PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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PETER J. MESTOUSIS,

Petitioner

- against -

TITAN CONCRETE, INC. and MICHAEL SACCENTE JR. a/k/a MICHAEL SACCENTE,

Respondents

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Index No. **42007/2023E**

Hon. **FIDEL E. GOMEZ**
Justice

The following papers numbered 1 to 11, Read on this Motion noticed on 5/01/23, and duly submitted as no. 1, 3WE on the Motion Calendar of 6/28/23.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 5	
Answering Affidavit and Exhibits	3, 9	
Replying Affidavit and Exhibits	7, 11	
Notice of Cross-Motion - Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers- Order of Reference Judgment and Appointment of Referee to Compute		
Memorandum of Law	2, 4, 6, 8, 10	

Petitioner's motions are decided in accordance with the Decision and Order annexed hereto.

Dated: 5/22/2023

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HON. **FIDEL E. GOMEZ, JSC**

1.CHECK ONE ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION/CROSS-MOTION IS ☐ GRANTED (MOTION) ☐ DENIED (MOTION)
X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE.
☐ SETTLE ORDER
☐ SUBMIT ORDER
☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT
☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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PETER J. MESTOUSIS,

Petitioner, **DECISION AND ORDER**

- against - Index No. **42007/2023E**

TITAN CONCRETE, INC. and MICHAEL SACCENTE JR. a/k/a MICHAEL SACCENTE,

Respondents.
----------X

In the instant special proceeding, petitioner, by order to show cause, moves for the appointment of a temporary receiver to protect and conserve the assets of respondent TITAN CONCRETE INC. (Titan) pursuant to BCL §1113, 1203, and CPLR § 6401. Respondents oppose.

Separately, petitioner moves for an order pursuant to BCL §1113, 1118, and §1115 directing respondents to post a bond or other security in connection with the proposed elective purchase in an amount of at least $10,000,000. Respondents oppose.

For the reasons that follow hereinafter, petitioner's request for a temporary receiver is denied. Petitioner's motion to post a bond is hereby granted to the extent that the instant dissolution proceedings will be stayed pending a hearing to determine the fair value of petitioner's shares.

BACKGROUND

In this proceeding, petitioner seeks the judicial dissolution of Titan Concrete, Inc. pursuant to BCL §1104-a, the appointment of a receiver pursuant to BCL §1113, and an accounting. The verified petition alleges that petitioner and respondent MICHAEL SACCENTE JR. (Saccente) are each 50% shareholders of all outstanding shares in Titan. Petitioner demands that Titan, a concrete provider for commercial and residential projects, be dissolved on the grounds that those in control

of the corporation are guilty of (1) illegal, fraudulent, and oppressive actions toward shareholders; and (2) looting, wasting, and diverting corporate assets. Petitioner alleges to have invested approximately $6,000,000 in Titan. Petitioner also alleges to have loaned Titan approximately $2,000,000 which has not been repaid.

The verified petition also alleges that Saccente has looted, wasted, diverted, or mismanaged Titan's assets based on the following facts: Saccente is keeping cash paid on delivery jobs for himself instead of depositing the money into Titan's accounts. Saccente has wasted, mismanaged, and misappropriated Titan's assets causing the United Service Workers Union (USWU) to suspend coverage of Titan's 50-60 employees and has caused Titan to fail to meet its payroll obligations. Saccente unilaterally caused Titan to borrow $900,000 from Canon Advance LLC (Canon). The terms of said loan require payments in the amount of $1,350,000 within six months. Petitioner alleges that this is an unfavorable agreement that will cause Titan irreparable harm. The petition further alleges that Saccente illegally, fraudulently, and oppressively induced petitioner to pay $250,000 to Titan. In 2022, Saccente wasted, mismanaged, and misappropriated $2,000,000 loaned to the company by petitioner. Saccente unlawfully stopped payments on eight checks, totaling $157,854.56, issued by Titan to repay petitioner for a separate loan. Saccente allowed his father to wrongfully receive cash payments from Titan for his personal benefit despite not being on Titan's payroll. Petitioner alleges Saccente obstructed petitioner's participation in the management and control of Titan. Petitioner further alleges that Titan leases Titan's premises located at 301 Route 52, Carmel, New York (301 Route) from Kent Investors II, LLC, which is owned solely by Saccente, and that Saccente is diverting rent payments. Additionally, petitioner alleges that Titan pays for Saccente's personal accountant and other personal expenses. Saccente overpays one of Titan's employees who is his good friend, and unnecessarily pays for new trucks

for certain employees. Saccente has wasted Titan's assets by knowingly overpaying for fuel. Petitioner alleges that Saccente has diverted payments from customers resulting in a balance of "undeposited funds" exceeding $6.6 million as of January 2023. Finally, petitioner alleges that Saccente has wasted Titan's assets by leasing thirty new concrete trucks costing approximately $75,000 per month.

PETITIONER'S MOTION FOR TEMPORARY RECEIVER

Business Corporation Law §1203(a) provides that the court may appoint one or more receivers of the property of a corporation at any stage before final judgment or final order in an action or special proceeding brought under article 12. CPLR §6401 provides, in pertinent part, as follows:

> (a) Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed.

The appointment of a receiver is a remedy which courts should use sparingly since it is tantamount to "the taking and withholding of possession of property from a party without an adjudication on the merits" (*Hahn v Garay*, 54 AD2d 629, 629 [1st Dept 1976] ["It is well recognized that courts of equity exercise extreme caution in appointing receivers Pendente lite."]; *S.Z.B. Corp. v Ruth*, 14 AD2d 678, 679 [1st Dept 1961]). Indeed, the drastic remedy of appointing a receiver should only be awarded when it is absolutely necessary to protect the parties to the action and their interests (*In re Armienti*, 309 AD2d 659, 661 [1st Dept 2003]; *S.Z.B. Corp.* at 679). Generally, the proponent seeking the appointment of a receiver must establish that absent a receiver, there is "danger of irreparable loss" (*In re Ar*mienti at 661 ["CPLR 6401 (a) authorizes the appointment of a receiver where there is danger that the property will be removed from the state, or lost,

materially injured or destroyed."][internal quotations omitted]; *S.Z.B. Corp.* at 679; *Moran v Moran*, 77 AD3d 443, 445 [1st Dept 2010]).[1]

Where a petitioner moves to appoint a receiver in an action for dissolution of a closely held corporation, the requirements remain the same-- that movant demonstrate a danger of irreparable loss and that the receivership is necessary for the protection of the interests of the parties (*In re Harrison Realty Corp.*, 295 AD2d 220, 220 [1st Dept 2002][Appointment of receiver in action for dissolution of corporation denied where disputed payments in the course of effecting the dissolution did not establish a serious risk of potential loss.]). Consequently, there must be a sufficient demonstration that the corporation is insolvent or that the corporation's assets are being diverted or wasted in order to warrant this drastic remedy (*Di Bona v Gen. Rayfin Ltd.*, 45 AD2d 696, 696 [1st Dept 1974]).

Significantly, however, in an action to appoint a receiver of a corporation's assets, the mere misconduct of officers or directors will not justify appointment of a receiver absent a demonstration that the appointment is necessary to preserve the property or rights of stockholders (*Fenn v W.M. Ostrander*, 132 AD 311, 313 [1st Dept 1909]["It is also well established that a receiver will not be appointed upon loose and general allegations of fraud and maladministration,

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[1] Respondents' assert that in a post-commencement election under BCL §1118, it is especially inappropriate to appoint a receiver because now that Titan has elected to purchase petitioner's shares of Titan under BCL §1118, petitioner is a shareholder "in name only." However, courts have a broad discretion to issue orders in protection of corporate assets pending dissolution (*see* BCL §1113; BCL §1202). Moreover, while the issuance of a bond is preferred over the appointment of a receiver in cases where respondent exercises the rights under BCL § 1118(c)(2), a bond is appropriate only if sufficiently protects petitioner's interest (*In re Application of Chiovitti*, 280 AD2d 412, 413-14 [1st Dept 2001] ["Because we find the $500,000 surety bond adequate to protect Chiovitti's interests in Alpine, approximated at $140,000, as reflected by the financial statements submitted by Chiovitti at the receivership hearing, we reverse the order directing the appointment of a temporary receiver. In circumstances similar to these, this Court has consistently refrained from appointing pendente lite receivers, because such action amounts to a taking without adjudication on the merits."]; *Application of Androtsakis*, 139 AD2d 471, 471 [1st Dept 1988] ["After reviewing the record, in view of respondent's election to buy out petitioners, we find an undertaking in the amount of $250,000.00 "sufficient to secure petitioners for the fair value of their shares. Accordingly, we modify the IAS order to the extent of denying petitioners' motion for a receiver, and delete from the order the appointment of a receiver, upon condition that respondent post an undertaking in the amount of $250,000.00" [internal citations and quotation marks omitted].).

made on information and belief, and unsupported by anything that can reasonably be called legal proof, especially when the answering affidavits deny the allegations contained in the moving papers."]; *see also In re Harrison Realty Corp.* at 220 ["The record supports the motion court's determination that grounds for the appointment of a receiver in this action for dissolution of a closely held corporation were not established, since Merola, one of the two principals owning 50% of the corporation, did not demonstrate danger of irreparable loss, and resort to a receivership is appropriate only when necessary for the protection of the interests of the parties. *Merola's allegations that his fellow HRC shareholder, respondent Thomas Axon, used HRC funds without authorization during the course of the judicial dissolution proceedings, do not establish a serious risk of potential loss or violation of the court's directives*."] [emphasis added]).

In support of the instant application, petitioner contends that Saccente's criminal history, failure to meet financial obligations, diversion of corporate assets, fraudulent conduct, and financial impropriety create irreparable loss and waste and thus a temporary receiver is necessary to protect and conserve Titan's assets. Petitioner alleges that although respondents have been credited millions to its accounts, including petitioner's $6,000,000.00 purchase and $2,000,000 loan, $88,000,000 in gross earnings from 2018-2021, a loan of $900,000 from Canon LLC in 2023, and a second hard money loan from Jett Funding Cap LLC (Jett Funding) for $700,000 in 2023, Titan's bills remain unpaid, and Titan's as of March 2023,five bank accounts with Webster Bank are all overdrawn.

In support of his contentions, petitioner submits an affidavit with attached exhibits and an NYPD case report by Joanna Mestousis (JM), petitioner's sister, in which she states that she witnessed Titan trucks "stealing" water from a city fire hydrant; she attaches photos which show a truck connected to a fire hydrant by hose. An NYPD case report indicates that Saccente was

arrested and charged with theft of services for diverting water from a fire hydrant into his swimming pool in 2010. The case report includes statements from a witness who was threatened by Saccente and issued a temporary order of protection against. Petitioner also submits a Notice of Federal Tax Lien issued to Saccente indicating an unpaid balance of $92,354.70.

In his affidavit, petitioner avers, *inter alia*, the following facts. There are nine active lawsuits in the Supreme Court Commercial Division against Titan including: *U.S. Concrete, Inc. v Titan Concrete*, *Inc.* Index No. Not Assigned (satisfied); *Barrco Fuel, LLC v Titan Concrete*, *Inc.* Index No. 55104/2023; *J&J Heating & Fuel Oil Corp. et al v Titan Concrete Inc et al* Index No. 817751/2022e; *ANJAC Enterprises, Inc. v Titan Concrete, Inc.* Index No. 516306/2022; *Prime Structures, Inc. v Titan Concrete, Inc.* Index No. 656396/2021; *Essex Cement Company, LLC et al v Titan Conrete, Inc et al* Index No. 651015/2021; *Harlem River Concrete Inc. v Titan Concrete, Inc.* Index No. 63524/2018; *City & County Paving, Corp. v Titan Concrete, Inc. Index No.* 24108/2018E.

In March 2023, Titan "bounced" its rent check in the amount of $56,276 to Point H. Realty Corp. Petitioner submits emails from JM to Brandon Wong, Titan's treasurer, apprising him of the "bounced" check and requesting that a replacement check for rent and additional fees be issued. Petitioner believes that Titan has still not issued a replacement check. Additionally, petitioner alleges that Titan's payroll checks continued to bounce, while Saccente was successfully receiving his paychecks, using Titan accounts to pay for his personal residence and vehicles, and issuing checks to his personal account at Chase Bank for "reimbursements." For example, petitioner alleges charges in the amounts of $1,309.31 and $9,898.57 from March 2023 that are unaccounted in Titan's books and which he presumes were incurred by Saccente for his personal benefit. Furthermore, based upon failure to remit full and timely contributions to the United Service

Workers Union (USWU), Titan's employees' benefits have been suspended. Petitioner submits a letter from USWU detailing the suspension of medical benefits as a result of their employer's failure to meet financial obligations. Titan also owes $98,823.57 to Tilcon, a supplier, as of February 2023. Petitioner submits emails from Tilcon requesting payment.

Regarding the Canon LLC loan for $900,000, petitioner notes that for unknown reasons, the daily payment has increased from $11,250 to $18,000 per day. Petitioner notes that as of January 2021, Titan has an undeposited funds balance of $6,657,724.56, which petitioner believes reflects money received by Saccente from customers that has not been deposited into Titan's accounts. Additionally, a certain number of Titan's jobs are cash on delivery (COD) and Saccente has failed to deposit the cash from COD jobs into Titan's accounts; instead, petitioner alleges, Saccente is keeping the cash for himself. Petitioner believes that there is about $2,000,000 of COD work on an annual basis that is unaccounted. Petitioner does not submit any documentary evidence in support of this allegation. Petitioner avers that the payments for the approximately thirty new concrete trucks Saccente has leased will be approximately $75,000 per month, which, along with the payments to Canon LLC, are a waste of assets that can bankrupt Titan. Finally, petitioner avers that Saccente has cut him and his family out of management and administrative control, took them off Titan's payroll, and increased his own weekly salary.

In opposition, Saccente contends that appointing a receiver would be to the business' detriment because the receiver would not have the connections or specific knowledge to operate Titan more effectively than current management. Saccente claims that his personal liabilities are irrelevant and are being used here as "abhorrent attacks" by petitioner. Saccente avers that since the filing of the petition, Titan has rebounded, with $1.5 million in current accounts receivables, $1.18 million in accounts receivables between 1-90 days old, and $2.68 million in concrete already

sold and delivered which will be paid to Titan. The foregoing is evidenced by an Accounts Receivables Aging Summary submitted by Saccente.

In support of his contentions, Saccente submits an affidavit with attached exhibits in which he states: He is the president and sole director of Titan. Petitioner's claim of a $6,000,000.00 investment in Titan was in fact made by petitioner's father, who invested $5,705,000.00 in two other entities: $1,705,000.00 to Achlo Transport, Inc., and $4,000,000.00 to "Mestousis Enterprises LLC." The alleged $2,000,000.00 loan was also made by petitioner's family and their entities. Respondent submits various checks to Titan from Mestousis Development LLC, Mestousis Enterprises LLC, Mestousis LLC, Point H Realty Corp, and Peter Mestousis. As such, Saccente alleges that petitioner obtained his 50% interest in Titan by stock purchase wherein petitioner obtained 30% for $1.00 in December 2021, and an issuance of a second share certificate in July 2022 that brought the holding to 50%.

Saccente avers that although petitioner requests that he and his family be placed on Titan's payroll, Titan paid $250,000 toward their salary in 2022, even though, as Saccente claims, petitioner's family, "provided no work of value." Saccente submits a copy of petitioner's 2022 wage and tax statement, which evinces the foregoing. Saccente acknowledges that petitioner advanced $157, 854.56 to Titan in October 2022 to help the company pay its vendors. However, Saccente states that Titan stopped payment of the eight checks issued to repay petitioner because the checks were never authorized by the company.

Saccente denies petitioner's claims that he has increased his salary after the election to buy shares. Saccente explains that he transitioned payroll companies, from ADP to Decision HR. Thus, the $534.20 debit on February 24, 2023, was a tax associated with salary paid on the same date. The $1,854.66 debit was paid to an employee who was transitioning to Titan's new plant in

Connecticut which required a different taxation matrix from the rest of Titan's employees who work in New York. Saccente submits an invoice from Decision HR evincing the foregoing. Saccente denies that he is paying for personal expenses with Titan's accounts. Saccente avers that the leasing of two vehicles has always been part of his compensation package. Additionally, Saccente describes an arrangement with Titan wherein the company uses a portion of Saccente's personal property for its business and in lieu of paying rent, Titan pays the utilities for the property. Saccente also denies that checks were issued into his personal account at Chase Bank for personal reimbursements. Saccente avers that those charges represent checks written to pay Titan's Chase credit card and reimburse an employee who paid for business expenses.

Saccente further alleges that petitioner and his family have added to Titan's financial issues. JM reversed a payment to American Express for the company's credit card, which was being used as a source of funding during a period of low cash flow, and caused American Express to terminate the account. Petitioner hired two additional mechanics who performed unnecessary repairs and damaged Titan trucks. In support, Saccente submits a copy of Titan Concrete Inc.'s Schedule of Repairs and Maintenance for the period of January 2022 through December 2022, which evince the same. Furthermore, Saccente states that during a "crisis point" in December 2022, the company required money to pay for certain obligations, so petitioner's father offered a loan of $1,000,000 in exchange for a proxy to vote 10% of the company's share, which would give petitioner's family control of the company. Saccente refused and instead received financing through Canon LLC, which purchases receivables at a discount. Saccente obtained $900,000 that he alleges he used to pay a settlement agreement with US Concrete, Titan's Union, suppliers, and payroll, among other "debts and obligations." Saccente avers that the Jett Funding loan for

$700,000 was also necessary to pay the money to US Concrete, and the remaining funds went toward business operations.

With regard to the lawsuit against Titan, Saccente avers that Titan is strongly apposing both *Prime Structures, Inc. v Titan Concrete, Inc.* (Supreme Court, New York County, Index No. 656396/2021) and *City & County Paving, Corp. v Titan Concrete, Inc.* (Supreme Court, Bronx County, Index No. 24108/2018E) which are both cases alleging defective concrete. In *U.S. Concrete, Inc. v Titan Concrete*, *Inc.,* Saccente alleges that US Concrete sought to file affidavits of confession of judgment seeking $1,611,285.26, but Titan reached a settlement for $413,090.35. Saccente also submits that Titan has entered into a payment plan agreement with USWU which includes repayment of money owed and retroactive reinstalment of all union benefits.

Saccente explains that Titan's five bank accounts with Webster Bank were overdrawn because of a default judgment obtained against him and Titan by J&J Heating and Fuel Oil Corp. Titan was served with restraining notices and information subpoenas on Titan's banks. In accordance, Webster Bank spread the amount restrained across all of Titan's bank accounts and placed them into negative balances. Thus, Titan was unable to use these accounts, causing checks and charges to bounce. Titan submits a copy of a conditional release, allowing Titan to have the restraint lifted and Saccente avers that Titan is finalizing a settlement agreement with J&J Heating and Fuel Oil Corp. Saccente further alleges that Titan is working on a similar arrangement with Barrco Fuel, LLC. Significantly, Titan concludes, the only lawsuit that post-dates the filing of the petition is US Concrete which has been satisfied as described above.

Saccente avers that payments credited to customer Stagg Group were a clerical accounting error, and said payments were later allocated to the correct customer. Saccente denies taking cash from COD jobs, and proffers that petitioner provides no proof of this. Saccente asserts that leasing

thirty trucks was necessary to operate a new concrete plant in Connecticut, and expects that extra business in derived from this third plant will be sufficient to pay for costs of the new trucks. Finally, Saccente asserts that the "undeposited funds" is an entry that exists in Titan's bookkeeping software to show that there has not been a bank reconciliation.

In reply, petitioner offers the following: Respondents do not dispute the total balance of the judgments and federal tax liens against them totaling $2,003,959.75 plus interest, which may represent a non-payment of financial obligations sufficient to support a request for a receiver. Although respondents do not dispute that petitioner is a 50% owner of the company's stock, they argue that petitioner never invested $6,000,000.00 in Titan as claimed, but in fact, petitioner's father invested in two other entities. Petitioner argues that Michael (Lemmo), one of Saccente's previous partners in Titan, sold petitioner the interest in these other entities. The purchase of these assets was made for the purposes of acquiring Lemmo's interest in Titan. Petitioner submits the closing statements for these purchases evidencing that he purchased said assets. Additionally, although Saccente argues that the $2,000,000 loan was made by petitioner's father, petitioner asserts that any loan the petitioner's family made to Titan was made on his behalf. Petitioner submits copies of checks and payments that account for $1,971,259.19 of the alleged amount.

Petitioner further denies that he is abusing company funds in asking for a salary since he is entitled to be paid for his work as supervisor of Titan's mechanic operations. Petitioner states that his family's salary was agreed to by Titan and that the work provided by his family saved Titan thousands of dollars. In fact, petitioner alleges that Brooke Saccente, Saccente's wife, is receiving checks even though she does not work for Titan. Petitioner further notes that the increase in Titan's payroll from $85,000 to $300,000 per week was not addressed in opposition. Thus, the

payroll has tripled even though Saccente does not mention any new hires and does not offer any evidence explaining the increase.

In addition, Petitioner notes that an additional payment of $72,000 has been advanced to Canon LLC and the daily payments have increased from $11,250.00 to $36,000. In fact, petitioner alleges that Canon LLC is another tool for respondents' looting, further alleging that Canon LLC, "does not even seem to exist or that certainly does not exist at the location listed on the loan documents." In support, petitioner submits the affidavit of Martin Marrero, who visited Canon Advance LLC's alleged address and avers that both front desk attendants responded that there was no such company on the premises. Photos of the building directory as proof of companies residing in the suite are annexed thereto.

Petitioner replies to Saccente's assertion that JM was not authorized to write checks repaying petitioner for the $157,854.56 advance to Titan. Petitioner asserts that JM was an authorized signer on Titan's accounts at the time and that Brandon Wong, Titan's treasurer, printed and authorized the checks. Petitioner notes that Saccente's opposition papers discuss how he refused to accept the $1,000,000 loan from petitioner's father but did not discuss that he accepted $250,000 on the loan which he has not repaid. Petitioner avers that he was fraudulently induced to deposit the $25,000 to Titan because, "Saccente verbally agreed to the loan then reneged and refused to sign the loan document."

Petitioner denies that the mechanics he hired have increased costs for repairs and maintenance and notes that there is no evidence of the alleged sabotage. Petitioner claims that the settlement agreement between USWU is merely purported considering that it is signed by "Titan Concrete Corp. a/k/a Titan Concrete, Inc." which petitioner alleges is an entirely different entity than TITAN CONCRETE, INC. Petitioner asserts that the $700,000 loan from Jett Funding was

in contravention to a recommendation made by Hon. Gretchen Walsh on Feb 10, 2023, that respondents obtain petitioner's approval for any big purchase and hard money loan. Finally, petitioner reaffirms that although Saccente asserts that he has never taken cash from COD jobs, there is no indication of cash being deposited from 2022 to date on Titan's bank records.

Significantly, Petitioner notes that Titan's Bronx rent is $56,276 per month and was unpaid for March and April of this year. Petitioner asserts that Titan's inability to satisfy this basic expense indicates that there must be a lack funds or misallocation of funds by respondents. Petitioner's concern is that Titan will have no funds to purchase petitioner's 50% interest, as demonstrated by Titan's struggle to pay its operating expenses, payroll, and other expenses.

Based on the foregoing, the record does not justify the appointment of a temporary receiver pursuant to BCL §1113. Again, it bears repeating that the appointment of a receiver is a remedy which courts should use sparingly since it is tantamount to "the taking and withholding of possession of property from a party without an adjudication on the merits" (*Hahn* at 629; *S.Z.B. Corp.* at 679). Indeed, the drastic remedy of appointing a receiver should only be awarded when it is absolutely necessary to protect the parties to the action and their interests (*In re Armienti* at 661; *S.Z.B. Corp.* at 679), and only when the proponent seeking the appointment of a receiver establishes that absent a receiver, there is "danger of irreparable loss" (*In re Ar*mienti at 661).

Here, while the record is replete with events which depict Titan as a company in the midst of financial hardship, respondents' evidence, which provides satisfactory explanation for many of the alleged wrongs alleged by petitioner, creates a record bereft of sufficient evidence that Titan is insolvent, that assets are being diverted, or that assets are being wasted so as to warrant the drastic remedy of a receivership. Only in conclusory form, does petitioner aver that there is a threat of self-dealing and diversion. Indeed, the allegations of certain unaccounted credits and certain loans

that have to yet to be repaid, alone do warrant a receiver because, as detailed above, "the mere misconduct of officers or directors will not justify appointment of a receiver absent demonstration that the appointment is necessary to preserve the property or rights of stockholders (*Fenn v W.M. Ostrander*, 132 AD 311, 313 [1st Dept 1909]). Moreover, on this record, where Titan's business activities have been consistently managed, in large measure, by Saccente since its inception, there is insufficient evidence that he is a threat to the company's continued viability. Hence, it would be improper to deprive him of his property absent a determination on the merits. Inasmuch as petitioner argues that the Court should consider Saccente's criminal history as evidence militating in favor of a receiver, namely, Saccente's arrest for using Titan trucks to steal water from a city fire hydrant, it is hard to fathom how this is, in any way, tantamount to irreparable loss. Lastly, while the pending judgments against Titan are also significant, Saccente has established that these judgments are being addressed and settled so as not to render the company insolvent. With respect to the alleged tax liens totaling $92,354.70, during oral argument of the instant motion held on May 1, 2023, respondents orally asserted that the tax debt has been fully paid and provided petitioner with evidence thereof. Accordingly, petitioner has failed to establish that a receiver is necessary to protect his interest in the corporation against a danger of irreparable loss.

PETITIONER'S MOTION TO POST A BOND

Petitioner moves pursuant to BCL §1118, 1113, and 1115, directing respondents to post a bond or other security in connection with the proposed elective purchase in an amount of at least $10,000,000 dollars.

BCL §1118 provides:

> (a) In any proceeding brought pursuant to section eleven hundred four-a of this chapter, any other shareholder or shareholders or the corporation may, at any time within ninety days after the filing of such petition or at such

> later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value. . . (b) If one or more shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers or the petitioner, may stay the proceedings brought pursuant to section 1104-a of this chapter and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed . . . (c)(2) The court, in its discretion, may require, at any time prior to the actual purchase of petitioner's shares, the posting of a bond or other acceptable security in an amount sufficient to secure petitioner for the fair value of his shares.

"The primary purpose of the bond requirement under § 1118(c)(2) is to protect minority shareholders against tactical fluctuations in their share prices during the valuation process" (*In re 212 E. 52nd St. Corp.*, 185 Misc. 2d 95, 99 [Sup. Ct. 2000]). Thus, courts have considered factors such as a petitioner's serious allegations of waste and mismanagement, likelihood of the waste and mismanagement rendering the corporation worthless, a party's financial capability to purchase the petitioner's shares, drastic differences in opinion on the value of the shares, and pending lawsuits (*In re Kastleman*, 234 AD2d 181, 182, [1st Dept 1996] ["Business Corporation Law § 1118 (c)(2) provides for the posting of a bond in such circumstances in the court's discretion. In light of petitioner's serious allegations, the rather questionable financial capability of William Shalom to carry through on his offer to purchase petitioner's shares, the parties' drastically different opinions as to the value of petitioner's shares, the pendency of several lawsuits against William Shalom and his family and the likelihood, if petitioner's allegations of waste and mismanagement are substantiated, that the corporation would be worthless, the IAS Court's denial of petitioner's application was improvident."]). Significantly, the First Department has granted the posting of a bond pursuant to BCL §1118(c)(2) to secure a petitioner's fair value of their shares where the

appointment of a temporary receiver would be too extreme or inappropriate in light of the circumstances (*Application of Androtsakis*, at 471 "[I]t is well recognized that courts of equity exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits. After reviewing the record, in view of respondent's election to buy out petitioners, we find an undertaking in the amount of $250,000.00 sufficient to secure petitioners for the fair value of their shares" [internal citations and quotation marks omitted].; *see also In re Application of Chiovitt* at 413–14). In fact, in *In re Application of Chiovitti*, a shareholder in a closely held corporation moved for dissolution of the company on the ground that the other two principals froze him out of management. Thereafter, the other two principals elected to purchase petitioner's shares pursuant to BCL §1118(a). Petitioner then moved for an appointment of a temporary receiver (*Id*.). The IAS court granted the appointment of a receiver finding insufficient information to determine the value of petitioner's shares (*Id*.). However, even though a federal indictment against the principals supported petitioner's allegations of misappropriation of corporate assets, the First Department reversed the supreme court's order appointing a temporary receiver and found that a $500,000 bond would be sufficient to protect petitioner's interests (*Id*. ["Because we find the $500,000 surety bond adequate to protect Chiovitti's interests in Alpine, approximated at $140,000, as reflected by the financial statements submitted by Chiovitti at the receivership hearing, we reverse the order directing the appointment of a temporary receiver. In circumstances similar to these, this Court has consistently refrained from appointing pendente lite receivers, because such action amounts to a taking without adjudication on the merits."] [internal citations omitted]).

In support of his motion, petitioner contends that Saccente's diversion of corporate assets, mismanagement, fraudulent conduct, and financial impropriety together with Saccente's criminal

history, require the posting of a bond in connection with the proposed elective purchase in an amount of at least $10,000,000 to secure the fair value of petitioner's shares.

In support of his contentions, petitioner submits the affidavit of Joseph Maddaloni (Maddaloni), maintenance manager from November 2022 to February 2023, dated March 1, 2023, wherein he states that he was responsible for maintaining maintenance records, assigning truck repairs to mechanics, and ensuring a positive repair with the proper tools and parts. Maddaloni avers that many of his requests for repairs were ignored or denied due to Titan's management claiming that the company could not afford to purchase items. Petitioner offers this as further evidence that Titan's inability to afford such items means that Saccente is diverting corporate assets.

Petitioner avers that a $10,000,000 bond is warranted, considering petitioner's $6,000,000 investment and $2,000,000 loan that have yet to be repaid. Petitioner also bases the amount of the bond upon Titan's tax returns from 2018-2021 indicating that Titan grossed more than $88,000,000.

In opposition, respondents allege that petitioner's lack of evidence of the fair value of its share, Titan's financial position, and Titan's financial obligation and pending litigation as of the valuation date, show that petitioner's shares "are likely worthless or have minimal value." Respondents provide, *inter alia*, the affidavit of Martin Yonks (Yonks), shareholder of R. Yonks & Associates, Inc., accountants for Titan since May 2012, in which he states: The "undeposited funds" of $6,657,724.56 merely represents a failure to complete bank reconciliations. As of December 31, 2022, the cash available in Titan's bank accounts totals $213,179. As of December 31, 2022, Titan had an accounts receivable balance of $2,773,984.64. As of December 31, 2022, Titan had an accounts payable balance of $4,183,402.82, including sales tax payable to IRS in the

amount of $567,619. Titan's retained earnings and equity based on its 2021 tax return is negative $3,607,656. In determining the fair value of petitioner's shares, respondents consider Titan's financing and pending lawsuits. Although respondents allege that it has turned a corner as a "profitable and viable operation," Saccente avers that Titan operated at a loss including negative earnings and equity of over $3.6 million at the time petitioner invested in the company and purchased his shares.

Saccente avers that Titan's $88,000,000 gross income cannot alone be used to calculate the company's valuation. Neither can the fact that the business is engaged in litigation be used as evidence of waste or fraud, "especially where, as here, those litigations relate to time periods prior to Petitioner's involvement in the Company and the Company anticipates having more than enough funds to pay the legitimate claims against it." Thus, respondents further aver that, unlike *In re Kastleman*, here, claims of mismanagement or waste have been rebutted, petitioner failed to make a showing of the fair value of his shares, and has failed to show that Titan lacks the ability to pay for those shares. Saccente also asserts that petitioner's allegations of financial impropriety lack evidentiary support and the parties' difference of valuations, alone, does not justify the posting of a bond.

In reply, petitioner submits, *inter alia*, his affidavit, in which he notes that the Yonks affidavit was created by accountants who are not "on-site" accountants, but provide after-the-fact accounting services based on documents and explanations provided by their client. Thus, petitioner contends, Yonk's assertions are merely based on a general ledger and other materials provided by Titan with none of the relevant documents annexed thereto.

Furthermore, petitioner avers that Titan has grossed $88,000,000 as shown by its tax return from 2018-2021 and yet is still defaulting on its financial obligations. Petitioner also reiterates

that a bond in the amount of $10,000,000 is warranted based upon the petitioner's investments and is necessary to protect the fair value of petitioner's interests.

Based on the foregoing, and as discussed with respect to petitioner's application for a receiver, while there is insufficient evidence of irreparable harm sufficient to warrant a receiver, here, the record does support the conclusion that Titan is less than financially solvent. Accordingly, the petitioner is entitled to some measure of protection given the uncertainty of Titan's financial status and respondent's representation that petitioner's shares are worthless. Indeed, even though respondents aver that while Titan is facing a financial upturn and continues as a "profitable and viable operation," they nevertheless concede that Titan very recently faced a period of low cash flow, a "crisis point" in December 2022, and that pending litigation has lowered the value of the company and affected the company's ability to use its bank accounts. Respondents also concede that as of 2022, its earnings and equity were in the negative. As borne by the record, Titan's lawsuits expose the company to significant judgments and fees, Saccente may have performed illegal conduct with the company's name, Titan is defaulting on rent and other financial obligations, and Titan is incurring debt through third party loans and financing to address its financial incapabilities. While this alone is unlikely to lead to Titan's demise, it certainly does little to help its value. Accordingly, in accordance with the holding in *In re Kastleman*, on this record, where there is some evidence of waste and mismanagement, which could rendering Titan worthless, here an order directing respondents' to post a bond is warranted. Although the record makes it difficult to value Titan so as to calculate the amount of the bond, because the purpose of the bond is to protect petitioner's interest until such time as he is paid for the reasonable value of his shares, a bond in the amount of $8,000,000 is not unreasonable. This sum is roughly 10% of sums that the record evinces Titan has grossed between 2018-2022. It is hereby:

ORDERED that respondents post a bond in the amount of $8,000,000 within 30 days of service of this order upon them, with Notice of Entry. It is further

ORDERED that petitioner serve this Decision and Order with Notice of Entry upon all respondents within 30 days hereof.

This constitutes the Decision and Order of this Court.

Dated:
05/22/23

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Hon.
FIDEL E. GOMEZ, J.S.C.