To be Argued by:
KEVIN R. LELONEK
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

Docket Nos.:
CA 23-00451
CA 23-01367

In the Matter of the Application of

MATTHEW KAVANAUGH, JAMES KAVANAUGH and HELEN KAVANAUGH for the Judicial Dissolution of Consumers Beverages, Inc. pursuant to BCL § 1104-a,

Petitioners-Appellants-Respondents,

– against –

CONSUMERS BEVERAGES, INC., CORNELIUS KAVANAUGH a/k/a Neil Kavanaugh, MARTHA KAVANAUGH and LAWRENCE M. KAVANAUGH, JR.,

Respondents-Respondents,

– and –

MARY ELLEN KAVANAUGH,

Respondent-Respondent-Appellant.

BRIEF FOR PETITIONERS-APPELLANTS-RESPONDENTS

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QUESTIONS PRESENTED

1. Did Special Term err in dismissing Matthew and James' claims for common law dissolution of Consumers Beverages Inc. based on Neil's termination of thier forty (40) plus years of employment at Consumers?

Proposed Answer: Yes.

2. Did Special Term err in dismissing Matthew and James' claims for dissolution under New York Business Law section 1104-a(a) based on a lack of standing where Neil did not submit any proof that Matthew and James' voting share certificates had been properly replaced with certificates of non-voting shares?

Proposed Answer: Yes.

3. Did Special Term err in dismissing Matthew, James, and Helen's claims for statutory dissolution based on Neil's looting, waste, and diversion of corporate assets?

Proposed Answer: Yes.

4. Did Special Term err in finding that Helen has an adequate alternative remedy to dissolution without first holding a hearing?

Proposed Answer: Yes.

5. Did Special Term err in finding that the Petitioners' other lawsuits provide an adequate alternative remedy to dissolution?

Proposed Answer: Yes.

PRELIMINARY STATEMENT

This appeal arises from the dismissal of the Verified Petition for dissolution of Consumers Beverages, Inc. ("Consumers") pursuant to New York Business Corporation Law ("BCL") section 1104-a and New York common law. The Petitioners are Matthew Kavanaugh ("Matt"), James Kavanaugh ("Jim"), and Helen Kavanaugh ("Nell") (sometimes collectively referred to as "Petitioners").

Petitioners' assertion of a claim for oppressive conduct is the culmination of Neil's tyrannical reign as President of Consumers. This Court has previously encountered Neil's selfish and unlawful conduct toward his siblings and fellow shareholders when it struck down Neil's surreptitious and greedy attempts to swindle Mary Ellen and Martha out of their ownership interests in both Consumers and Kavcon Development LLC ("Kavcon"). *See Kavanaugh v. Kavanaugh*, 200 A.D.3d 1576 (4th Dep't 2021) (rendering null and void Neil's purported purchase of Mary Ellen and Martha's interests); *Kavanaugh v. Kavanaugh*, 200 A.D.3d 1568 (4th Dep't 2021) (same).

Since that time, Neil has upped the ante and retaliated further against Petitioners by, *inter alia*: (1) looting Consumers and Kavcon of more than $2.25 million (R. 113-14); (2) terminating Matt and Jim's employment at Consumers (R. 108, 114-15); (3) amending the leases between Consumers and Kavcon solely in

favor of Consumers (R. 116-17); and, (4) causing Consumers to cease issuing dividends. (R. 967, 995, 1005-06).

A. Neil was removed as Manager of Kavcon.

Following this Court's rulings voiding and nullifying Neil's purported acquisition of Mary Ellen and Martha's membership interests in Kavcon, the members of Kavcon removed Neil as its Manager. (R. 113, 267, 329-30).

By Written Consent of Members dated December 27, 2021, six of Kavcon's seven members agreed to remove Neil as Manager and to appoint Matt in his stead. (R. 267-68). The six members who agreed to remove Neil are: Matthew Kavanaugh, James Kavanaugh, Helen Kavanaugh, Mary Ellen Kavanaugh, Martha Kavanaugh, and Lawrence Kavanaugh Jr. Matt hand delivered the written consent to Neil on December 27, 2021. Neil does not deny receiving the written consent.

B. Neil looted Kavcon and Consumers.

Thereafter, Neil, without authority, caused Kavcon to issue to himself four checks totaling $2,673,912.18. (R. 113-14, 1165-68). The checks were as follows:

Check 6380 – 12/29/2021 - $47,562.84

Check 6381 – 12/29/2021 - $54,644.00

Check 6389 – 12/31/2021 - $1,407,383.34

Check 6390 – 12/31/2021 - $1,164,322.00

On December 30, 2021, Neil caused Consumers to provide the necessary liquidity to Kavcon by loaning $2,250,000.00 to Kavcon, even though Neil did not

have authority to accept such loan on behalf of Kavcon or approval to lend such money from Consumers' board of directors. (R. 1003). Kavcon commenced a lawsuit against Neil to recover these funds. (R. 272-328). The lawsuit is pending in the Erie County Supreme Court, captioned *Kavcon Development LLC v. Cornelius Kavanaugh*, Index No. 801813/2022. Recently, Neil confirmed at his deposition in June of 2023 that the sole purpose of Consumers' loan to Kavcon was so that he could turn around and pay that money to himself.

C. Neil terminated Matt and Jim's employment at Consumers.

Following his removal as Manager, Neil filed an order to show cause in the lawsuit captioned *James Kavanaugh, Helen Kavanaugh, and Matthew Kavanaugh v. Neil Kavanaugh, Martha Kavanaugh, Mary Ellen Kavanaugh, Consumers Beverages, Inc., and Kavcon Development LLC*, index number 801916/2019 (the "Jim Action") seeking a preliminary injunction to enjoin Mary Ellen and Martha from exercising or receiving their Consumers stock and Kavcon membership interests. (R. 335-39). Neil sought to prevent Mary Ellen and Martha from exercising their rights as owners unless and until they repaid Neil the money that he allegedly paid to Mary Ellen and Matha's for their ownership interests. *Id.* In essence, Neil's application for a preliminary injunction sought to circumvent, stay, and avoid the consequences of this Court's Decisions, which imposed no such conditions on its nullification of Neil's attempted purchases.

In response, Kavcon cross-moved for an order compelling Neil and Consumers to turn over Kavcon's books and records, including Kavcon's checkbook and financial documents. (R. 341).

Special Term denied Neil's application for a preliminary injunction from the bench on March 10, 2022 and granted Kavcon's cross-motion to compel the turnover of books and records. (R. 113).

Again, not to be restrained by the rule of law, Neil terminated Matt's employment with Consumers effective March 27, 2022 (discussed further below). (R. 1176).

Two months later, on May 31, 2022, Neil terminated Jim's forty (40) plus years of employment at Consumers on the baseless ground that Jim "stole" a floor scrubber from a Consumers' location (discussed more fully below). (R. 1163). Neil previously placed Jim on paid administrative leave in December 2018 "pending an evaluation of [Jim's] role within the Company moving forward". (R. 1162). Neil kept Jim on administrative leave until May 31, 2022. (R. 108, 1163).

D. Neil altered the leases between Consumers and Kavcon.

When Neil finally produced some, but not all, of Kavcon's leases, those leases contained a purported amendment that benefited Consumers to the detriment of Kavcon. (R. 116, 1179-83).

For example, one of the leases contained a First Amendment to Lease Agreement dated November 1, 2021 (the "Lease Amendment"). (R. 1140). Pursuant to the Lease Amendment, Neil granted Consumers additional rights, including, but not limited to, a right of first refusal and the right to terminate on forty-five (45) days' notice. (R. 116-17). Neither of these terms were previously part of the Consumers-Kavcon leases. Upon information and belief, Neil purported to execute similar lease amendments for all seventeen (17) of the stores Consumers leases from Kavcon. (R. 116-17).

Neil confirmed at his deposition in June 2023 that he back-dated the Lease Amendments for all seventeen (17) Consumers locations leased from Kavcon. Neil's testimony is also confirmed in the meta-data of the native format Lease Amendments which were produced by Consumers. The meta-data demonstrates that the documents were not created until after Neil was removed as Manager of Kavcon on December 27, 2021.

E. Neil ceased issuing dividends.

Historically for the past twenty (20) years, Consumers issued to Petitioners dividends before the quarterly deadlines for paying estimated taxes, which are typically on or about April 15, June 15, September 15, and January 15 of the following calendar year. (R. 967, 995, 1005-06).

As of the date of oral argument on the motion to dismiss, Consumers had not issued dividend checks for the periods ending April 15, 2022, June 15, 2022, September 15, 2022, of January 15, 2023.

Petitioners have paid these taxes, in the range of $100,000, from their own pocket based on estimates prepared by their accountants from Consumers' past financial data. (R. 967, 995, 1005-06).

Consumers has since resumed issuing dividends in accordance with past historical practice. However, Consumers refuses to recognize Mary Ellen and Martha as Shareholders and has been paying their dividends to Neil. (R. 1032-33).

STATEMENT OF FACTS

The facts are more fully set forth in the Dissolution Petition and the Affidavits of Matt, Jim, and Nell, which were submitted in opposition to Neil's motion to dismiss. The salient facts giving rise to Petitioners' dissolution claims are summarized below.

A. Neil's oppressive, illegal, fraudulent and wasteful conduct.

1. Neil's purported purchases of Mary Ellen and Martha's Consumers' stock.

In 2012, Neil seized on Mary Ellen's questions about what she could expect to receive from Consumers in retirement to solicit Mary Ellen's ownership interests in the Kavanaugh companies. (R. 95). Neil sent Mary Ellen a copy of an offer he previously authorized non-party Bill Mancini to extend to Martha. (R. 95).

Neil consulted with corporate counsel on whether his acquisition of Mary Ellen's stock complied with the SPA. (R. 1071-72). By email dated December 24, 2012, corporate counsel advised Neil as follows:

> As we discussed, I did get a chance to look at the Share Purchase Agreement, dated December 27, 1986. The agreement does not specifically contemplate a transfer between shareholders outside of death, divorce or third party or offers from third party offerors. [sic] There is a general provision restricting transfers outside of the agreement. There is language in the "Background" clause of the Agreement that describes that it is in the best interests of the Corporation to have the shares owned by the existing Shareholders. Since the transfer is not explicitly permitted by the agreement, the safest route is to

> confirm with the other shareholders that they do not want to purchase […]
>
> (R. 1071-72) (emphasis added).

Neil ignored counsel's advice and did not advise his siblings and fellow shareholders about his intent to purchase Mary Ellen's Consumers shares or obtain their consent to do so. (R. 95). Rather than obtain the consent of his siblings as fellow shareholders of Consumers and members of Kavcon, Neil lied to Mary Ellen to keep her from alerting the other siblings about their deal. (R. 96, 149-52).

Neil, in his capacity as President of Consumers, requested that Mary Ellen keep their deal confidential because if any of the other shareholders found out about the transaction, they would want the same deal and "that would drain the companies of cash". (R. 152). Neil well knew that he, and not the "companies" was purchasing Mary Ellen's interests. Neil never even considered having Consumers redeem or purchase Mary Ellen's shares. (R. 164).

Neil purported to purchase Mary Ellen's Consumers stock for $200,000 and her Kavcon membership interests for $200,000. (R. 224). Neil did not disclose to Mary Ellen that he caused Consumers to prepare a valuation of Consumers' stock in 2008, which valued Mary Ellen's 612 non-voting shares at that time, without discount, at $370,005.90. (R. 1075-1100). Between 2008 and 2012, Consumers' annual revenue increased from $23,590,176 to $30,847,070. (R. 96, 1137).

The terms of Neil's purported acquisition of Mary Ellen's ownership interests included a $50,000 down payment and payments pursuant to two separate promissory notes for the remaining $350,000. (R. 224-31). Remarkably, Neil structured his promissory note to Mary Ellen so that his payment obligations thereunder would be covered by the interest payments due Neil on loans he purportedly made to Consumers. (R. 162, 228, 1195, 1196). While Neil paid Mary Ellen 4% interest on his promissory note to her, he purported to charge Consumers above-market interest at 6% on at least $500,000 of his purported loans to Consumers. (R. 162, 228, 1195-96). The interest payment on Neil's purported loans to Consumers exceeded his entire payment obligation to Mary Ellen under his promissory note with her, and the amount that exceeded Neil's payment obligation was added to the purported loan amounts owed by Consumers to Neil. (R. 1101-02).

Neil's purported loans were never disclosed to his fellow directors and were not approved by a disinterested majority of Consumers' board of directors. (R. 97). The above market rate of 6% interest Neil charged Consumers was not disclosed to the Board and was not approved by a disinterested majority of Consumers' board of directors. (R. 97).

Although Neil acquired Mary Ellen and Martha's ownership interests for himself, he utilized Consumers' as his personal piggy bank out of which he

authorized payment of his legal and accounting fees incurred in connection with his purported purchase of Mary Ellen's Consumers stock and Kavcon membership interests. (R. 97).

Neil structured his deal with Martha the same as his deal with Mary Ellen, using corporate funds to purchase her interests. (R. 167-68). Neil used Bill Mancini as a middle-man to deceive Martha into thinking he was a neutral intermediary, when in fact he was doing Neil's bidding. As with Mary Ellen, Neil did not disclose to Martha that her interests in Consumers were valued five (5) years earlier at twice the price he paid for them. (R. 99-101). Since that valuation, Consumers' revenue had increased from $23,590,176 to $32,382,819. (R. 96).

This Court voided Neil's purported purchase of Mary Ellen and Martha's Consumers' stock in December 2021. *Kavanaugh*, 200 A.D.3d 1576; *Kavanaugh*, 200 A.D.3d 1568.

2. Bonuses.

Neil unilaterally paid himself substantial annual bonuses without first disclosing to or obtaining approval from a disinterested majority of the board of directors as required by Consumers' by-laws. (R. 118-19). He awarded himself the following bonuses:

Fiscal year ending July 31, 2010 - $889,041

Fiscal year ending July 31, 2011 - $830,842

Fiscal year ending July 31, 2012 - $1,016,619

Fiscal year ending July 31, 2013 - $1,090,803

Fiscal year ending July 31, 2014 - $1,091,956

Fiscal year ending July 31, 2015 - $1,094,042

(R. 1194).

At the time of the Dissolution Petition, Petitioners did not know the amounts of the bonuses Neil awarded to himself between 2016 and 2022. Neil refused to disclose such information.

Petitioners have since learned, and Consumers disclosed, that Neil paid himself, unilaterally and without approval of a disinterested board of directors, the following bonuses:

Fiscal year ending on July 31, 2019 – $390,000.00

Fiscal year ending on July 31, 2020 – $980,000.00

Fiscal year ending on July 31, 2021 – $1,200,000.00

Fiscal year ending on July 31, 2022 - $1,200,000.00

3. Neil's purported "loans" to Consumers.

After paying himself bonuses unilaterally and without proper authorization, Neil allegedly "loaned" that money back to Consumers for no apparent benefit to Consumers. (R. 119-20).

For example, in July of 2012 Neil unilaterally paid himself a bonus in excess of $1 million. (R. 1194). In that same month Neil "loaned" to Consumers the sum of $500,000 at an above-market interest rate of 6%. (R. 1195). When questioned

about such loans under oath, Neil could not recall the reason he "loaned" money to Consumers, whether or why Consumers needed the money, and whether the "loan" was a paper transaction or if he received a bonus check from Consumers and cut a separate check back to Consumers to fund the "loan". (R. 169-70, 172, 205).

4. Neil's other business ventures.

While serving as President of Consumers Neil engaged in and operated multiple other businesses which received benefits from Consumers to the detriment of its shareholders.

For example, Neil owned and operated Downing Holdings LLC, which owned and developed real property located at 3131 Transit Road, Elma, New York. (R. 121-22). Neil, in his capacity as President of Consumers, caused Downing Holding LLC to be added as an additional insured to Consumers' general corporate liability insurance policy. (R. 1228-31). Neil also used Consumers' money to pay for obligations of Downing Holding LLC. (R. 1232-36).

Neil also owned and operated Grand View Pedal Tours Inc. (R. 121). Grand View Pedal Tours Inc. operates pedal bike tours that permit the customers to drink alcoholic beverages. (R. 121). Neil has permitted such company to operate Consumers' vehicles thereby unnecessarily subjecting Consumers to liability. (R. 121). Neil, in his capacity as President, also purported to loan money from Consumers to Grand View Pedal Tours Inc. (R. 1237).

Upon information and belief, Neil either owns or has a business interest in TapTrails Inc., which purports to create maps with the locations of different breweries around Western New York. Neil caused Consumers to purchase in excess of $10,000 worth of product from Tap Trails. (R. 122, 1239-46).

5. Dividends.

As discussed above, Neil ceased issuing dividends in retaliation for being removed as Manager of Kavcon. (R. 121).

6. Misuse of corporate money.

While making the self-interested "loans" described above, Neil, in his capacity as President of Consumers, also loaned sums to various individuals at 0% interest. Since 2013, Neil loaned, at minimum, $69,000 at 0% interest. (R. 1215-26).

Additionally, Neil caused Consumers to voluntarily pay Zita Courtney-Kavanaugh, Larry Sr.'s second wife, an annual salary and benefits since 2002 until July 31, 2018. (R. 120). The same was never authorized by the Board of Directors. (R. 1227). Zita did not perform work for Consumers during this time period. (R. 120). Zita was not legally entitled to the funds Neil voluntarily paid to her and Neil's payment of the same constitutes further waste on the part of Neil. (R. 120).

7. Embezzlement.

As discussed above, Neil caused Consumers to loan $2.25 million to Kavcon for the sole purpose of having Kavcon pay that money to him. (R. 113-14, 267-68, 1003, 1165-68).

B. Petitioners' history of employment at Consumers and Neil's pretextual and retaliatory firings.

As detailed more fully below, each of the Petitioners have worked at Consumers for more than forty (40) years. They started working at Consumers when their father, Lawrence Kavanaugh Sr. ("Larry Sr.") was President and held the majority of Consumers' voting shares.

1. Matt's employment history.

Matt started to work at Consumers in 1983 at the age of eighteen (18). Matt worked at Consumers since then, continuously, until his employment was terminated by Neil on March 23, 2022. Matt started working in the warehouse and his most recent role was overseeing maintenance of existing locations and the development and construction of new locations. (R. 91-92).

During his employment at Consumers, his salary from Consumers and annual bonus were his primary sources of income. (R. 92). Matt has also served as a director of Consumers since 1986. (R. 92). Matt holds a total of 1,450 of Consumers' total 10,000 outstanding shares. (R. 83). Of those 1,450 shares, 77 are

voting shares and 1,373 are non-voting shares. (R. 83). Consumers has a total of 500 voting shares. (R. 83).

When Matt started working at Consumers, Larry Sr. was President and held the majority of Consumers' voting shares. (R. 92-93, 964). Matt intended and expected to work for Consumers for his entire career, and to have an active role in management of Consumers. (R. 92-93, 964).

In 1993, Matt confirmed his expectations about his employment at Consumers in response to a written family questionnaire from Larry Sr. (the "Questionnaire"). (R. 964, 972).

Relevantly, Larry Sr. posed the following questions in the Questionnaire:

> 5. Do you intend to stay in the company?
>
> 7. Are you here for a free ride, or does the business really mean something to you?
>
> (R. 972).

Matt answered these questions as follows:

> 5 *I figure it's my company. Why would I ever leave.*
>
> 7. *It means everything in the world to me.*
>
> (R. 973).

In response to the question, "what does the business mean to you", Matt responded, "It's not a business as much as a way of life or lifestyle. I really enjoy it." (R. 972, 974).

In response to question 14, "what would you be doing if there was NO Consumers" Matt answered as follows:

> That is another question I don't think I can answer. Who really knows! I couldn't imagine life without C.B. or 2230.
>
> (R. 975).

The Questionnaire also asked for the family's opinion about Neil taking over management of the family businesses. Relevantly, Larry, Sr. asked:

> How do you see management by Neil for Consumers and the Partnership?
>
> Could you live with Neil as head of operations?...can you take orders from him?
>
> (R. 972).

At the time, and up until learning about Neil's attempts to buy Mary Ellen and Martha's ownership interests, Matt had complete faith and trust in Neil. (R. 966).

By letter dated April 16, 1993, Larry, Sr. summarized the results of the answers he received to the Questionnaire from the other family members. (R. 978-80).

Concerning question 5, "do you intend to stay in the company", Larry, Sr. wrote:

> 5. Those who are working with Consumers intend to stay, those who do not actively work there would like to be more active with some exceptions.
>
> (R. 979).

Regarding the question about Neil taking over management of the companies, Larry, Sr. wrote:

> Everyone agrees that Neil is the person to take over, but there has been genuine concern for his health and his ability to be firm and demand respect from all family members. Without 100% cooperation he cannot and will not survive without some of the burdens being lifted from his shoulders. This company has grown into a thriving corporation which can help support all of you and your families for years to come, if you work together NOW…
>
> (R. 979-80).

Neil also understood that Larry Sr. intended and wanted his children to have the opportunity and job security provided by working for the family business. (R. 983). Larry Sr. asked "[s]hould there be certain qualifications required of Family Members before making the Family Business a permanent career?" (R. 972). Neil responded that "the die has been cast for permanent career status." (R. 983). Clearly, Neil understood that Larry Sr. intended Consumers to provide permanent employment to his children.

2. Neil's baseless termination of Matt's employment.

Neil's purported termination of Matt's employment was based on Neil's claim that Matt was not providing services to Consumers during the period of January through March 2022, and that Matt was devoting his time to Kavcon as its Manager. (R. 966, 1177). Matt continued to perform services for Consumers in addition to performing services for Kavcon in early 2022. (R. 966).

During that time Neil tasked Matt with finishing a project at 2227 South Park for Kavcon. (R. 966). The companies were expecting a new tenant for the space and needed to prepare it for the tenant. *Id.* Matt attended to the tasks Neil assigned to him because that is the way they worked for over 30 years. *Id.* As Neil admits in his affidavit, Consumers charges Kavcon for Matt's time spent working on Kavcon projects. (R. 904). Moreover, Consumers produced documentary evidence confirming that Consumers charged Kavcon for Matt's time up to and including March of 2022.

3. Jim's employment history.

Prior to May 2022, Jim worked continuously at Consumers since high school. At the time the Verified Petition was filed in June 2022, Jim was 58 years old. (R. 92).

When Jim started working at Consumers, Larry Sr. was President and held the majority of Consumers' voting shares. (R. 992). Jim intended and expected to work for Consumers for his entire career, and to have an active role in management of Consumers. (R. 92, 992).

Prior to Neil placing Jim on administrative leave in December 2018, Jim was a store supervisor and was in charge of eight (8) locations. (R. 92).

While employed by Consumers, Jim's salary and annual bonus were his primary sources of income. (R. 92). Jim holds a total of 1,450 of Consumers total

10,000 outstanding shares. (R. 83). Of those 1,450 shares, 77 are voting shares and 1,373 are non-voting shares. (R. 83).

Jim was also given a copy of the Questionnaire and responded to questions about his intent to remain employed and actively involved in managing Consumers as follows:

> 5. Yes, and I want to be more active and to do that I think I need to work with you and Neil more. […]
>
> 7. No! the business means everything to me. Being a family member born into it, I feel it is in my blood. It's something I would like to have for a long time. I know that when I get married that I will have kids and I would want them to be part of Consumer's and keeping it going.
>
> (R. 999).

Like Matt, Jim lost all faith in Neil after Neil refused to return to Mary Ellen and Martha their ownership interests in the companies. (R. 992).

4. Neil's baseless termination of Jim's employment.

Neil's alleged "cause" for terminating Jim's employment with Consumers was based on stale and incorrect information, underscoring Neil's ulterior motives.

Neil's May 31, 2022 letter purportedly terminated Jim's employment because Jim "stole" a floor scrubber from the Orchard Park store. (R. 1163-64). The issue with the floor scrubber occurred in late 2021 or early 2022. (R. 994-95).

Jim did not steal the floor scrubber from the Orchard Park location.

In December 2021 or early January 2022, Jim stopped by the Orchard Park store and noticed that the floors were dirty. (R. 994). He asked the store manager, Justin McManus, why the floors were dirty and whether they had been using the floor scrubber to clean the floors. *Id.* Mr. McManus informed Jim that the floor scrubber was broken. *Id.*

During his employment at Consumers, Jim was involved in the selection and purchase of the floor scrubbers. (R. 994). Over the course of using them, Jim became familiar with some common issues that caused them to malfunction. *Id.* As a result, Jim offered to take the floor scrubber to repair it. *Id.* Mr. McManus agreed to allow Jim to remove the floor scrubber from the store to try to fix it. *Id.* He helped Jim load it into Jim's vehicle. *Id.*

Neil's accusation that Jim "stole" the floor scrubber is ironic given Neil's actions in late December 2021 when he embezzled $2.67 million from Consumers and Kavcon (discussed further above).

5. Nell's employment history.

Nell started working at Consumers in the 1970s. (R. 92). When Nell started working at Consumers, Larry Sr. was President and held the majority of Consumers' voting shares. (R. 1005). Nell intended and expected to work for Consumers for her entire career, and to have an active role in management of Consumers. (R. 92-93, 1005). Nell holds a total of 1,450 of Consumers total 10,000 outstanding shares.

(R. 83). Of those 1,450 shares, 77 are voting shares and 1,373 are non-voting shares. (R. 83).

Nell started at Consumers cleaning the offices and then transitioned to working in the now-defunct soda-pop plant. (R. 92). Since the 1980s, Nell has been responsible for managing inventory and fulfilling the orders placed by the various stores for various products. (R. 92).

To date, Neil has not yet terminated Nell's employment by Consumers.

PROCEDURAL BACKGROUND

Petitioners filed their Verified Petition on June 7, 2022 (the "Dissolution Petition"). (R. 81). Special Term's Order dated June 7, 2022 required the respondents, including Neil, to serve a responsive pleading to the Dissolution Petition on or before June 13, 2022 at 5 p.m. (R. 352). Special Term subsequently rescheduled the hearing date on the Dissolution Petition to July 20, 2022, thereby moving Neil's time to respond to the Dissolution Petition. Neil answered the Dissolution Petition on July 8, 2022. (R. 362).

A. Motion to Dismiss.

By notice of motion dated December 21, 2022, Neil moved to dismiss the Dissolution Petition on numerous grounds. (R. 770). Petitioners opposed Neil's motion and filed affidavits to supplement the factual allegations in the Dissolution Petition. (R. 963, 991, 1004).

By Order dated February 14, 2023, Special Term dismissed the Dissolution Petition in its entirety. (R. 11).

Special Term dismissed Matt and Jim's dissolution claims arising from Neil's baseless termination of their employment on the ground that such termination rendered both Matt and Jim non-voting shareholders, depriving them of standing to proceed under BCL section 1104-a. (R. 39). Relevantly, Special Term held as follows:

> He was a W-2 employee and let go. And the minute, the nanosecond he was let go, for cause or otherwise, the shareholder agreement dictated that his voting shares were exchanged for non-voting shares, he no longer had standing to commence the action.
> […]
>
> The motion's granted as to Matthew and James based on standing. Their employment relationships were terminated, whether for cause of otherwise is irrelevant because the shareholder agreement does not distinguish between the two. Once the employment ends, so does the voting shareholding and they're converted to non-voting shares.
>
> (R. 25, 39)

As discussed further below, at Point II.A at page 34, Special Term's holding is based on a misinterpretation of Consumers' Share Purchase Agreement ("SPA").

Special Term did not address Matt and Jim's claims for common law dissolution, yet dismissed them anyway. (R. 12-41).

With respect to Nell, Special Term dismissed her claims for dissolution on the basis that she had adequate alternative remedies. (R. 40). Special Term reasoned as follows:

> As to Helen, while she may have standing, the Court finds based on the related lawsuits there are more than adequate remedies to dissolution. And a dissolution, number one, under the common law or statute is disfavored in New York, especially when there are other ways to handle the grievances and/or differences or legal issues. And I find in particular on the records, plural, of these six pending lawsuits that Helen has more than adequate remedies, and dissolution is not one of them.

(R. 40).

Petitioners filed a Notice of Appeal on March 1, 2023. (R. 1). Petitioners thereafter filed an Amended Notice of Appeal on March 2, 2023 to correct an error in the first Notice of Appeal. (R. 5).

B. Motion to Renew.

Following the dismissal of the Dissolution Petition, Petitioners filed a motion to renew under CPLR 2221(e) based on a FOIL response from the New York State Liquor Authority ("SLA") showing that Matt and Jim were still listed as voting shareholders as of February 9, 2023. (R. 1012, 1014-15).

Special Term denied Petitioners' motion to renew by order dated April 26, 2023. (R. 46-47). Petitioners filed a Notice of Appeal on May 25, 2023. (R. 42).

MOTION TO DISMISS STANDARD

"On a motion to dismiss, a court must accept the plaintiff's allegations as true and determine whether they fit into any cognizable legal theory." *Divito v. Fiandach*, 160 A.D.3d 1356, 1357 (4th Dep't 2018) (citations omitted). The focus on a motion to dismiss is whether a plaintiff has a cause of action, not whether he has properly stated one. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976). A plaintiff may submit an affidavit in response to a motion to dismiss to remedy any defects in the pleading. *Id.* "Any facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, [however,] and the benefit of every possible favorable inference is afforded to the plaintiff." *Manitone v. Crazy Jake's, Inc.*, 101 A.D.3d 1719, 1720 (4th Dep't 2012) (*quoting Gibraltar Steel Corp. v. Gibraltar Metal Processing*, 19 A.D.3d 1141, 1142 (4th Dep't 2005)).

To constitute documentary evidence under CPLR 3211(a)(1) for purposes of a motion to dismiss, the document must be unambiguous, authentic, and its contents must be essentially undeniable. *Granada Condominium III Ass'n. v. Palomino*, 78 A.D.3d 996, 996-97 (2d Dep't 2010) (*quoting Fontanetta v. John Doe No. 1*, 73 A.D.3d 78, 84-86 (2d Dep't 2010)). Affidavits submitted by a defendant do not constitute documentary evidence under CPLR 3211(a)(1). *J.A. Lee Elec., Inc. v. City of New York*, 119 A.D.3d 652, 653 (2d Dep't 2014).

POINT I

SPECIAL TERM ERRED IN DISMISSING MATT AND JIM'S CLAIMS FOR COMMON LAW DISSOLUTION

Petitioners Matt and Jim asserted claims for common law dissolution based on, *inter alia*, Neil's unilateral termination of their employment at Consumers. Prior to the purported termination of their employment in March 2023 (Matt) and May 2023 (Jim), each had worked at Consumers for more than forty (40) years. (R. 92-93). Neil's termination of Matt and Jim's employment at Consumers readily supports a colorable claim for common law dissolution.

A. Termination of a shareholder-employee's employment is grounds for common law dissolution.

The same conduct that constitutes oppressive conduct under BCL §1104-a(a)(1) is grounds for dissolution under the common law. *See In re Charlestown Sq.*, 295 A.D.2d 425 (2d Dep't 2002). "Despite the different standards for statutory and common-law dissolution, courts have permitted common-law dissolution actions to proceed where there are colorable claims of oppression and looting, which are grounds for statutory dissolution under section 1104-a(a)(1) and (2)." *Feldmeier v. Feldmeier Equip. Inc.*, 164 A.D.3d 1093, 1099 (4th Dep't 2018); *see also Ferolito v. Vultaggio*, 99 A.D.3d 19, 28-29 (1st Dep't 2012).

The termination of the employment of a shareholder who has a reasonable expectation of employment constitutes oppressive conduct under BCL §1104-a and

is sufficient to warrant dissolution of the corporation. *See Williamson v. Williamson*, 259 A.D.2d 362 (1st Dep't 1999); *DiMino v. DeVeaux Servs.*, 238 A.D.2d 943 (4th Dep't 1997); *In re Dissolution of HGK Asset Mgmt.*, 644 N.Y.S.2d 26, 26-27 (1st Dep't 1996); *In re Burack*, 137 A.D.2d 523 (2d Dep't 1988); *In re Weidy's Furniture Clearance Center Co.*, 108 A.D.2d 81, 84 (3rd Dep't 1985).

A shareholder-employee's history of employment and participation in management of the company is sufficient to establish a reasonable expectation of continued employment. *See e.g. Gunzberg v. Art-Lloyd Metal Prods. Corp.*, 112 A.D.2d 423, 425 (2d Dep't 1985) (employment of 25 and 35 years); *see also Matter of Gould Erectors & Rigging, Inc.*, 146 A.D.3d 1128 (3rd Dep't 2017) (employment of employment of 23 or 24 years); *In re Burack*, 137 A.D.2d 523 (2d Dep't 1988) (employment of, at minimum, 40 years). For example, the Court in *Gunzberg* held that "[a]s a result of their long history of taking an active part in the running of the corporation, petitioners demonstrated that they had a reasonable expectation that they would continue to be employed by the company and have input into its management." *Gunzberg*, 112 A.D.2d at 425.

In *Matter of Gould Erectors & Rigging, Inc.*, 146 A.D.3d 1128 (3rd Dep't 2017) the Third Department affirmed Special Term's finding that the termination of petitioner's twenty-two (22) years of employment was oppressive. Petitioner's "reasonable expectations at the time of his acquisition of stock in both corporations

was long-term employment, a role in corporate management and compensation in the form of profit-sharing." *Matter of Gould Erectors*, 146 A.D.3d at 1131.

Based on the above-cited authorities, Neil's termination of Matt and Jim's forty (40) plus years of employment at Consumers supports a claim for common law dissolution. (R. 92-93). Therefore, Special Term erred in dismissing the Dissolution Petition.

B. At minimum, there is an issue of fact regarding whether the SPA precludes Matt and Jim from forming a reasonable expectation of continued employment with Consumers.

In his motion to dismiss Neil argued that the SPA precludes Petitioners from forming a reasonable expectation of continued employment at Consumers. Neil relied on a provision in the SPA stating that "[i]n the event a Shareholder who is employed by the Corporation ceases to be employed by the Corporation for any reason whatsoever, whether voluntarily or involuntarily, such Shareholder shall deliver all certificates representing voting common shares owned by such shareholder, if any, to the Corporation […]". (R. 1125-26).

Petitioners' responses to the Questionnaire stated that they both desired and expected to have full-time employment at Consumers, demonstrating that the parties did not regard the SPA as a bar to the same. (R. 92-93, 964-66, 972-74, 983, 991-92, 999). The Questionnaire and Petitioners' responses occurred after the SPA was enacted in 1986. (*Compare* R. 972, 973, 999 *with* R. 1109). As such, the

Questionnaire and responses raise an issue of fact as to whether the provision cited by Neil was controlling or waived through course of conduct. *See Matter of Tehan v. Tehan Catalog Showrooms, Inc.*, 110 A.D.3d 1498 (4th Dep't 2013) (affirming denial of a motion to dismiss a dissolution petition on finding "issues of fact whether and to what extent the parties performed their obligations under the applicable shareholders' agreement or whether the parties elected to abandon that agreement."). Therefore, Special Term erred in dismissing the Dissolution Petition.

C. Matt and Jim were not precluded by the SPA from having a reasonable expectation of continued employment.

This Court's decision in *In re Apple*, 224 A.D.2d 1016 (4th Dep't 1996) does not preclude Matt and Jim from having a reasonable expectation of employment. This Court in *In re Apple* rejected a shareholder's claims of oppression under BCL §1104-a as follows:

> Even assuming, arguendo, that the closing that morning was ineffective and that Peter Apple was still a stockholder in the afternoon, the basis for his petition is allegedly oppressive conduct in that his employment was terminated, triggering a mandatory offer to sell his stock at a price set in the share purchase agreement. That agreement explicitly binds each shareholder to offer to sell his or her stock within 30 days after ceasing for any reason, either voluntarily or involuntarily, to be in the employ of the corporation. That agreement is enforceable and Peter Apple cannot heard to argue that he had a reasonable expectation that he would be employed and would be a shareholder for life.
>
> *In re Apple*, 224 A.D.2d at 1016.

Petitioners respectfully submit that *In re Apple* is not controlling in this case and the holding is contrary to established Court of Appeals precedence, and thus, should be overturned.

In re Apple is not controlling in this case in light of Larry's Sr.'s Questionnaire and the responses thereto from Petitioners and the other shareholders. Those documents, at minimum, raise questions of fact as to whether the parties waived section 11 of the SPA.

Alternatively, the holding in *In re Apple* should be overturned as contrary to established Court of Appeals precedence. The Court of Appeals has not directly confronted the issue of whether a clause mandating a share recall of a former employee's shares upon separation precludes a shareholder from forming a reasonable expectation of employment. However, in *In re Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73 (1984), the Court of Appeals instructed that the reasonableness of a shareholder's expectations of continued employment "depend[s] on the circumstances in the individual case." *In re Kemp & Beatley, Inc.*, 64 N.Y.2d at 73. The Court of Appeals reasoned as follows:

> A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. […]
>
> [O]ppression should be deemed to arise only when the majority conduct substantially defeats the expectations, that, objectively viewed, were both reasonable under the

> circumstances and were central to the petitioner's decision to join the venture. It would be inappropriate, however, for us in this case to delineate the contours of courts' consideration in determining whether directors have been guilty of oppressive conduct. As in other areas of law, much will depend on the circumstances in the individual case.
>
> *In re Kemp & Beatley, Inc.*, 64 N.Y.2d at 73.

Additionally, *In re Apple* offered no rationale for its holding and the case consists of a sparse three paragraphs. Only three New York cases cite *In re Apple* but none adopted *In re Apple*'s holding that a share purchase agreement with language confirming at-will employment precludes, as a matter of law, a shareholder from forming a reasonable expectation of continued employment with the corporation.

Moreover, the holding in *In re Apple* restricts the availability of relief under BCL §1104-a. A bright-line rule that a shareholder cannot, as a matter of law, have a reasonable expectation of continued employment where a share purchase agreement confirms the default status of at-will employment, is illogical. *See Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293 (1983) (recognizing that employment in New York is at-will). There is no practical difference between the default, at-will nature of employment in New York and a contractual provision providing that a person's employment can be terminated for any reason. Both merely confirm that employment is at-will. Yet, under *In re Apple*, relief under BCL

1104-a for oppression based on termination of a shareholder's employment would discriminate between categories of shareholders based on this meaningless distinction. Shareholders of corporations without such language in operative agreements could avail themselves of section 1104-a, while those of corporations with such language could not, even though the operative factor, at-will employment status, is the same for both groups. Such anomalous results are abhorrent to the law.

POINT II

NEIL FAILED TO CONCLUSIVELY ESTABLISH THAT MATT AND JIM LACK STANDING TO BRING CLAIMS FOR DISSOLUTION UNDER THE BCL

Special Term dismissed Matt and Jim's statutory claims for dissolution upon finding that Matthew and James were not voting shareholders holding at least 20% of Consumers' voting shares when the Dissolution Petition was filed on June 7, 2022. Special Term found that Matt and Jim were immediately divested of their voting shares upon the termination of their employment with Consumers, which occurred in March 2022 and May 2022, respectively. (R. 25, 39).

Neil did not carry his burden of demonstrating that Matt and Jim were not voting shareholders when the Dissolution Petition was filed, and Consumers' records with the SLA, which were submitted on Petitioners' motion to renew, demonstrate that Matt and Jim were still voting shareholders as of the filing of the Dissolution Petition. (R. 1018-20).

A. Neil did not carry his burden of demonstrating Matt and Jim lacked standing.

Special Term found that Matt and Jim were immediately divested of their voting shares upon the termination of their employment with Consumers, which occurred in March 2022 and May 2022, respectively. (R. 25, 39). Matt and Jim each hold 77 voting shares of Consumers' total 500 voting shares. (R. 83). As such, they each hold 15.4% of the total voting shares for a combined total of 30.8%.

Special Term relied on section 11 of the SPA to dismiss Matt and Jim's claims. That section provides relevantly as follows:

> In the event a Shareholder who is employed by the Corporation ceases to be employed by the Corporation for any reason whatsoever, whether voluntarily or involuntarily, such Shareholder shall deliver all certificates representing voting common shares owned by such Shareholder, if any, to the Corporation to be redeemed, and the Corporation shall redeem all of such shares, in exchange for an equal number of non-voting common shares.
>
> (R. 1125-26).

Contrary to Special Term's finding, this provision of the SPA does not automatically convert voting shares into non-voting shares.

Moreover, Neil did not present evidence demonstrating that Consumers actually converted Matt and Jim's voting shares to non-voting shares on or before the filing of the Dissolution Petition on June 7, 2022. *See Singe v. Bates Troy, Inc.*, 206 A.D.3d 1528, 1531 (3rd Dep't 2022). For example, Neil did not present copies

of properly endorsed share certificates for non-voting shares to replace Matt and Jim's voting shares. Pursuant to Consumers' by-laws, section VI (1), those share certificates must be endorsed by (1) the President or Vice President and (2) either the Treasurer or Assistant Treasurer, or Secretary or Assistant Secretary. (R. 1062-63). Matt is a Vice President and Treasurer and Jim is the Assistant Secretary. (R. 905). Neil is the President. (R. 897). Neil did not submit on his motion to dismiss new certificates for Matt and Jim's non-voting shares properly endorsed by Neil and Matt or Jim, as required by the By-laws.

In *Singe v. Bates Troy, Inc.*, 206 A.D.3d 1528, 1531 (3rd Dep't 2022) the Third Department reversed Special Term's dismissal of a dissolution petition where the respondent failed to demonstrate that the petitioner lacked standing. "Nothing in the record indicates that defendants bought back plaintiff's shares as apparently required by the stock purchase agreement and the award of restricted stock agreement." *Singe*, 206 A.D.3d at 1531.

Same as the respondents in *Singe*, Neil failed to carry his burden of demonstrating that Matt and Jim's voting shares were actually replaced with non-voting shares before June 7, 2022 when the Dissolution Petition was filed. Therefore, Special Term erred in dismissing Matt and Jim's claims based on a lack of standing.

B. Matt and Jim were still voting shareholders when the Dissolution Petition was filed.

New York's Alcoholic Control Beverage Law prohibits the change in corporate ownership of a licensed entity without prior approval of the New York State Liquor Authority ("SLA"). Section 99-d(2) provides relevantly as follows:

> 2. Before any change in the members of a limited liability company or the transfer of a membership interest in a limited liability company or any corporate change in stockholders, stockholdings, alcoholic beverages officers, officers or directors, except officers and directors of a premises licensed as a club or luncheon club under this chapter can be effectuated for the purposes of this chapter, there shall be filed with the liquor authority an application for permission to make such changes and there shall be paid to the liquor authority in advance upon filing of the application a fee of one hundred twenty-eight dollars.
>
> N.Y. A.B.C.L. §99-d(2) (Lexis 2023).

Section 99(d)(2) makes clear that no change in shareholders or stockholdings may be effectuated without prior approval of the SLA. Neither Neil, as President of Consumers, nor Consumers obtained approval of the SLA of the termination of Matt and Jim's employment with Consumers or the conversion of Matt and Jim's voting shares to non-voting shares. This is confirmed by the SLA FOIL response dated February 9, 2023. (R. 1018-21). As such, Matt and Jim were voting shareholders as of June 7, 2022 and the Dissolution Petition should not have been dismissed on the grounds of lack of standing.

In continuing self-serving fashion, Neil and Consumers have refused to advise the SLA that his attempts to purchase Martha and Mary Ellen's Consumers stock were voided and nullified. Neil did not report his purported purchase to the SLA until 2019. (R. 1169). Neil and Consumers have asserted that Martha and Mary Ellen are not shareholders of Consumers unless and until the SLA approves of the transfer of their shares back from Neil. (R. 1032). Consumers insists that an "application must be submitted to the SLA for approval prior to such transfer taking legal effect." (R. 1032). This Court's Decisions imposed no such conditions on the return of Mary Ellen and Martha's ownership interests to them.

Yet on the other hand, Consumers and Neil maintain that the SLA did not need to approve the conversion of Matt and Jim's voting shares to non-voting shares to take legal effect.

POINT III

SPECIAL TERM ERRED IN DISMISSING NELL'S CLAIM FOR DISSOLUTION UNDER BCL §1104-a FOR OPPRESSION

Special Term dismissed Nell's claims under BCL §1104-a for oppressive conduct on the basis that she has adequate alternative remedies. (R. 40). In so holding, Special Term put the cart before the horse.

A. It was error for Special Term to determine the adequacy of remedies without first holding a hearing.

The issue of an adequate remedy depends on the circumstances of the case. *In re Kemp & Beatley, Inc.*, 64 N.Y.2d at 73. The remedy is fashioned based on the findings at the hearing on the petition. *In re MacDougall*, 150 A.D.2d 160 (1st Dep't 1989) (finding that a hearing was required before a remedy could be fashioned on an 1104-a dissolution petition).

Special Term erred in determining that Nell possessed an adequate remedy without first conducting a hearing to determine the egregiousness of the allegations in the Dissolution Petition.

B. Nell's other claims do not provide an adequate remedy.

On his motion to dismiss, Neil argued that Nell has adequate alternative remedies to dissolution under BCL § 1104-a in the form of the claims she asserted in the Jim Action.

Comparison of Nell's claims in the Jim Action, the remedies Nell seeks therein, and the capacity in which she asserts those claims to her claims in the Dissolution Proceeding readily demonstrates that the Jim Action does not protect Nell's personal stake in Consumers. *Lewis v. Jones*, 107 A.D.2d 931 (3rd Dep't 1985). As such, Special Term erred in finding that Nell had adequate alternative remedies to dissolution.

In the Jim Action, Nell has three pending claims: one for breach of fiduciary duty, one under BCL section 706 for the removal of Neil as director of Consumers, and one under BCL section 716 for the removal of Neil as President of Consumers. (R. 832-53). These claims are based on allegations that Neil engaged in the following wrongful conduct, including: (1) withholding Petitioners' paystubs to hide bonus amounts; (2) awarding himself unauthorized, improper, and excessive bonuses that constitute de facto dividends; (3) using Consumers' corporate money to finance his purported purchase of Mary Ellen and Martha's interests; and (4) breaching Consumers' SPA in attempting to improperly purchase Mary Ellen and Martha's shares. Although Nell's Verified Dissolution Petition is also founded on this same wrongdoing, it is also based on additional misdeeds by Neil.

The Dissolution Petition is based on the following additional misconduct by Neil: (1) causing Consumers to transfer $2,250,000 to Kavcon for the sole purpose of paying in excess of $2.67 million to himself; (2) terminating Matt and Jim's employment, leaving her alone to fend against Neil's arbitrary and retaliatory conduct; and, (3) causing Consumers to cease issuing dividends to shareholders following his removal as manager of Kavcon. (R. 81-127). None of these actions by Neil are the subject of the Jim Action and were not committed by Neil until years after the Jim Action was commenced.

In addition to having different factual grounds, Nell's claims also have different remedies. Nell's claims in the Jim Action are asserted derivatively, and the remedies flow to the benefit of Consumers. (R. 848-51). In contrast, the dissolution proceeding provides "a proper remedy to protect the [Nell]'s personal stake in the corporation". *Lewis*, 107 A.D.2d at 933. As such, even with the factual overlap in certain claims, the Jim Action and Dissolution Proceeding seek different remedies for different wrongs. *See Singe*, 206 A.D.3d at 1532.

In *Singe* the Third Department's reasoning behind the denial of defendants' motion under CPLR 3211(a)(4) is applicable here. Relevantly the Third Department reasoned:

> The first action concerned plaintiff's status as a former Bates Troy employee and alleged that defendants breached the stock purchase agreement or the award of restricted stock agreement when they wrongfully deprived plaintiff of his shares, which were part of his compensation, entitling him to damages. By contrast, the claims in this action arise from plaintiff's status as a putative minority shareholder, and he frames defendants' alleged unlawful conduct and his wrongful termination as oppression for which he seeks dissolution of Bates Troy or a buyout of his shares. Although both actions proceed from the same general allegations of malfeasance by Kradjan, the amended complaint in this action, in effect, seeks 'different damages' for 'different wrongs' than sought in the first action.
>
> *Singe*, 206 A.D.3d at 1531-32 (*quoting Feldman v. Harari*, 183 A.D.3d 629, 631 (2d Dep't 2020) (internal citations omitted).

This same reasoning applies to Nell's claims in the Jim Action and Dissolution Proceeding, and demonstrates why Nell does not have adequate alternative remedies to dissolution. Based on the foregoing, Special Term erred in dismissing Nell's claims for dissolution.

POINT IV

PETITIONERS' OTHER LAWSUITS DO NOT PROVIDE ADEQUATE REMEDIES TO DISSOLUTION AS A MATTER OF LAW

Derivative and direct claims do not provide an adequate remedy to dissolution. Protracted costly and contentious litigation does not constitute a fair return on Petitioners' personal stake in Consumers. *In re Kemp & Beatley, Inc.*, 64 N.Y.2d at 74. Without the Dissolution Proceeding, Petitioners are without an adequate remedy to protect their personal stake in Consumers.

In *Lewis v. Jones*, 107 A.D.2d 931 (3rd Dep't 1985) the Third Department rejected arguments that a shareholder's derivative lawsuit was an adequate remedy to common law dissolution. While the case involved common law dissolution, not statutory dissolution under BCL section 1104-a, the rationale behind the finding that derivative claims are not an adequate remedy to dissolution is applicable here.

Lewis involved a minority shareholder who commenced three separate actions: (1) an 1104-a proceeding, which was dismissed due to lack of standing; (2) a shareholder derivative lawsuit; and, (3) a common law dissolution proceeding. The respondent corporations and shareholders argued that the petitioning minority

shareholder had an adequate remedy in the form of the derivative lawsuit. The court rejected this argument as follows:

> Given plaintiff's factual allegations of fraud, misappropriation and use of corporate assets for personal gain, plaintiff is not limited to a shareholder's derivative action on behalf of the corporation as his only remedy. Assuming the allegation herein to be true, plaintiff is in need of a remedy which will assure the recovery of his personal investment in defendant corporations and prevent further misuse by the individual defendants who now have exclusive control over management of the corporations. Thus, were we to hold, as defendants urge, that plaintiff is proscribed from presenting a common-law dissolution action, his lack of standing to commence an action for that remedy pursuant to section 1104-a of the Business Corporation Law would leave him without an adequate remedy, a circumstance abhorrent to the common law.
>
> *Lewis*, 107 A.D.2d at 932-33 (internal citations omitted) (emphasis added).

The Third Department also rejected the argument that the derivative lawsuit precluded the assertion of a common-law dissolution claim, as follows:

> It is well recognized that a derivative suit by a shareholder seeks to recover on behalf of the corporation for the waste of corporate assets. Where the damage claimed is primarily to the shareholder as a result of fiduciary breaches by corporate management, the shareholder may properly sustain a direct action against the corporate defendants. In such a situation, a direct action by a shareholder for judicial dissolution of the corporation may be a proper remedy to protect the shareholder's personal stake in the corporation.
>
> *Lewis*, 107 A.D.2d at 933 (internal citations omitted).

The extensive litigation between the parties underscores the complete breakdown of the relationship between Petitioners and Neil that further supports the need for dissolution. "[W]hen there has been a complete deterioration of relations between the parties, a court should not hesitate to order dissolution". *In re Kemp & Beatley, Inc.*, 64 N.Y.2d at 74.

Based on the foregoing, Special Term erred in finding that Petitioners have adequate alternative remedies to dissolution.

POINT V

PETITIONERS ASSERTED COLORABLE CLAIMS FOR STATUTORY DISSOLUTION BASED ON NEIL'S WASTE, LOOTING, AND DIVERSION OF CORPORATE ASSETS

Section 1104-a of the BCL also authorizes dissolution where those in control of a corporation are guilty of fraudulent or illegal conduct, looting, waste, or diversion of corporate assets. N.Y. B.C.L. §1104-a(1)-(2) (Lexis 2023). Neil's overall conduct as President and majority voting shareholder of Consumers and his abuse of Consumers support colorable claims for dissolution under these other statutory grounds. (R. 81-127).

A. Fraudulent and illegal conduct under BCL §1104-a(a)(1).

The terms "fraudulent" and "illegal" are given their common meaning. *In re Kemp & Beatley*, 64 N.Y.2d at 71.

B. Looting, waste, or diversion of corporate assets under BCL §1104-a(a)(2).

Waste under section 1104-a(a)(2) includes the misappropriation of corporate assets for personal use. *Cunningham v. 344 6th Ave. Owners Corp.*, 256 A.D.2d 406 (2d Dep't 1998). Waste also includes the use of corporate assets for improper or unnecessary purposes. *Arnoff v. Albanese*, 85 A.D.2d 3, 5 (2d Dep't 1982).

An act of waste of corporate assets is void, as opposed to voidable, and cannot be ratified by shareholders. *Id.* at 4. This is the rule because "an unconscionable deal between directors personally and the corporation they represent could not become conscionable merely because most of the stockholders were either indifferent or actually in sympathy with the directors' scheme." *Id.* (*quoting Gotlieb v. Chem. Corp.*, 90 A.2d 660, 665 (Del. Sup. Ct. 1952).

Ordinarily, the conduct of a corporation's officers and director is shielded by the business judgment rule. However, the business judgment rule does not apply when the director or officer engaged in fraud, self-dealing, unconscionability or other misconduct. *Aurbach v. Bennett*, 47 N.Y.2d 619, 631 (1979).

In the context of compensation to an officer or director, "to disprove a waste claim, a director who had a personal interest in challenged payments has the burden of showing that they were made in good faith and were fair to the corporation." *Arnoff*, 92 A.D.3d at 546.

Next, "[a] corporate opportunity is defined as any property, information, or prospective business dealing in which the corporation has an interest or tangible

expectancy or which is essential to its existence and naturally adaptable to its business." *Greenberg v. Greenberg*, 206 A.D.2d 963, 964 (4th Dep't 1994) (citations omitted).

C. Petitioners have alleged colorable claims for dissolution.

Petitioners have colorable claims for dissolution based on Neil's looting, and waste and diversion of Consumers' assets.

Most egregiously, after Neil was removed as manager of Kavcon he embezzled in excess of $2.67 million from Consumers and Kavcon. On December 27, 2021 Neil was removed as Manager of Kavcon by the other members. (R. 267-68). Mere days later, on December 29 through December 31, lacking any authority whatsoever, Neil purported to "loan" to Kavcon substantial sums of money, which he then paid out to himself via four (4) separate checks totaling $2,673,912.18. (R. 1165-68). Neil has since admitted and acknowledged in an affidavit to the Court that he was properly removed as Manager (R. 329-330, ¶3) ("I was the managing member of Kavcon for approximately 21 years, until I was removed by my siblings on December 27, 2021"). Neil did not have authority to cause Kavcon take a loan from Consumers, to issue checks from Kavcon to himself, or to extend the loan from Consumers to Kavcon for the purpose of paying himself. Neil refused to return the embezzled funds, prompting Kavcon to file a lawsuit against him and to explore bringing criminal charges. (R. 272-328). Neil admitted at his deposition that the

sole purpose of Consumers' loan to Kavcon was to pay himself monies allegedly owed to him from Kavcon.

Additionally, Neil has looted, wasted, and diverted corporate assets in the form of unilateral, unauthorized and unreasonable bonuses that he has paid to himself. Between 2010 and 2015 Neil has paid himself, without obtaining authorization from a disinterested board of directors, annual bonuses between 7 to 8 times his base salary, resulting in total compensation between roughly $800,000 and $1.1 million per year. (R. 1194) For the past three years, Neil has paid himself total annual bonuses in excess of $3 million without obtaining approval from the board of directors.

During this same time period, despite Neil's exorbitant bonuses, Consumers did not experience an increase in profitability to justify such bonuses. (R. 1194). The company's net income remained between $500,000 and $600,000. (R. 1137).

To compound his looting, waste, and diversion, Neil purported to "loan" back his excessive bonuses to Consumers at an above-market interest rate of 6%. (R. 1195-96). At his deposition, Neil was unable to identify the purpose of these loans, instead suggesting that they were made to generate passive income for himself. (R. 171-72). If Consumers did no need the money "loaned" to it by Neil, then such "loans" provided no benefit to Consumers and constitute a waste of corporate assets. In contrast, if Consumers needed the money "loaned" to it by Neil, such need further

underscores the impropriety of Neil's unilateral and exorbitant bonuses he unlawfully paid to himself.

Last but not least, Neil used Consumers' assets for non-corporate purposes, including his own separate business enterprises, such as a real estate development company, a business that printed maps with the locations of bars that served beer from local breweries, and a pedal bike tour business that permitted the consumption of alcohol. (R. 121-22). Neil used Consumers' money and assets to fund, support, pay bills, start, or generate sales for these businesses.

Based on all the foregoing, Petitioners alleged colorable claims that Neil has engaged in illegal, fraudulent, and oppressive conduct under BCL 1104-a(a)(1) and looted, wasted, or diverted corporate assets under BCL 1104-a(a)(2).

POINT VI

PETITIONERS ASSERTED COLORABLE CLAIMS FOR COMMON LAW DISSOLUTION

Petitioners have colorable claims for common law dissolution based on the same conduct by Neil that gives rise to Petitioners' claims for statutory dissolution outlined above. The same conduct that constitutes oppressive conduct under BCL §1104-a(a)(1) is grounds for dissolution under the common law. *See In re Charlestown Sq.*, 295 A.D.2d 425 (2d Dep't 2002). Likewise, looting and corporate waste of assets that is sufficient under BCL §1104-a(a)(2) to warrant dissolution of

a corporation, is also sufficient under to warrant dissolution under the common law. *Id.*; *see also Ferolito*, 99 A.D.3d at 28-29.

CONCLUSION

Based on all the foregoing, Petitioners respectfully request that the order dismissing their Verified Petition for Dissolution of Consumers pursuant to BCL §1104-a(a) be reversed, Respondent Neil Kavanaugh's motion to dismiss be denied in its entirety, and the Verified Petition be reinstated in its entirety.

Dated: Buffalo, New York
September 25, 2023

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