To Be Argued By:
Jeffrey D. Buss

Bronx County Clerk's Index Nos. 17384/07, 300513/10 and 83796/10

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Index No. 17384/07

In the Matter of the Application of

HUGH W. CAMPBELL, as the Preliminary Executor of the Estate of EMMA C. BRISBANE,

Petitioner-Appellant,

against

For the Judicial Dissolution of

MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Respondent-Respondent.

(Additional Caption on the Reverse)

BRIEF FOR RESPONDENT-RESPONDENT/ DEFENDANTS-RESPONDENTS

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Index No. 300513/10

HUGH W. CAMPBELL as the Executor of the Estate of EMMA C. BRISBANE,

Plaintiff-Appellant,

against

JEFFREY D. BUSS, ESQ. and JAMES H. ALSTON, JR.,

Defendants-Respondents.

Index No. 83796/10

JAMES H. ALSTON, JR., and MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Third-Party Plaintiffs,

against

HUGH W. CAMPBELL, Individually,

Third-Party Defendant.

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted by Respondents McCall's Bronxwood Funeral Home, James H. Alston, Jr., and Jeffrey D. Buss Esq. in opposition to Appellant's appeal of a December 21, 2016 Decision and Order of the Honorable Elizabeth A. Taylor, (ROA 8-16).

This case arises out of Appellant's unwarranted effort to dissolve a thriving Bronx business that has existed for more than fifty (50) years.

The Court below properly granted Respondents' motion for summary judgment dismissing Appellant's Petition for judicial dissolution because a 1998 Stockholder's Agreement, [ROA 49-67] provides a feasible alternative to dissolution and a fair return to Appellant's Estate. The Court below found that the 1998 Stockholders Agreement provided a preferred and predictable mechanism for the resolution, sale and valuation of Appellant's stock interest in McCall's Bronxwood Funeral Home.

Appellant's argument that the written shareholders agreement is not applicable to this situation because Appellant is not seeking to sell or transfer the decedent's interests in the funeral home is disproven by

reading just three (3) pages in the voluminous, 1231 page record, in the following order, [ROA 161, 54 and 52].

Page 161 of the ROA is a portion of a decision by the Surrogate's Court, Westchester County which expressly found that Appellant must sell the Estate's stock in the funeral home to comply with the decedent's will. According to Surrogate Scarpino:

> ORDERED ADJUDGED AND DECREED that the construction and effect of Article Eighth of the decedent's Last Will is that the decedent's intent was to permit her executor [Appellant Campbell] to distribute the proceeds from the sale of her interest in a certain funeral home [Respondent Bronxwood] directly to the Emma C. Brisbane Trust, after using the first $200,000 of proceeds to fund a charitable trust...

Thus, all of Appellant's arguments that it is not engaged in a sale or transfer of the Decedent's stock interest in Respondent Bronxwood are untrue and Appellant is estopped from making any such argument.

Second, Page 54 contains paragraph 8 of the 1998 Stockholders Agreement entitled "Stock Purchase Upon Death". Subsection (b) of paragraph 8 provides as follows:

> (b) In the event the above mentioned legatee/trustee/beneficiary wishes to sell or transfer their shares of stock, then said sale or transfer shall be in accordance with Paragraph 7 above.

Thus, Appellant's argument that the Stockholder's Agreement does not control a sale or transfer upon the death of a shareholder has no merit.

Third, Pages 52 and 53 contain paragraph 7 of the 1998 Stockholder's Agreement which sets forth a detailed mechanism for the sale, transfer or disposition of the decedent's shares. Respondent followed those procedures when it tendered $393,048 to Appellant in September of 2009 on June 1, 2991

As such, Justice Taylor's well reasoned decision should be affirmed.

QUESTIONS PRESENTED

1. Did the trial court properly find that a 1998 Stockholder's Agreement provided an adequate and fair alternative to judicial dissolution of an on-going business? Yes, the shareholder's agreement, voluntarily entered into by the Corporation's shareholders, presented a just and fair mechanism to value and pay for each shareholder's interests in the Corporation.

2. Did the trial court correctly determine that Appellant suffered no damage by Respondent's tender of the contractually agreed upon purchase price to Appellant? Yes, the trial court correctly

determined that Appellant suffered no harm by Respondent's tender of the contractually agreed upon purchase price of $393,048 to Appellant, and properly dismissed Appellant's unsupported claims of misconduct.

FACTS

The underlying Petition for Judicial Dissolution [ROA 68-78] arises out of the ownership and operation of a thriving Bronx business, Respondent "McCall's Bronxwood Funeral Home, Inc." (the "Funeral Home"). The Funeral Home has been in continuous operation for more than 50 years, having repeatedly survived the lives of its founders, paying all of its vendors, employing Bronx residents, and servicing Bronx families for generations.

Pursuant to a 1981 Stockholders' Agreement among founding stockholders Herbert T. McCall, Emma Brisbane and James H. Alston, Sr., each individual would own an equal one-third (1/3) interest in the Corporation. [ROA 330-340]. At that time, Respondent James Alston, Jr. (hereinafter "Defendant" or "Mr. Alston") was named Administrator of the Corporation. He has remained in that capacity for more than 37 years.

Included in the 1981 Stockholders' Agreement was a provision entitled "STOCK PURCHASE UPON DEATH". This provision established in pertinent part that upon the death of McCall, Alston Sr., or Brisbane, the Corporation would purchase from the decedent's personal representatives all of the shares of capital stock of the Corporation owned by the decedent. [ROA 331].

Mr. McCall died in 1985. In his will, he left his shares in the Bronxwood Funeral Home to Emma Brisbane. No judicial dissolution took place. Instead, in accordance with the express terms and requirement of paragraphs seven, nine, ten and eleven of the 1981 Stockholders' Agreement, Ms. Brisbane entered into a written agreement to sell the decedent's stock interest to the Corporation. [ROA 341-347]. Hugh W. Campbell, the Appellant in this dissolution action, represented Ms. Brisbane in that transaction. [ROA 341-347].

In 1987, the Corporation entered into a new Stockholders' Agreement evidencing the fact that the remaining shareholders were Emma Brisbane and James H. Alston Sr. [ROA 348-367, November 2, 1987 Stockholders' Agreement]. The 1987 Agreement was drafted by Mr. Campbell and contained a similar provision providing for the voluntary purchase of a decedent's interest by either the Corporation

or the remaining shareholder, [ROA 354, entitled "Right of Corporation to Purchase Shares upon Death of Stockholder"].

In 1993, the parties entered into an updated, third version of a Shareholders' Agreement. That Agreement, like the two preceding agreements, was primarily drafted by Mr. Campbell and contained similar provisions providing for the voluntary repurchase of a decedent's interest in the Corporation, [ROA 368-389, and 1993 Stockholder's Agreement, paragraphs 8, 9, and 10].

In 1995, James H. Alston, Sr., Respondent's father, passed away, devising his fifty percent interest in the Corporation to his son, Respondent James H. Alston, Jr. At that time, Emma Brisbane stated that she intended to buy James H. Alston, Sr.'s interest in the Corporation in accordance with the terms of the 1993 Stockholders' Agreement, [ROA 390-391, letter dated September 22, 1995 from Emma Brisbane to Respondent James H. Alston].

In a subsequent conversation, Ms. Brisbane stated that in lieu of purchasing James H. Alston, Sr.'s shares she would consider allowing Mr. Alston to continue as Administrator and as the owner of the fifty percent interest in the Corporation. She suggested that Mr. Alston

write to her attorney, Mr. Campbell, to accomplish this result. The result was the 1998 Stockholder's Agreement. [ROA 24].

The 1998 Stockholder's Agreement was created between Mr. Alston, Ms. Brisbane and McCall's. [ROA 49-67]. The 1998 agreement, similar to the 1981 agreement, the 1987 agreement and the 1993 agreement, contains provisions governing the sale or transfer of stock upon the death of a shareholder. Specifically, paragraph eight, entitled "STOCK PURCHASE UPON DEATH" provides that:

> (a) Either stockholder shall be permitted to dispose of their shares in the corporation, in their will or trust, provided the legatee/beneficiary of said shares is a relative of decedent by blood or marriage, or trustee of said relative. In the event of the death of either stockholder, the personal representative(s) of the deceased stockholder shall immediately, upon issuance and receipt of Letters Testamentary or Letters of Administration, deliver to McCall's and to the remaining stockholder, a copy of such Letters.
>
> (b) In the event the above mentioned legatee/trustee/ beneficiary wishes to sell or transfer their shares of stocks, then said sale or transfer shall be in accordance with Paragraph 7 above.

[ROA 54].

Paragraph 7 of the 1998 Agreement provides:

> (a) If Alston, Jr. or Brisbane desires to sell his or her shares of stock (hereinafter referred to as "The Selling Stockholder") he or she shall be obliged to give notice of such intention to McCall's and to the other stockholder,

> which notice shall contain an offer to sell all of his or her shares of stock to McCall's, and McCall's shall have the right within thirty (30) days after receipt of such notice to make an election to purchase, and The Selling Stockholder shall sell all shares of McCall's owned by him or her at the purchase price determined pursuant to the terms set forth in this Agreement.

[ROA, 52-54].

Read together, these provisions indisputably require that, if any shareholder, including an Estate "wishes to sell or transfer their shares of stocks" it must provide written notice of the intention to sell to both the Corporation and the other shareholder, and offer to sell all of the shares of stock to the Corporation at the price provided for in the Agreement. The Corporation and/or the remaining shareholder then have an exclusive right to purchase the shares.

The agreement provides in detail for the calculation of the price of the stock,[1] the manner and time period over which it must be paid,[2] any Estate's obligation to create an escrow fund to cover tax liabilities,[3] and that disputes regarding the agreement are subject to binding arbitration.[4] [ROA, 63].

Ms. Brisbane died in 2005, naming Appellant Campbell as executor of her estate.

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[1] Paragraphs seven, eight, nine, and ten provide that the Corporation or the remaining shareholder may acquire the decedent's interest by making an initial payment of twenty-five percent of the value of the decedent's shares. The balance shall be payable over a seven and one-half year period, in ninety equal monthly installments, at the prime interest rate in effect on the date of death of the selling stockholder. Paragraph nine provides that the purchase price of the stock shall be determined by calculating the arithmetic average of the net income of McCall's for the five fiscal years immediately preceding the date of death of a selling shareholder or the date upon which the selling shareholder gives notice of its intention to sell, and by multiplying the quotient obtained thereby by four. The agreement further provides that one half of the value calculated pursuant to this formula shall be assigned to the value of each shareholder.

[2] Paragraph ten of the Shareholder's Agreement contains detailed provisions regarding the financing of the purchase price, the creation of a sinking fund, the calculation of a "Surplus" for the purpose of effectuating a purchase, the utilization of insurance proceeds, the recording of a mortgage, the treatment of a decedent's draw, the execution of promissory notes, the calculation of "Net Income" and the adjustment of the payment terms if the Corporation's Net Income should fall below a negotiated amount, a limitation on the issuance of additional shares, and a requirement that payment in full be made if the Corporation is sold during the payout period, [ROA 55-59].

[3] Paragraph 11 of the 1998 Agreement establishes an "Escrow Fund" to be funded by the decedent's estate for the payment of potential tax liabilities which may be assessed during the three-year period follow an election to purchase, [ROA 59-60].

[4] In addition, paragraph 20 of the 1998 Agreement provides that any dispute between the shareholders, or relating to any issue arising out of the Agreement, shall be resolved by binding arbitration. [ROA 63].

In her will, Ms. Brisbane appointed Appellant as Executor of Ms. Brisbane's Estate, and required that the stock interest be converted to a monetary sum and split among various trusts, foundations and legatees.

These provisions constitute a disposition of her interest in the funeral home, and demonstrate her wish to sell or transfer the stock as contemplated by the plain language of the Stockholders' Agreement. [ROA 152-158].

If there were any doubt, it was laid to rest by a 2008 Surrogate's Court's decision holding that:

> ORDERED ADJUDGED AND DECREED that the construction and effect of Article Eighth of the decedent's Last Will is that the decedent's intent was to permit her executor to distribute the proceeds from the sale of her interest in a certain funeral home directly to the Emma C. Brisbane Trust, after using the first $200,000 of proceeds to fund a charitable trust.

[ROA 159-161, at 161].

In 2007, rather than give notice to the Corporation with an offer to sell the Estate's shares as required by the Stockholders' Agreement, Appellant filed a Petition for dissolution with the Bronx County Supreme Court.

Respondent answered, asserting affirmative defenses including that the 1998 Stockholders' Agreement controls and provides Appellant with a full and fair return on Ms. Brisbane's investment.

In September 2009, Respondent tendered the sum required by the 1998 Stockholders Agreement to the Estate. Appellant rejected the tender. In retaliation, Appellant commenced a new action against Defendants James Alston, Jr. and his attorney, Jeffrey D. Buss, personally, alleging that Appellant had somehow been harmed by the offer and claiming damages of triple the offer. This action, assigned Index Number 300513/2010, is patently frivolous, as Appellant can show no harm or damage resulting from the offer to purchase. Further, as noted by the Court below "plaintiff [Appellant] suffered no damages or harm as a result of [Respondents] alleged misconduct. In opposition, [Appellant], who did not meaningfully address those causes of action, failed to raise a triable issue of fact", [ROA 15-16].

On December 21, 2016, the Honorable Elizabeth Taylor, J.S.C. Bronx County, granted summary judgment to Respondent McCall's Bronxwood Funeral Home, dismissing Appellant's Petition for Judicial Dissolution in the proceeding bearing index number 17384/07, and

dismissing Appellant's claims against Respondents Alston and Buss in the proceeding bearing index number 300513/2010, [ROA 8-16].

ARGUMENT

The Petition below sought the extraordinary, and utterly unwarranted, dissolution of a thriving Bronx business, contrary to a contractual agreement between the parties, contrary to the Business Corporation Law provisions describing when dissolution should be granted, and contrary to the public interest of the Bronx community that McCall's Funeral Home has served for more than fifty (50) years.

It is a naked attempt to circumvent the terms of the contract between the parties, pursuant to which McCall's Funeral Home is entitled to buy back Appellant's shares for $393,048.00.

McCall's tendered the required amount to Appellant, who refused to accept it. Rather, Appellant wants to dissolve the corporation, throw employees and the other stockholders out of work, and sell the corporation's property and assets in the belief that he will obtain greater money than what the parties contractually agreed to accept in the 1998 Stockholders Agreement. This is not permitted by the contract between the parties and is not authorized under Business Corporation Law § 1104-a, under which the Petition was filed.

Despite four years of extensive discovery, hundreds of demands, and multiple inspections of Respondents' premises, computer systems, and documents, Appellant failed to uncover evidence sufficient to overcome the Stockholders' Agreement. Instead, discovery has demonstrated that Appellant Hugh W. Campbell commenced and prosecuted this action as part of a premeditated scheme to churn and dissipate the estate of Emma Brisbane to his own personal benefit, and to the detriment of her heirs.

Mr. Campbell concedes that he drafted both Ms. Brisbane's will and the 1998 Stockholders' Agreement. The Will he drafted appointed him Executor. In the action below he contends that the two documents he drafted are contradictory. Appellant has used an alleged contradiction of his own creation to spawn more thirteen (13) years of contested proceedings in the Bronx Supreme Court and the Westchester County Surrogates' Court. The bill for this unnecessary and abusive litigation is paid not by Mr. Campbell, but by Ms. Brisbane's heirs. Justice Taylor's decision was not only correct on the law; it was also a substantial step forward in bringing this matter to a fair and just conclusion.

A plain reading of the Stockholders' Agreement and the Last Will and Testament of Emma Brisbane demonstrates that the documents are not contradictory. Read together, they demonstrate beyond a doubt that: (1) Ms. Brisbane and/or her Estate have demonstrated a "wish to sell or transfer the shares"; (2) the shares are therefore required to be offered to the Corporation at the price provided in the Stockholders' Agreement; and (3) the Corporation wishes to exercise its option to purchase the shares.

If there were any doubt of the Estate's "wish to sell or transfer the shares," that doubt was laid to rest ten (10) years ago with the Surrogate's Court Decree of June 11, 2008 that the decedent intended the sale of the Estate's interest in the Corporation

The 1998 Stockholders' Agreement provides a full and fair return to the Appellant of her at best, $10,000 investment and establishes that dissolution is not the only means by which a full return may be achieved.

Further, the circumstances alleged in the Petition were known to Ms. Brisbane when she negotiated and entered into the 1998 Stockholders' Agreement. That agreement represented an accord and

satisfaction of any claims or disputes she may have had with Respondent in 1998.

In addition, Ms. Brisbane received a vacant lot adjacent to the funeral home at 4035 Bronxwood Avenue, Lot 73 Block 4852, Bronx New York, in consideration of the agreement. [ROA 65, paragraph 23]. That real property is now worth millions of dollars and represents partial performance of the 1998 Stockholder's Agreement. Her estate may not renege on that agreement after accepting this real property and seek dissolution of the Corporation to avoid the terms of the Agreement.

Finally, Appellant's claims against James Alston, Jr. and his attorney arising out of the tender of $393,048.00 to the estate are simply frivolous. Appellant does not and cannot demonstrate any harm from the offer of $393,048.00. What is clear is that both the dissolution action and the action against Alston and Buss are without basis in law or fact. As noted by Justice Taylor in her decision below, Appellants suffered no harm by being offered $393,048, failed to meaningfully address this issue in the record below, and failed to raise a trial issue of fact, [ROA 16].

STANDARD FOR SUMMARY JUDGMENT

Pursuant to CPLR § 3212, a motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action(s) shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of the movant.

The proponent of a motion for summary judgment is required to make a prima facie showing of their entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 [1994]; Falah v. Stop & Shop Companies, Inc., 41 A.D.3d 638 [2d Dept 2007]; Paulin v. Needham, 28 A.D.3d 531 [2d Dept 2006].

Here, as demonstrated in record before the trial court, there are no disputed issues of material fact, and Justice Taylor correctly granted summary judgment to Respondent and Defendants Alston and Buss.

I. The Court Below Correctly Dismissed The Petition For Judicial Dissolution Because The 1998 Stockholders' Agreement Controls And Provides A Feasible And Fair Means Of Satisfying Shareholder Expectations

The Petition for Judicial Dissolution is a naked attempt to avoid the consequences of the fully negotiated and partially performed 1998

Stockholders' Agreement pursuant to which the Estate is entitled to receive $393,048 for its shares.

It is well settled in New York courts that written shareholders' agreements should be enforced even where there is a loss to the selling shareholders. Allen v. Biltmore Tissue Corp., 161 N.Y.S.2d 418 (1957). So long as the selling shareholder gets what he is entitled to receive under the shareholders' agreement, courts are reluctant to interfere with the implementation of the agreement, for such interference by the Court would open the door to costly and lengthy litigation and be disruptive of the settled principle that parties may contract among themselves to deal with future events in a predictable manner. Id.

Here, acting with full knowledge of the relevant circumstances, the parties entered into the 1998 Stockholders' Agreement. Discovery made clear that the parties contracted with full knowledge of: (1) the manner in which James Alston, Jr. had managed and conducted the business of the Corporation since 1981; (2) the alleged financial improprieties presented as the basis for the Petition; (3) the probability of their own demise.

This is unsurprising considering that the Corporation owns and operates a Funeral Home. That the owners of such a business would

plan for their own demise is hardly shocking. Further, the corporate history shows that the corporation and its shareholders adopted and used shareholder agreements upon the death of every other shareholder.

Ms. Brisbane knew and understood the consequences of the agreement that she signed, and accepted the transfer of valuable real property in connection therewith in partial performance of the contract. [ROA 65, paragraph 23].

The Agreement clearly provides clearly that if a stockholder, or his or her estate, wishes to sell or transfer shares, it must first offer them to the Corporation at the price provided by the Agreement.

> 7. DISPOSITION OF SHARES DURING LIFETIME
>
> (a) If Alston, Jr. or Brisbane desires to sell his or her shares of stock (hereinafter referred to as "The Selling Stockholder") he or she shall be obliged to give notice of such intention to McCall's and to the other stockholder, which notice shall contain an offer to sell all of his or her shares of stock to McCall's, and McCall's shall have the right within thirty (30) days after receipt of such notice to make an election to purchase, and The Selling Stockholder shall sell all shares of McCall's owned by him or her at the purchase price determined pursuant to the terms set forth in this Agreement.
>
> 8. STOCK PURCHASE UPON DEATH
>
> (a) Either stockholder shall be permitted to dispose of their shares in the corporation, in their will or trust, provided the legatee/beneficiary of said shares is a

> relative of decedent by blood or marriage, or trustee of said relative. In the event of the death of either stockholder, the personal representative(s) of the deceased stockholder shall immediately, upon issuance and receipt of Letters Testamentary or Letters of Administration, deliver to McCall's and to the remaining stockholder, a copy of such Letters.
>
> (b) In the event the above mentioned legatee/trustee/ beneficiary wishes to sell or transfer their shares of stocks, then said sale or transfer shall be in accordance with Paragraph 7 above.

[ROA 52-54].

As the trial court correctly found [ROA 10, 11] Ms. Brisbane, and her Estate, demonstrated an intent to "sell or transfer" the shares. In her Last Will and Testament, Ms. Brisbane indicated her wish to sell or transfer the shares to fund various trusts. [ROA 152-157] As held by the Westchester County Surrogates' Court, such a sale is necessary to accomplish the intent of the Will. [159-161, at 161].

Upon such a "wish," paragraph 8b of the Stockholders Agreement requires that the stockholder or her estate act according to paragraph 7(a). Paragraph 7 (a) requires Appellant to offer the shares to the Corporation and permit it to exercise its option to purchase the shares "at the purchase price determined pursuant to the terms set forth in this Agreement." [ROA 52].

Respondents have demonstrated that they were ready, willing and able to consummate the purchase in accordance with the Stockholders Agreement, and did in fact, tender payment for the shares after due notice to Appellant, [ROA 162-178].

Rather than sell the shares at the price set by the Agreement, Appellant filed the underlying Petition in a deliberate and improper effort to bypass the Stockholders' Agreement he drafted and which the decedent, Ms. Brisbane, knowingly and willingly executed...

II. The 1998 Stockholders' Agreement Affords Appellant A Fair Return

Even if the Court were inclined to look beyond the Stockholders' Agreement, Appellant cannot demonstrate entitlement to dissolution under BCL § 1104-a. The statute requires that the Court exercise discretion in deciding whether to award the "drastic" remedy authorized under this provision, and must consider certain delineated factors. See Gimpel v. Bolstein, 125 Misc 2d 45, 49 [Sup Ct 1984]; Application of Topper, 107 Misc 2d 25, 28 [Sup Ct 1980] ("Despite a finding of 'oppressive' conduct, judicial dissolution of a thriving corporation is a matter of discretion and may not be undertaken lightly.").

One such consideration is whether Appellant may obtain a fair return by means short of dissolution. BCL §1104-a (b) provides:

> (b) The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account:
>
> (1) Whether liquidation of the corporation is the only feasible means whereby the Appellants may reasonably expect to obtain a fair return on their investment; and
>
> (2) Whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the Appellants.

NY BCL § 1104-a.

A Court must deny dissolution where an agreement between the parties provides the Appellant with a fair return on its investment. See Matter of Harris, 118 A.D.2d 646 [2d Dept 1986] (affirming denial of dissolution petition); DiPace v. Figueroa, 223 AD2d 949, 951-52 [3d Dept 1996] ("There is every indication that Di Pace can obtain a fair return on her investment without resort to such a Draconian remedy—which would harm the other shareholders far more than it would benefit Di Pace—by selling her shares to Figueroa and Hoffman, ... by the parties' buy-out agreement and to purchase the shares in accordance therewith.").

The Court below properly exercised its discretion to deny dissolution, following the binding precedent of Matter of Judicial Dissolution of Kemp & Beatley, Inc., 64 NY2d 63, 73 [1984], and Matter of Harris, 118 A.D.2d 646 [2d Dept 1986]", [ROA 14, 15].

The 1998 Stockholders' Agreement provides Appellant with a full and fair return on Ms. Brisbane's investment. This is evident because, during her life, Ms. Brisbane specifically, knowingly and voluntarily negotiated the terms of that agreement, with the assistance of Appellant as her counsel.

The 1998 Agreement is not one of adhesion, to which Ms. Brisbane was bound to agree with no input. Rather, it was aggressively negotiated by her counsel, and she had an equal, if not greater, bargaining position than McCall's and Alston (who was not yet a shareholder at that time). See [ROA 390-392, 1998 Correspondence between the parties].

Further, Ms. Brisbane was not an oppressed minority shareholder. She was a successful businesswoman with multiple assets and resources at her command. She owned fifty percent (50%) of the stock in the funeral home and was financially capable of purchasing it entirely if she so chose upon the death of Alston, Sr. Ms.

Brisbane would not have executed an agreement that did not afford her a fair return, and her counsel, the Appellant in this proceeding, would presumably, not have permitted her to do so.

In 1998, Ms. Brisbane, having been a stockholder in the Corporation since its founding in 1966, with full knowledge of her investment and the history, finances and operation of the Corporation, including the services rendered by Respondent Alston during his tenure as Administrator from 1981 to 1998, agreed to the specific provisions of the 1998 Agreement.

In exchange for the transfer of certain real property and the specific purchase and valuation provisions of the 1998 Agreement, she agreed to permit Mr. Alston to inherit his father's shares and the corresponding 50% interest in the business.

The real property she received in 1998, now worth several million dollars, was transferred to her prior to her sale of any shares. [ROA 65].

At or about the same time she entered the Stockholder's Agreement, Ms. Brisbane drafted a Last Will and Testament that required the sale of the shares. She undoubtedly knew that such sale would be pursuant to the terms of the Agreement she had just executed

with the Corporation and with Respondent James Alston. Presumably, she did so as part of a plan for the orderly administration of her estate.

Appellant's continual prosecution of this action thwarts that intent. Appellant has kept the estate open for more than thirteen (13) years! and kept it embroiled in costly litigation in the Appellate Division, the Bronx County Supreme Court and the Westchester County Surrogates Court.

Ms. Brisbane already obtained a significant return on her investment of $10,000 when she received a parcel of real property now worth several million dollars. Appellant is indisputably entitled to payment under the Stockholders' Agreement of $393,048 more. This is a full and fair return on her investment, as a matter of law. Accordingly, under Matter of Harris, 118 A.D.2d 646 [2d Dept 1986] and DiPace v. Figueroa, 223 AD2d 949, 951-52 [3d Dept 1996], the Court below correctly dismissed the dissolution Petition.

III. Appellant's Allegations Of Fraud, Oppression, Waste Or Looting Are Not Material

As discussed in detail above, where an agreement between the parties provides the Appellant with a fair return on its investment, it is irrelevant whether the Appellant can otherwise demonstrate

entitlement to relief under BCL §1104-a. See Matter of Harris, 118 A.D.2d 646 [2d Dept 1986]; DiPace v. Figueroa, 223 AD2d 949, 951-52 [3d Dept 1996]. As the Court explained in Harris:

> [T]he fact that the Appellant may have been able to demonstrate grounds for dissolution (Business Corporation Law §1104-a [a]), does not necessarily establish that the court abused its discretion in declining to order the involuntary dissolution of the respondent corporation . . . . A review of the record reveals that the Appellant may obtain a fair return on his investment pursuant to the buy-out provisions of the shareholder's agreement. Accordingly, under the circumstances of this case, nisi prius properly denied the dissolution petition.

Matter of Harris, 118 AD2d 646, 647 [2d Dept 1986].

Here, it is immaterial whether Appellant is able to demonstrate entitlement to dissolution, because the 1998 Stockholders' Agreement is a feasible alternative to dissolution whereby the Appellant "may reasonably expect to obtain a fair return on [Ms. Brisbane's] investment." NY BCL § 1104-a. Accordingly, any issues of fact Appellant may have presented to the trial court surrounding the allegations in the Petition allegedly giving rise to a cause of action for dissolution are immaterial on Respondent's motion for summary judgment.

IV. The Accounting Cause Of Action Is Barred By The Statute of Limitations

Appellant's second cause of action below sought an accounting to determine whether or not payment in full was made of a mortgage recorded against the property on April 1, 1986. This claim is barred by the statute of limitations and the doctrine of accord and satisfaction.

First, a proceeding to compel an accounting is governed by a six-year statute of limitations. NY CPLR §213(1); In re Meyer, 303 AD2d 682, 683 [2d Dept 2003]. Here, the subject mortgage provides that payment in full was due by March 1, 1996 (See Exhibit "L"). Thus, any claim that the mortgage was not paid should have been commenced within six years of March 1, 1996, or by March 1, 2002. Accordingly, the accounting claim is untimely and must be dismissed.

Second, where the parties agree to payment of a sum certain in satisfaction of a particular claim, and the payment is made and accepted, future assertion of the underlying claim is barred by the doctrine of accord and satisfaction. 19A N.Y. Jur. 2d Compromise, Accord, and Release § 1; Rein v. Wagner, 49 Misc. 2d 683, 268 N.Y.S.2d 659 (Sup. Ct. 1965) modified, 25 A.D.2d 356, 269 N.Y.S.2d 578 (1966) aff'd, 18 N.Y.2d 989, 224 N.E.2d 728 (1966) ("An accord and

satisfaction is an agreement between two parties under the terms of which an unresolved account is settled by some stipulated payment.").

The 1998 Stockholders' Agreement, signed after a lengthy and acrimonious dispute covering all extant disputes between the parties, constitutes an account stated as to any issues or disputes prior to that agreement. See [ROA, 49-67; 390-391]. The parties entered the 1998 Stockholders' Agreement in full satisfaction of any and all outstanding claims that they may have had against each other.

V. The Trial Court Properly Considered a Prior Pre-Discovery Decision Refusing to Dismiss the Petition and Appellant Has Waived Any Objection to Post Discovery Summary Judgment by Requesting Summary Judgment

Appellant's argument that the Court below failed to consider the issues raised by Justice Barone's 2008 decision is without merit.

Appellants argue that Justice Taylor should have denied Respondents' post discovery motion for summary judgment based on an interim decision of Justice Barone, before discover was conducted, because the pre-discovery decision noted the existence of disputed facts.

Appellant's argument is utter nonsense and would defeat the very purpose of discovery and the use of summary judgment.

Contrary to the arguments made by Appellants, the trial court did consider the issues posed by Justice Barone's pre-discovery decision.

According to Justice Taylor's decision:

> Because the 1998 agreement spells out a procedure and mechanism that provides for a fair return on Brisbane's investment, involuntary dissolution should be denied

[ROA 12, 13].

> In determining whether involuntary dissolution under BCL § 1104-a is warranted, the court must consider (1) whether liquidation "is the only feasible means whereby the Appellant may reasonably expect to obtain a fair return on [her] investment, and (2) whether liquidation...is reasonably necessary for the protection of the rights and interests, of any substantial number of shareholders or of the Appellant" (BCL § 1104-a[b]). "The determination of an application for a judicially ordered dissolution of a closely-held corporation is a matter of discretion and should not be undertaken lightly (Matter of Harris, 118 AD2d 646,647 [2d Dept. 1986]

[ROA, p. 14].

> Here, respondent-defendants-third-party plaintiffs made a prima facie showing that, under the totality of the circumstances, a remedy short or other than dissolution constitutes a feasible means of satisfying both Appellant's expectations and the rights and interests of the other shareholder (Matter of Judicial Dissolution of Kemp & Beatley, Inc., 64 NY2d 63,73 [1984]. The 1998 agreement between Brisbane and Alston, Jr., reflects that Brisbane's expectations and the rights and interests of Alston, Jr., will be vindicated by enforcement of that agreement. Additionally, under the totality of the circumstances,

> Appellant will obtain a fair return on Brisbane's investment under paragraphs seven, eight and nine of the 1998 agreement (see Matter of Harris, 118 AD2d at 647; see also DiPace v. Figueroa, 223 AD2d 949 [3d Dept. 1996])

[ROA, pp. 14, 15].

The express language of the trial Court's decision unequivocally establishes that the issues raised by Justice Barone's prior decision were considered and addressed by Justice Taylor in her well-reasoned decision.

Appellant's argument appears to be that Respondent's motion for summary judgment of the judicial dissolution proceeding should not have been considered by the trial court. Appellant misapprehends the relevant law and the express language of the CPLR.

The Judicial Dissolution action was brought as a special proceeding. Respondent moved to dismiss the proceeding for failure to state a cause of action. The Court denied that motion and ordered that the parties engage in discovery to be followed by a hearing.

Upon the completion of discovery, Respondent McCall's moved for summary judgment under CPLR 3212. This was entirely proper under the CPLR. The trial court, after considering and specifically referencing the voluminous documentary evidence, [ROA, 13,14, and 15] including business records, financial records, sworn deposition

testimony, transcripts, affidavits and prior decisions of the Court, granted summary judgment to Respondent McCall's dismissing the involuntary dissolution petition.

In so doing, it considered the evidence, and found that no disputed issue of material fact existed. The Court also correctly noted that "Appellant-Plaintiff-third-party defendant does not take issue with the valuation arrived at by respondent-defendants-third-party plaintiffs by employing paragraph 9 of the 1998 agreement, [ROA p. 15]

The Court also noted that Appellant "argues that it is entitled to [summary] judgment as a matter of law on the involuntary dissolution petition", [ROA p. 13, see also ROA p. 552, "Second Wilson Opposing Affidavit", dated April 29th, 2013, at page 16, where Appellant's counsel requests the following relief:

> "4. Award summary judgment to Petitioner [Appellant] pursuant to 3212 (b) that Petitioner [Appellant] has shown, as a matter of law, that he is entitled to summary judgment..."].

As such, Appellant expressly sought summary judgment, thereby waiving any argument that the trial court should not have granted summary judgment to Respondents.

VI. The Trial Court Properly Granted Summary Judgment To Defendants Alston And Buss In The Second Action Below

Where a plaintiff has not been harmed, the Court lacks jurisdiction to hear his complaint, and must dismiss it. Ovitz v. Bloomberg L.P., 18 NY3d 753, 758 [2012] (affirming dismissal for lack of jurisdiction where plaintiff suffered no harm or damage). As the First Department has succinctly explained, "If there are no damages, there can be no cause of action." Zletz v. Outten & Golden, LLP, 18 AD3d 322, 323 [1st Dept 2005].

Appellant-Plaintiff's claim is unintelligible, but boils down to an assertion that he was somehow harmed by the offer of $393,048.00, which he refused. [ROA 84-103]. It is undisputed that no money changed hands. Absent an allegation of loss or damage, the Court must dismiss the claim for lack of jurisdiction.

Tellingly, Appellant failed to "meaningfully address" the merits of its frivolous claim, or to show how it was injured, and as the trial court properly found "failed to raise a triable issue of fact", [ROA 15,16].

CONCLUSION

The December 21st 2016 Decision and Order of the trial court is well grounded in the law and supported by the facts. It represents a fair and judicious resolution of a long standing dispute that should not be reconsidered or overturned.

The Stockholders' Agreement controls here, as the documentary evidence and Appellants' conduct plainly demonstrate a wish and an intention to sell the Estate's shares. Further, the Stockholders' Agreement is a complete defense to the dissolution petition, because it affords Appellant a full and fair return on Ms. Brisbane's investment in the Corporation.

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Finally, the action against Respondents Alston and Buss individually was properly dismissed by the trial court and should not be overturned. Appellant failed to establish how the tender of $393,048 caused Appellant any harm, or to offer any meaningful opposition to Respondents' motion for summary judgment.

Dated: August 8, 2018
Yonkers, New York

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