BE CONVERTED TO A PLENARY ACTION</u>

Lastly, this proceeding, if not dismissed, should be converted to a regular plenary action with a right to discovery and a full hearing on the numerous disputed facts. CPLR 103(b) and (c); *Phalen v. Theatrical Protective Union No. 1*, 22 N.Y.2d 34, 41-42 (1968); *Lakeland Water Dist. v. Onondaga Co. Water Auth.*, 24 N.Y.2d 400, 408-09 (1969). CPLR 103(b) is explicit: "All civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized." CPLR 103(c) continues that, when there is jurisdiction over the parties, the Court shall make whatever order is required for proper prosecution when it is not brought in the proper form. We are not aware of any specific statutory authorization permitting a Partnership Law §68 claim to be brought in a special proceeding, or statutory authorization for Petitioners' underlying substantive claims for a declaration of rights to be brought in the form of a special proceeding.. As such, the Court is without authority to summarily award Petitioners the relief sought in the Petition. *Taskiran v. Murphy*, 8 A.D.3d 360 (2d Dept 2004); *Neilson v. 6D Farm Corp.*, 123 A.D.3d 676 (2d Dept 2014) (issues relating to the winding up of partnership after death of a partner were determined in a regular plenary action, not a special proceeding); *Birnbaum v. Flaum*, 172 A.D.2d 473 (2d Dept 1991) (action for dissolution of a partnership by operation of law was brought by complaint); *Patycki v. Slaski*, 42 Misc.3d 1213(A) (Sup. Ct., Kings. Co. Jan. 17, 2014).

## V. CONCLUSION

Based on the foregoing, Arthur's motion should be granted, and the Petition should be dismissed in its entirety. In the alternative, this proceeding should be converted to a plenary action.

Dated: November 1, 2022
New York, New York

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## CERTIFICATION OF COMPLIANCE

I hereby certify that the forgoing memorandum of law complies with the word limit in Rule 17 of The Uniform Civil Rules for the Supreme Court and the County Court, 22 NYCRR 202.8-b, as it contains 6,999 words, excluding the parts exempted by 22 NYCRR 202.8-b.

_/s/ Jay Fialkoff_

Jay R. Fialkoff