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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

Appellate Division Docket Numbers: CA 23-00451 and CA 23-01367

In the Matter of the Application of

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

Petitioners-Appellants-Respondents,

vs.

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.

Erie County Index No. 806587/22.

BRIEF FOR RESPONDENT-RESPONDENT CORNELIUS KAVANAUGH a/k/a Neil Kavanaugh

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Questions Presented

1. Did Petitioners-Appellants Matthew Kavanaugh and James Kavanaugh have standing to petition for judicial dissolution of Consumers Beverages, Inc., under Business Corporation Law § 1104-a as nonemployee shareholders when the Consumers Beverages, Inc., Share Purchase Agreement provides that only shareholders employed by the company may hold shares entitled to vote?

The Motion Court correctly held that Petitioner-Appellants-Respondents Matthew Kavanaugh and James Kavanaugh lacked standing under Business Corporation Law § 1104-a.

2. Did the motion court abuse its discretion in determining that liquidation of Consumers Beverages, Inc., is not the only feasible means whereby Petitioners-Appellants may reasonably expect to obtain a fair return on their investment and is not reasonably necessary for the protection of the rights and interests of the Petitioners-Appellants, when Petitioners-Appellants are pursuing alternative remedies in separate actions against the same parties for shareholder derivative claims, breach of fiduciary duty claims, and other claims, all of which arise out of the same factual allegations as their dissolution petition?

The Motion Court correctly determined that the petition for involuntary dissolution of Consumers Beverages, Inc., should be dismissed because dissolution

is disfavored and because Petitioners-Appellants have available remedies alternative to judicial dissolution of Consumers Beverages, Inc., that are more than adequate to address their grievances.

3. Did Petitioners-Appellants Matthew Kavanaugh and James Kavanaugh state a claim for judicial dissolution of Consumers Beverages, Inc., under New York's common law standard?

The Motion Court correctly held that the Petitioners did not state a claim for judicial dissolution under the common law.

4. Did Petitioners-Appellants state a claim for judicial dissolution of Consumers Beverages, Inc., pursuant to Business Corporation Law § 1104-a?

The Motion Court correctly held that Petitioner-Appellants-Respondents Matthew Kavanaugh and James Kavanaugh lack standing and Helen Kavanaugh has adequate available remedies alternative to dissolution to address her grievances.

Preliminary Statement

Consumers Beverages, Inc., ("Consumers" or the "Company") is a popular, successful, and iconic Western New York regional retailer of beer, seltzer, pop, and other beverages. R. 897–98. With 18 locations across the Buffalo area, Consumers is a familiar regional brand that provides Western New Yorkers a high-quality selection at the best prices. The Company is financially strong and has grown to great success in the past decade. *Id.* Perhaps more importantly, Consumers provides at least 270 Western New Yorkers their livelihood with quality jobs in the Buffalo area. R. 406.

The Petitioners-Appellants-Respondents Matthew, James, and Helen Kavanaugh ("Petitioners"), as well as Respondent-Respondent-Appellant Mary Ellen Kavanaugh (collectively, "Appellants") want to end Consumers with this appeal. The Company's shareholders — all siblings who were gifted and inherited shares from their father, Consumers' founder — have squabbled for years over control, ownership, and management of the Company. Indeed, this action for judicial dissolution is the *sixth* action between the sibling-shareholders and their companies concerning their various overlapping disputes. R. 775, 784–98, 800–31, 832–53, 855–67. All these actions arise out of the same broad allegations and seek substantially similar relief.

Involuntary judicial dissolution, however, is a step too far, and the motion court prudently exercised its discretion to avoid the harsh, equitable remedy of the "judicially imposed death" of a healthy corporation that employs hundreds of Western New Yorkers. *Matter of Radom & Neidorff, Inc.*, 307 N.Y. 1, 7, 119 N.E.2d 563, 565 (1954).

It is "contrary to th[e] remedial purpose" of involuntary dissolution of a corporation "to permit its use by minority shareholders as merely a coercive tool." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d 63, 74, 484 N.Y.S.2d 799, 806 (1984). But that is precisely what Appellants seek to do by adding a dissolution petition to what the motion court called their "panoply of litigation matters." R. 33. Involuntary dissolution must be "the only feasible means" to provide a return on investment or "reasonably necessary" to protect shareholders. Bus. Corp. L. § 1104-a(b)(1). That is simply not so, here. Dissolution unnecessarily threatens the fate of Consumers' employees, State Liquor Authority licenses, and customers, and this Court should not entertain the Appellants' coercive attempt to use such a drastic measure.

The motion court correctly refused to let the Kavanaugh family's dysfunction force yet another decades-old, home-grown Western New York company out of business. This Court should affirm.

Procedural History

The petition that instituted this Bus. Corp. L. § 1104-a judicial dissolution proceeding was the latest and most drastic filing by the Petitioners in a series of long, drawn-out, and overlapping disputes between siblings over their inherited family businesses. Filed on June 7, 2022, the petition contains few unique allegations when compared to the pleadings in the Appellants' other lawsuits. *Compare* R. 81–127 *with* R. 775, 784–98, 800–31, 832–53, 855–67. A brief history of that pending litigation follows.

The first existing action was brought by Respondent Martha Kavanaugh ("Martha") and bears Erie County Index Number 810976/2017. R. 800–31. In her Second Amended Complaint, Martha asserts claims sounding in fraud, breach of fiduciary duty, and breach of contract arising out of her agreement with the Respondent-Respondent, Cornelius Kavanaugh a/k/a Neil Kavanaugh ("Neil"), to sell her ownership interest in the family companies, Consumers and Kavcon Development LLC ("Kavcon"). R. 819–31.

The second existing action was brought by Petitioner-Appellant-Respondent Matthew Kavanaugh ("Matthew") and bears Erie County Index Number 812636/2017. R. 784–98. Matthew asserts claims for breach of contract and breach of fiduciary duty against Martha, Respondent-Respondent-Appellant Mary Ellen Kavanaugh ("Mary Ellen") and Neil arising out of Martha's and Mary

Ellen's agreements to sell their ownership interests in the family companies to Neil. R. 786–98.

The third existing action was brought by Petitioners-Appellants-Respondents Matthew, James Kavanaugh ("James"), and Helen Kavanaugh ("Helen") individually and derivatively as shareholders of Consumers and members of Kavcon Development LLC, and bears Erie County Index Number 801916/2019. R. 832–53. In that action, Matthew, James, and Helen assert claims for breach of contract arising out of Martha's and Mary Ellen's agreements to sell their ownership interests in the family companies to Neil, as well as claims for breach of fiduciary duty against Neil and for his removal as officer and director. R. 847–51. Martha and Mary Ellen answered asserted cross-claims against Neil. James also brought a claim under the Labor Law against the Company. R. 851–52.

Matthew, James, and Helen moved for summary judgment on their breach of contract claims in the actions bearing Erie County Index Numbers 812636/2017 and 801916/2019, which this Court granted on appeal. R. 255–66. After this Court issued its memoranda and order on those motions, the members of Kavcon attempted to vote to change its Manager from Neil to Matthew, resulting in a dispute over control of Kavcon. R. 335–39. Other than the unsigned version of an Order to Show Cause attached to the petition, that dispute is not a part of the record

and irrelevant to this appeal.[1] Indeed, Kavcon is irrelevant to this appeal, which concerns involuntary dissolution of only Consumers.

The fourth existing action was filed by Kavcon against Neil after this Court's memoranda and orders in the previous related actions, and it bears Erie County Index Number 801813/2022. R. 856–67. In that action, Kavcon asserts claims for conversion, unjust enrichment, and breach of fiduciary duty arising out of Neil's management and the disputed change in control. R. 856–67. The fifth related action was filed by Consumers to collect a demand note owed by Kavcon. R. 775.

Finally, on June 7, 2022, the Petitioners filed this action seeking judicial dissolution of Consumers. At the motion court's hearing of the Petitioners' Order to Show Cause instituting this action, the motion court stayed the dissolution proceeding pending resolution of the Appellants' other lawsuits. R. 683.

On December 21, 2022, Neil moved to dismiss this petition for involuntary judicial dissolution, according to the motion court's briefing schedule. R. 770. At the time, the five foregoing lawsuits and this dissolution action were the subjects of a motion to join and cross-motion to consolidate. R. 775, 872. After Neil's motion to dismiss the petition was argued on January 18, 2023, the motion court dismissed

[1] As explained *infra*, Part IV.B., nearly all of Mary Ellen's brief concerns that dispute and improperly advances irrelevant arguments for the first time on this appeal.

the petition and cross-petitions in their entirety as well as all claims, counterclaims, and cross-claims seeking the involuntary judicial dissolution of Consumers. R. 9–11.

After dismissing the dissolution action, the motion court consolidated the other related actions. Matthew, James, and Helen then sought leave to amend their complaint in the action bearing Erie County Index Number 801916/2019 to add the few allegations from the dissolution petition concerning more recent events, and the motion court deemed those allegations included in the litigation.

Statement Of Facts

The relevant facts for this appeal are straightforward. The litanies of allegations recited by Matthew, James, Helen, and Mary Ellen in their briefs, on the other hand, are almost all absent from the record, not actionable, or restated from other lawsuits.

Neil, Matthew, James, Helen, Mary Ellen, Martha and Lawrence Kavanaugh, Jr., (collectively, the "Kavanaugh shareholder siblings"), are the shareholders in Consumers. R. 83–84. Neil, who holds the most shares, has served as President of Consumers since 2002 and before that as Vice President since 1986. R. 897. Despite intense and growing competition from regional and national giant chain stores, Consumers has consistently increased its revenue under

the management of Neil as President, with a 229% gain in revenue and 920% gain in net income from 2002 to 2021. *Id.*

In 2012 and 2013, respectively, Mary Ellen and Martha agreed to sell Neil their ownership interests in Consumers, R. 889–94, as well as its separate sister company, Kavcon. The long running disputes between the Kavanaugh shareholder siblings — evident from the foregoing procedural history — began when Matthew contested those sales under the companies' governing documents. R. 784–98. James, Helen, Mary Ellen, and Martha later joined and together asserted the variety of claims against Neil arising out of his leadership of Consumers discussed above. R. 800–53.

In 2020, as part of that litigation, the parties commissioned the accounting firm FreedMaxick to investigate the financial records of Consumers. R. 780. Importantly, that report found that "all related party transactions between the Organization and its owners and with related family members and entities have been properly accounted for." R. 501. FreedMaxick "did not identify any suspicious or irregular transactions that would indicate the existence of financial fraud within the Organizations." R. 497. The testimony of veteran Consumers employees buttresses the accountants' conclusion. According to Donna Kihl, Consumers' Controller, Neil has never asked her to falsify records or misappropriate funds and cannot access the companies' accounting systems

himself. R. 569–70. She also testified that related entities like Kavcon and others mentioned in the petition have been properly billed for all expenses incurred on their behalf. R. 569.

Until 2022, Neil, Matthew, James, and Helen were each at-will employees of Consumers. R. 901, 905. But after this Court granted summary judgment on the Petitioners' contract claims and the members of Kavcon attempted to install Matthew as its Manager, Matthew ceased performing work for Consumers. R. 877–78, 904. Consumers therefore terminated him for cause on March 23, 2022. *Id.* Likewise, James had been on paid administrative leave from his employment at Consumers since December 5, 2018, for various policy violations and disruptive behavior. R. 880–82, 904. Among the terms of that leave was a prohibition on entering Company premises without permission, which James violated by entering a store and removing company property. R. 883–884, 904. Because he violated the terms of administrative leave, Consumers terminated James' employment for cause on May 31, 2022. *Id.* Since then, Neil and Helen have been the only Kavanaugh shareholder siblings employed by Consumers. The Petitioners brought this action only after Matthew and James were terminated as employees.

Importantly, the Share Purchase Agreement ("SPA") governing Consumers restricts voting common shares to only those Kavanaugh shareholder siblings employed by the Company. R. 777. Indeed, it states "the parties hereto believe

that it is in the best interest of the Corporation . . . for the voting common shares of the Corporation to be owned solely by . . . those Shareholders who are employed by the Corporation." R. 431. Thus when the SPA was signed, Neil, Matthew, James, and Helen were the only Kavanaugh sibling shareholders holding common voting shares. R. 453. The other Kavanaugh shareholder siblings, including Mary Ellen and Martha, were not employed by the Company and have not owned voting common shares. R. 453, 903.

The SPA further dictates Matthew's and James' rights and obligations as shareholders upon termination. Article 11 states:

> 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. 447–48. Thus, when they filed their petition for judicial dissolution on June 7, 2022, neither Matthew nor James were entitled to vote their shares because their employment had been terminated and they were thus obligated to deliver their shares to the Company.

Argument

Judicial dissolution, the "judicially-imposed death" of a corporation, is a harsh, equitable action. *Matter of Radom & Neidorff, Inc.*, 307 N.Y. at 7, 119 N.E.2d at 565. The legislature thus permits it for only certain shareholders in certain circumstances. *See* Bus. Corp. L. § 1104-a(a). And even then, involuntary dissolution must be "the only feasible means" to provide a return on investment. Bus. Corp. L. § 1104-a(b)(1).

Determining whether dissolution is appropriate "rests within the sound discretion of the court considering the application." *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d 81, 84, 487 N.Y.S.2d 901, 904 (3d Dep't 1985); *see, e.g.*, *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 67, 484 N.Y.S.2d at 802. Simply put, the motion court providently exercised its discretion, and there is no reason to disturb its determination.

The petition here (as well as Mary Ellen's purported cross-petition) falls short of the threshold requirements to seek dissolution. All but one of the Appellants lack standing to seek dissolution, and they have each failed to state a claim for dissolution under either Bus. Corp. L. § 1104-a or the common law. Even if that were not so, the Appellants are actively seeking adequate, alternative remedies for their alleged harms in five other lawsuits for the same allegations as are in their petition, and thus dissolution cannot be "the only feasible means" or

"reasonably necessary" to protect their interests. Bus. Corp. L. § 1104-a(b)(1)–(2). The motion court therefore did not abuse its discretion in dismissing the petition and cross-petitions.

I. **The Motion Court Did Not Abuse Its Discretion When It Determined That Dissolution Was Not The Only Feasible Remedy And Not Reasonably Necessary.**

The Appellants failed to state a claim because they have not shown dissolution to be necessary, as a matter of law. According to the Court of Appeals, Section 1104-a *requires* that courts consider alternatives to dissolution. *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 806 (1984) ("courts are instructed to consider both whether 'liquidation of the corporation is the only feasible means' to protect the complaining shareholder's expectation of a fair return on his or her investment and whether dissolution 'is reasonably necessary' to protect 'the rights or interests of any substantial number of shareholders.'") (quoting Bus. Corp. L. § 1104-a(b)(1)). This reflects sound policy that the "ultimate remedy of dissolution and forced sale of corporate assets should only be applied as a last resort." *Matter of Klein Law Grp., P.C.*, 134 A.D.3d 450, 450, 19 N.Y.S.3d 748, 748 (1st Dep't 2015) (quoting *Matter of Ng*, 174 A.D.2d 523, 526, 572 N.Y.S.2d 295, 297 (1st Dep't 1991)).

The common law power to dissolve a corporation is similarly limited by the nature of equitable remedies. The Court of Appeals has explained that

> true to the ancient principle that equity jurisdiction will not lie when there exists a remedy at law, the courts have not entertained a minority's petition in equity when their rights and interests could be adequately protected in a legal action, such as by a shareholder's derivative suit.

Matter of Kemp & Beatley, Inc. (Gardstein), 64 N.Y.2d. at 70, 484 N.Y.S.2d at 803 (internal citations omitted). In other words, dissolution is inappropriate when other options exist, and that is so regardless of whether a petitioner pursues a statutory action under Bus. Corp. L. § 1104-a or a common law claim. *See Matter of Nelkin v. H. J. R. Realty Corp.*, 25 N.Y.2d 543, 550, 307 N.Y.S.2d 454, 459 (1969) (holding allegations that "may be adequately adjudicated in a shareholders' derivative action . . . are not . . . sufficient to justify the exercise of the Supreme Court's inherent power to order nonstatutory judicial dissolution.").

Therefore, to state a claim for dissolution a petitioner must demonstrate that dissolution is the only feasible means to obtain a fair return and reasonably necessary to protect the rights of a substantial number of shareholders. Here, the Appellants simply cannot meet that pleading requirement because they are actively pursuing other means to protect their rights in related litigation.

In "determining *whether to proceed*" with the Appellants' request for dissolution, the motion court "*shall* take into account" the alternative remedies and consider whether "liquidation of the corporation is the only feasible means" or "reasonably necessary." Bus. Corp. L. § 1104-a(b)(1)–(2) (emphasis added). Even if "oppressive conduct is found, consideration must be given to the totality of

circumstances . . . to determine whether some remedy short of or other than dissolution constitutes a feasible means of satisfying both the petitioner's expectations and the rights and interests of any other substantial group of shareholders." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 806.

"Whether dissolution constitutes an appropriate remedy rests within the sound discretion of the court considering the application." *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d at 84, 487 N.Y.S.2d at 904; *see, e.g.*, *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 67, 484 N.Y.S.2d at 802 (holding lower "courts did not *abuse their discretion* by concluding that dissolution was the only means by which petitioners could gain a fair return on their investment") (emphasis added). The motion court here was well within its discretion to find "the related lawsuits . . . are more than adequate remedies to a dissolution." R. 34. The Appellants have offered no reason to disturb the motion court's decision.

A. The Motion Court Did Not Abuse Its Discretion By Holding That The Appellants' Other Pending Lawsuits Based On The Same Allegations As The Dissolution Petition Are Adequate Alternative Remedies To Judicial Dissolution Such That The Court Should Not Proceed With Dissolution.

The motion court properly considered the "totality of circumstances" to determine whether dissolution was necessary. *Matter of Kemp & Beatley, Inc.*

(Gardstein), 64 N.Y.2d at 73, 484 N.Y.S.2d at 806. Because the vast majority of the allegations in the petition merely duplicate the allegations in other lawsuits, here the Appellants have other, obvious remedies, and judicial dissolution is not "the only feasible means" or "reasonably necessary" to protect them. Bus. Corp. L. § 1104-a(b)(1)–(2).

Comparing the petition to the Appellants' other lawsuits demonstrates their duplication. Paragraphs 19–55, 57–76, 100–226, 228–42, 257–264, and 309–311 of the petition merely repeat the substance of the plaintiffs' allegations in two five-year-old lawsuits, *Matthew G. Kavanaugh v. Neil Kavanaugh, et al.*, Erie County Index No. 812636/2017, and *Martha A. Kavanaugh v. Cornelius Kavanaugh, et al.*, Erie County Index No. 810976/2017, or in *James Kavanaugh v. Neil Kavanaugh a/k/a Cornelius Kavanaugh, et al.*, Erie County Index No. 801916/2019. *Compare* R. 81–127 *with* R. 784–98, 800–31, 832–53. The petition repeats allegations concerning Mary Ellen's and Martha's sales of their ownership interests that this Court already decided. R. 84–89, 255–63, 264–66. It also repeats allegations concerning Martha Kavanaugh's allegations of fraud. R. 800–31. The allegations in paragraphs 243–56 and 268–76 are the subject of Kavcon's more recent lawsuit, *Kavcon Development LLC v. Cornelius Kavanaugh*, Erie County Index No. 801813/2022. *Compare* R. 81–127 *with* R. 855–67. The only substantively new

allegations in the petition are paragraphs 77–94, 227, and 265–67,[2] which concern the history and termination of Matthew's and James' employment. R. 81–127. But as explained *infra* in Part II and in Part III.B, Matthew and James lack standing, and their allegations nonetheless fail to allege oppression.[3]

Obviously, the Appellants are addressing alleged breaches of fiduciary duties in their individual claims for breach of fiduciary duty. R. 784–98, 800–31, 832–53, 855–67. Furthermore, most of the Petitioners' allegations are limited to "waste of corporate assets" for which they must seek to recover in their derivative suit. *Lewis v. Jones*, 107 A.D.2d 931, 933, 483 N.Y.S.2d 868, 870 (3d Dep't 1985); R. 97, 113–14, 117–20, 121–22. The allegations concerning the termination of employment, R. 105–08, 114–16, are being pursued by James in his other lawsuit. R. 851–52. The mechanisms of corporate governance are also available to the Appellants, R. 1043–70, and they are pursuing a judgment to affect such governance pursuant to Bus. Corp. L. §§ 706 or 716 in another action. These alternatives obviate any need for dissolution.

Concerning Helen's claim — as the only petitioner with standing — the Petitioners admit that both the dissolution petition and her other lawsuit are

[2] These represent only 6.2% of the paragraphs in the petition.
[3] The few other paragraphs of the petition are either prefatory, state legal conclusions, or concern decades-old management practices at the Company and thus cannot state a claim for involuntary judicial dissolution because they meet the shareholders' reasonable expectations, as well as for other reasons explained *infra* in Part III.C.

"founded on [the] same wrongdoing." Brief for Petitioners-Appellants-Respondents Matthew, James and Helen Kavanaugh ("Petitioners Br.") 39. They attempt to identify three "additional misdeeds" for which this dissolution action is necessary, *id.*, but none of these is actionable, and even if any were it would certainly not state a claim for dissolution.

The first allegation the Petitioners list recasts a loan from Consumers to Kavcon — a common occurrence between these companies with overlapping ownership — as related to Neil's alleged "embezzlement" from Kavcon. *Id*. The parties' claims about management of Kavcon and transfers between it and Neil are the subject of a lawsuit by Kavcon. R. 855–67. These allegations are not unique to the petition and cannot justify dissolution of Consumers.

The second concerns the termination of Matthew and James' employment. Petitioners Br. 39. But as discussed at length, *infra*, Part III.B, the Petitioners fail to state a claim for those terminations. And in any event, Helen, as the sole "complaining shareholder" with standing, cannot claim those terminations are oppressive conduct "toward" her. Bus. Corp. L. § 1104-a(a)(1).

The third concerns the delay in issuing distributions (incorrectly termed "dividends") in the aftermath of this Court's December 23, 2021 memoranda and orders. Petitioners Br. 39. The Appellants admit in their brief they have received

these "dividends," Petitioners Br. 7, so this final additional allegation cannot support dissolution.

Money judgements — as sought in the Appellants' other lawsuits — are sufficient to remedy the wrongs they allege, if they are entitled to relief at all. *See Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 69–70, 484 N.Y.S.2d at 803. This relief sought in the Appellants' other lawsuits (all based on the same allegations as here) are each "some remedy short of or other than dissolution." *Id.* at 73, 484 N.Y.S.2d at 806.

The Petitioners rely on a misleading distinction between remedies benefiting the company and remedies benefiting Helen to argue that Helen's other suits seek "different remedies" such that dissolution is necessary to protect her stake in Consumers.[4] Petitioners Br. 40. But Helen brought her alternative claims under Erie County Index Number 801916/2019 both individually *and* derivatively as a shareholder. R. 832. She seeks to vindicate her rights as a shareholder both in that lawsuit and here by requesting dissolution. The motion court was well within its discretion to decide the other lawsuits were adequate to protect her rights, i.e., that "liquidation of the corporation" is not "the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment." Bus.

[4] The standard is not whether other remedies are "different," Petitioners Br. 40, but whether dissolution is the "only feasible means" and "reasonably necessary." Bus. Corp. L. § 1104-a(b).

Corp. L. § 1104-a(b)(1)–(2); *see Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 67, 484 N.Y.S.2d at 802; *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d at 84, 487 N.Y.S.2d at 904.

The Petitioners also rely on *Singe v. Bates Troy, Inc.*, 206 A.D.3d 1528, 1532, 172 N.Y.S.3d 147, 149 (3d Dep't 2022), but *Singe* in fact demonstrates why the motion court was correct in this case. In *Singe*, the court compared two actions based on alternative and mutually exclusive sets of alleged facts. In the first action the plaintiff asserted claims for breach of contract and various other claims for conduct that allegedly "compell[ed] him to give up his Bates Troy shares," such that he was no longer a shareholder. *Id.* at 1529, 172 N.Y.S.3d at 149. The second action, in which he sought dissolution of the company, "ar[o]se from plaintiff's status as a putative minority shareholder." *Id.* at 1532, 172 N.Y.S.3d at 151. The facts alleged in each action were mutually exclusive because the petitioner either *was* or *was not* a shareholder. Thus neither action alone was sufficient to resolve the disputed issues. *Id.*; *see also* CPLR § 3211(a)(4).

Here, unlike in *Singe*, Helen's claims in both this dissolution action and her other lawsuit arise out of her status as a shareholder in Consumers, and the allegations overlap. Rather than explain why dissolution could be necessary, the Petitioners selectively quote from a nearly forty-year-old case from the Third

Department, *Lewis v. Jones*, 107 A.D.2d 931, 483 N.Y.S.2d 868 (3d Dep't 1985). But they omit the important distinction made by the *Lewis* court in its analysis:

> [T]he allegations set forth in plaintiff's instant complaint demonstrate[] conclusively that *the remedy sought is personal to plaintiff* and seeks recovery for personal losses inflicted upon him by reason of defendants' misconduct. *This is clearly to be distinguished from the form of relief pursued by plaintiff in the shareholder's derivative suit, which is the only proper form of action when recovery is sought for waste of corporate assets.*

Id. at 933, 483 N.Y.S.2d at 870 (emphasis added). Because the *Lewis* petitioner sought dissolution to "recover[] for personal losses" other than the "waste of corporate assets" addressed in a separate derivative action, the court permitted a common law dissolution action. *Id.* Just as in *Singe*, the rights supporting recovery in *Lewis* were distinct between the actions.

Here the rights supporting recovery are the same between the actions. The Appellants' several lawsuits (and in particular Helen's action brought individually and derivatively) aim to recover for *both* alleged personal losses[5] *and* alleged losses suffered by the Company.[6] R. 832–53. Likewise, the petition aims to recover for the same alleged *personal losses* and same alleged *losses suffered by the Company*. R. 81–127. Neither *Singe* nor *Lewis* permit such duplication, and it

[5] These include allegations about distributions, disclosure, or claims seeking to bar directors or officers of Consumers under Bus. Corp. L. §§ 706 and 716. R. 832–53.

[6] These include allegations about bonuses, self-dealing, interest rates on loans to the Company, transactions without a corporate purpose, and others that amount to allegations of corporate waste are losses suffered by the company, which the dissolution action again duplicates from Helen's derivative action. *Compare* R. 81–127 *with* R. 832–53.

is improper, especially in light of the legislature's command that dissolution be "the only feasible means" and "reasonably necessary." Bus. Corp. L. § 1104-a(b)(1)–(2). The Appellants have not identified what rights cannot be protected in their other actions nor why dissolution is necessary.[7] That silence speaks volumes.

The Appellants simply have no need to destroy the Company, and the petition serves no purpose other than "as merely a coercive tool" against the majority. *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 74, 484 N.Y.S.2d at 806. In fact, while arguing the Order to Show Cause by which the Petitioners began this action, their counsel intimated their goal was to coerce a "true binding resolution," i.e., sale of their shares (presumably at higher prices than Neil and his sisters had previously agreed upon). R. 708–09. But the Court of Appeals has made clear that coercion is "contrary to th[e] remedial purpose" of involuntary judicial dissolution of a corporation. *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 74, 484 N.Y.S.2d at 806; *see Matter of Cassata v. Brewster-Allen-Wichert, Inc.*, 248 A.D.2d 710, 711, 670 N.Y.S.2d 552, 553 (2d Dep't 1998) ("A minority shareholder 'whose own acts, made in bad faith and undertaken with a view toward forcing an involuntary dissolution, give rise to the complained-of oppression' is not entitled to redress under the statute.") (quoting

[7] Any allegations of more recent facts contained in the petition can and have been added to the prior claims by moving to the amend pleadings in the Appellants' other actions.

id.). For the sake of the Company's over 270 employees, many of whom have worked for the Company for decades, this Court should affirm the motion court's order dismissing the petition and cross-petitions.

B. The Motion Court Did Not Abuse Its Discretion By Proceeding Without A Further Hearing On The Petition.

The motion court did not need to hold a further hearing.[8] A "hearing is only required where there is some contested issue determinative of the validity of the application." *Matter of Klein Law Grp., P.C.*, 134 A.D.3d at 450, 19 N.Y.S.3d at 749 (quoting *Matter of Gordon & Weiss*, 32 A.D.2d 279, 280, 301 N.Y.S.2d 839, 841 (1st Dep't 1969)); *see Matter of Quail Aero Serv., Inc.*, 300 A.D.2d 800, 803, 755 N.Y.S.2d 103, 107 (3d Dep't 2002) (affirming dismissal of petition for dismissal pursuant to Bus. Corp. L. § 1104-a because request for an evidentiary hearing was without merit as there was no disputed issue of fact determinative to the dissolution application). "In the absence of such an issue, there is nothing in the nature of such a proceeding that distinguishes it from any other litigated proceeding in this respect." *Matter of Goodman v. Lovett*, 200 A.D.2d 670, 670, 607 N.Y.S.2d 52, 53 (2d Dep't 1994).

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[8] The motion court did in fact hear the petition pursuant to the order to show cause by which the Petitioners instituted this action. R. 347–52, 679–769. At that hearing, the motion court determined from the parties' submissions that the dissolution proceeding should be stayed pending resolution of the Appellants' related lawsuits. R. 683. Neil moved to dismiss the stayed petition several months later. R. 770–71. The Petitioners did not request a further hearing in their papers opposing that motion.

No contested factual issue was determinative of the application, and so an evidentiary hearing was unnecessary. As explained *supra*, the motion court determined Matthew and James lack standing, as a matter of law, under the unambiguous terms of Consumers' SPA. R. 26, 39. Interpreting that agreement is an issue of law for the Court. *See, e.g.*, *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 569 (2002).

As to Helen, the motion court determined she had alternative remedies in other lawsuits such that dissolution could not be necessary. R. 40. Importantly, the motion court's decision with respect to Helen did not require that it resolve any issue of fact. Determining "*whether to proceed*" with dissolution as "the only feasible means" or one that is "reasonably necessary" to protect Helen's interests — despite her duplicative legal proceedings — is a legal determination that both the statute and common law assign to the sound discretion of the motion court. Bus. Corp. L. § 1104-a(b)(1)–(2); *see Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 67, 484 N.Y.S.2d at 802; *see Matter of Nelkin*, 25 N.Y.2d at 550, 307 N.Y.S.2d at 459; *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d at 84, 487 N.Y.S.2d at 904. The Appellants do not contest that the other lawsuits exist (nor could they). Indeed, the Appellants offer no reason why a simple comparison of the pleadings does not demonstrate their alternative remedies to dissolution. *Compare* R. 81–127 *with* R. 775, 784–98, 800–31, 832–53, 855–67.

The Petitioners cite *Matter of MacDougall (Manhattan Ad Hoc Housewares)*, 150 A.D.2d 160, 540 N.Y.S.2d 245 (1st Dep't 1989) for the proposition that the motion court erred by not conducting a hearing. But their argument based on *MacDougall* is backwards.

The First Department in *MacDougall* found the lower court erred by *granting* judicial dissolution without first holding a hearing. *Id.* at 160–61, 540 N.Y.S.2d at 245–46. Ordering such affirmative relief, however, requires determinations of disputed facts. *See id.*; *see also Matter of Rosen (Hofteller Enters.)*, 102 A.D.2d 855, 855, 476 N.Y.S.2d 625, 626–27 (2d Dep't 1984) ("Special Term erred in granting the petition for dissolution without first conducting a hearing on the issue of whether appellants were guilty of oppressive conduct toward the petitioner."). This appeal presents the opposite case because the motion court did not grant dissolution. Rather it denied the application as insufficient on the pleadings as a matter of law. R. 39–40. The motion court has discretion to do so, as in "any other litigated proceeding," when, as here, no factual issue will affect the outcome. *Matter of Goodman*, 200 A.D.2d at 670, 607 N.Y.S.2d at 53.

II. **Matthew And James Lack Standing To Petition For Judicial Dissolution Pursuant to Bus. Corp. L. § 1104-a Because They Are Not Shareholders Entitled To Vote.**

Section 1104-a of the Business Corporation Law permits only those shareholders with voting shares to bring a petition for judicial dissolution. *See* Bus. Corp. L. § 1104-a(a) ("holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation . . . *entitled to vote* . . . may present a petition of dissolution") (emphasis added).

Shareholders who are not entitled to vote have no standing to bring a petition for judicial dissolution, and courts routinely dismiss their petitions. *See, e.g.*, *Matter of Twin Bay Vil., Inc.*, 153 A.D.3d 998, 1000, 60 N.Y.S.3d 560, 563, (3d Dep't 2017) (holding that beneficial owners of shares that were not shareholders of record and thus could not vote their shares lacked standing pursuant to Bus. Corp. L. § 1104-a), *leave to appeal denied*, 31 N.Y.3d 902, 77 N.Y.S.3d 657; *Artigas v. Renewal Arts Realty Corp*., 22 A.D.3d 327, 328, 803 N.Y.S.2d 12, 13 (1st Dep't 2005) (dissolution petition properly dismissed where petitioner sold interests before bringing petition); *Matter of Fromcheck v. Brentwood Pain & Med. Servs.*, *P.C.*, 254 A.D.2d 485, 486, 679 N.Y.S.2d 632, 633–34 (2d Dep't 1998) ("Because the petitioner is . . . not entitled to vote in an election of directors, there is no basis upon which the petitioner can establish the prerequisites necessary for her to present the [judicial dissolution] petition."); *Matter of Hesek v. 245 S. Main St.,*

Inc., 170 A.D.2d 956, 956, 566 N.Y.S.2d 127, 127 (4th Dep't 1991) (holding that because "petitioner [wa]s no longer the lawful holder of a stock interest in the corporation," judicial dissolution petition should be dismissed); *Martin Enterprises, Inc. v. Janover*, 140 A.D.2d 587, 587, 528 N.Y.S.2d 855, 856 (2d Dep't 1988) ("Since the petitioner was not a shareholder entitled to vote, she was without standing to bring a proceeding to dissolve the corporation.").

A. Matthew And James Are Not "Entitled To Vote" Because Their Employment Was Terminated And The Share Purchase Agreement Requires They Deliver Their Voting Shares In Exchange For Non-Voting Shares.

The only shareholders "entitled to vote" under Consumers' SPA are those holding voting common shares, which, in turn, can be held only by shareholders employed by the Company. The Share Purchase Agreement of Consumers explicitly provides "for the voting common shares of the Corporation to be owned solely by . . . those Shareholders who are employed by the Corporation." R. 431. It further provides that upon "ceas[ing] to be employed by the Corporation for any reason whatsoever," a shareholder may no longer own any voting share of Consumers and "shall deliver all certificates representing voting common shares owned by such Shareholder, if any, to the Corporation to be redeemed." R. 447–48.

As of June 7, 2022, the date they filed the petition, Matthew and James were not "entitled to vote" their shares pursuant to the Share Purchase Agreement of

Consumers because they were no longer employed by the Company.[9] R. 877–78, 883–884, 904. They admit in the petition that they were terminated, R. 108, 115, and their counsel conceded the same during argument. R. 25.

The SPA lays out Matthew's and James' rights and obligations following those terminations: they "shall deliver all certificates representing voting common shares . . . to be redeemed." R. 447–48. The obligation in the first instance is on Matthew and James to deliver their shares. *Id.*

The Petitioners twist the language of the SPA to assign error to the motion court for finding their shares "automatically convert[ed]" and assign Neil the burden to demonstrate "Consumers actually converted" the shares. Petitioners Br. 34. That argument is specious. The SPA itself demonstrates that Matthew and James were not "entitled to vote" their shares. Bus. Corp. L. § 1104-a(a).

The SPA obligates Matthew and James to first deliver their voting shares to be redeemed. They do not remain "entitled to vote in an election of directors," Bus. Corp. L. § 1104-a(a), by refusing to deliver their shares to be converted because the SPA limits their rights upon termination to "deliver[ing] all certificates representing voting common shares" to be redeemed and exchanged. R. 447–48. If they tried to vote their shares, the Company could simply redeem them in

[9] Although both Matthew and James were terminated for cause, that is irrelevant to their voting rights under the SPA, which contemplates termination "for any reason whatsoever." R. 447–48.

exchange for non-voting shares. The Petitioners elevate form over substance and argue their own noncompliance preserves their voting rights and standing, but that argument relies on their own unclean hands. Petitioners Br. 34. They are simply wrong because the SPA requires nothing of Consumers until and unless Matthew and James deliver their shares.

In any event, Article 11 immediately changes Matthew's and James' rights under the SPA upon termination of their employment. They are entitled only to deliver their voting shares for exchange, not to vote them. They therefore lack standing.

In similar circumstances, this Court has found a petitioner lacked standing when the corporation was "entitled to an order directing petitioner to transfer the stock owned by decedent to" it. *See Matter of Hesek*, 170 A.D.2d at 956, 566 N.Y.S.2d at 127. In *Hesek*, for example, the corporation gave timely notice and tendered the agreed-upon price to redeem shares under a redemption agreement.[10] *Id.* Although the *Hesek* petitioner had refused to transfer her stock, like Matthew and James apparently do here, this Court held she nonetheless lacked standing because the corporation was entitled to transfer of the stock by operation of law, and thus the petitioner was no longer the lawful holder of the stock. *Id.*

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[10] Importantly, Consumers' SPA has no similar preconditions.

The Petitioners again rely on *Singe v. Bates Troy, Inc.*, but that case is factually distinct.[11] 206 A.D.3d at 1528, 172 N.Y.S.3d at 147. There a "stock purchase agreement and [] award of restricted stock agreement" both "apparently required" that one party affirmatively buy back the others' shares, and the record did not indicate that purchase had happened. *Id.* at 1531, 172 N.Y.S. at 150. Here, on the other hand, the SPA includes no condition precedent for Consumers, and upon their termination Matthew and James became obligated in the first instance deliver their voting shares to be redeemed.

Under the clear terms of the SPA, the Company became entitled to delivery of Matthew's and James' shares upon termination of their employment, so just like the petitioner in *Hesek*, Matthew and James lack standing. *See also Long Island Med. & Gastroenterology Assocs., P.C. v. Mocha Realty Assocs., LLC*, 191 A.D.3d 857, 862, 143 N.Y.S.3d 56, 63, (2d Dep't 2021) ("The court also correctly concluded that, since [Petitioner's] interest in [the Company] had been properly terminated pursuant to the operating agreement, he lacked standing to seek [the Company's] dissolution."), *leave to appeal denied,* 37 N.Y.3d 908, 152 N.Y.S.3d 681 (2021). The SPA controls, regardless of whether Matthew and James complied with the SPA and "actually converted" their voting shares. Petitioners Br. 34.

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[11] To the extent Appellants offer *Singe* for a proposition that contradicts this Court's holding in *Hesek,* it conflicts with the law in the Fourth Department and is not controlling.

B. The Motion Court Correctly Denied The Appellants' Motion To Renew On The Basis Of The State Liquor Authority's Freedom Of Information Law Response Because The Alcohol Beverage Control Law Does Not Control The Shareholders' Voting Rights And Does Not Require Reporting A Change In A Shareholder's Voting Rights.

In a motion to renew Neil's motion to dismiss their petition, the Petitioners belatedly offered a response from the State Liquor Authority ("SLA") to their Freedom of Information Law request for records related to Consumers. R. 1018–20. CPLR Rule 2221(e)(2) requires a motion to renew "be based upon new facts not offered on the prior motion that would change the prior determination," but the Petitioners presented no new facts relevant to the motion court's prior determination.

The Petitioners offered the SLA response as evidence that Matthew and James remained voting shareholders on the date of the petition, June 7, 2022. But contrary to the Petitioners' explicit representations to the Court, those SLA records do not demonstrate that Matthew or James were voting shareholders in Consumers. Rather the SLA records identify only officers, shareholders, and number of shares in Consumers. R. 1019–20. The word "voting" is nowhere in the document, and it contains no information as to whether shares are voting or non-voting, nor does it provide any information at all about shareholders' governance rights. *Id.*

The SLA records are silent on shareholders' voting power and governance because the SLA is agnostic on such matters. The relevant section of the Alcoholic

Beverage Control Law requires that "there shall be filed with the liquor authority an application for permission to make such change[s]" only for a "corporate change in stockholders, stockholdings, alcoholic beverages officers, officers or directors." Alcoholic Beverage Control Law § 99-d(2). The plain language of the statute simply does not mandate an application before a change in shareholders' voting power and governance rights when the identities of the stockholders remain unchanged. *Id.*

Notwithstanding the Petitioners' continued misrepresentations to the contrary, the SLA records demonstrate only that Matthew and James are stockholders, an irrelevant and undisputed fact. The SPA — not the SLA — determines Matthew's and James's voting rights. That fact was crucial to the motion court's prior determination to grant Neil's motion to dismiss, and the motion court correctly found it fatal to the Petitioners' motion to renew because Section 1104-a of the Business Corporation Law provides standing to only voting shareholders. *See* Bus. Corp. L. § 1104-a(a). This Court should affirm the motion court's order denying Petitioners' motion to renew.

III. <u>The Appellants Failed To State A Claim For Involuntary Judicial Dissolution Under Bus. Corp. L. § 1104-a Or The Common Law.</u>

In a dissolution action pursuant to Bus. Corp. L. § 1104-a, the petitioners have the burden in the first instance to "set forth a prima facie case of oppressive conduct." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73–74, 484

N.Y.S.2d at 806. Even if any Appellant other than Helen had standing, and even if the Appellants did not have adequate alternative remedies, they have nonetheless failed to show they could meet that burden. Indeed, their allegations do not amount to oppressive conduct or waste,[12] and for that additional reason the order dismissing the petition should be affirmed.

The Court of Appeals has explained that "oppressive" conduct is "conduct that substantially defeats the *reasonable* expectations held by minority shareholders in committing their capital to the particular enterprise." *Id.* at 72, 484 N.Y.S.2d at 805 (internal quotation marks omitted and emphasis added). And therefore the "complaining shareholder's reasonable expectations" are "a means of identifying and measuring [whether] conduct alleged to be oppressive is appropriate." *Id.* at 73, 484 N.Y.S.2d at 805 (internal quotation marks omitted). Here, the Appellants fail to allege that any of them have had reasonable expectations defeated.

Likewise, to claim corporate property is being "looted, wasted, or diverted for non-corporate purposes," Bus. Corp. L. § 1104-a(a)(2), petitioners must allege "misappropriation of corporate assets for private purpose as opposed to simple

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[12] Likewise, Petitioners have not set forth any "illegal" or "fraudulent" conduct, Bus. Corp. L. § 1104-a, which are given their common meaning under the statute. *See Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 71, 484 N.Y.S.2d at 804. To the extent the petition repeats the allegations of fraud made by Martha in her prior lawsuit, that lawsuit, not her siblings' attempted dissolution proceeding, is the proper forum for Martha to address them.

mismanagement." *Matter of Cunningham v. 344 6th Ave. Owners Corp.*, 256 A.D.2d 406, 407, 681 N.Y.S.2d 593, 594 (2d Dep't 1998) (internal citations omitted). Waste occurs only when no "person of ordinary business judgment" could say that the Company did "received [a] fair benefit" from a disputed transaction. *Aronoff v. Albanese*, 85 A.D.2d 3, 5–7, 446 N.Y.S.2d 368, 371 (2d Dep't 1982). Here, too, the petition falls short.

A. The Petition Fails To State Any Oppressive Conduct Toward The Sole Complaining Shareholder With Standing, Helen Kavanaugh.

When the petition was filed, only Helen was employed by Consumers and thus held shares "entitled to vote" sufficient to have standing under Bus. Corp. L. § 1104-a. R. 108, 265, 447–48, 903. But the petition includes no allegations of "illegal, fraudulent, or oppressive actions *toward the complaining shareholder[]*," Helen, and thus she has not stated a cause of action for judicial dissolution. Bus. Corp. L. § 1104-a(a)(1) (emphasis added); *see, e.g., Matter of Brickman v. Brickman Est. at the Point, Inc.*, 253 A.D.2d 812, 813, 677 N.Y.S.2d 600, 601 (2d Dep't 1998) ("petitioners here were not oppressed"); *Matter of Smith (Koslowitz Constr. Co.)*, 154 A.D.2d 537, 538, 546 N.Y.S.2d 382, 383 (2d Dep't 1989) ("the petitioner was not oppressed"); R. 101–02. She remains employed and able to vote, and she has made loans to the Company that remained outstanding and are earning interest. R. 447–48, 542, 900, 903, 918. She therefore has not had any reasonable expectations defeated and has not alleged a prima facie case of

oppression.[13] *See Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 805.

To the extent the Appellants attempt to lump Helen's interests with alleged oppression toward other shareholders, they ignore the legislature's requirement that there be "oppressive actions *toward the complaining shareholder[]*." Bus. Corp. L. § 1104-a(a)(1) (emphasis added). The only allegations new to this action involve the terminations of Matthew and James. But Helen is not aggrieved by either termination, and if anything, those terminations benefit Helen by increasing the proportional voting power of her shares. R. 431, 447–48.

Helen's supplemental affidavit does not save the petition. R. 1004–07. Her nonspecific grievances about the office, meetings, or employee interactions — even if they were true — do not "substantially defeat" the "reasonable expectations" of an employee, working remotely at her own prerogative, who since she became a shareholder decades ago has been responsible simply for purchasing a portion of the Company's inventory. *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 805 ("Disappointment alone should not necessarily be equated with oppression."); *Matter of Brickman*, 253 A.D.2d at 813, 677 N.Y.S.2d at 601 ("Petitioners here were not oppressed . . . They did not seek

[13] Importantly, the inquiry should stop here because Helen is the only Petitioner entitled to vote under the Consumers Share Purchase Agreement and thus the only shareholder able to meet the threshold requirements of Bus. Corp. L. § 1104-a.

responsibilities in the day-to-day management [and] did not express an interest in shareholders' meetings."); *Matter of Smith (Koslowitz Constr. Co.)*, 154 A.D.2d at 539, 546 N.Y.S.2d at 384; *Matter of Farega Realty Corp*., 132 A.D.2d 797, 798, 517 N.Y.S.2d 610, 611 (3d Dep't 1987); R. 92.

Put simply, Helen alone has standing, but the petition fails to allege any "illegal, fraudulent or oppressive actions toward" her. Bus. Corp. L. § 1104-a(a)(1). It therefore fails to state a claim.

B. Matthew And James Have Not Stated A Claim Of Oppression To Justify Involuntary Judicial Dissolution Under Either The Business Corporation Law Or The Common Law Based On Termination Of Their Employment.

i. Matthew And James Have Not Stated A Claim For Oppression Under Either The Business Corporation Law Or The Common Law Because They Were At-Will Employees Terminated For Cause.

Even if Matthew and James had standing to bring this action following the termination of their employment by Consumers — they do not — such termination does not state a claim for judicial dissolution under either Bus. Corp. L. § 1104-a or the common law because they had no reasonable expectation of continued employment under the circumstances.

Both Matthew and James were terminated for cause, R. 877–79; 883–84; 904, and thus their terminations cannot have "substantially defeat[ed] expectations that, objectively viewed, were both reasonable under the circumstances and were

central to the petitioner's decision to join the venture." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 805; *see Matter of Quail Aero Serv., Inc.*, 300 A.D.2d at 802, 755 N.Y.S.2d at 106.

Both Matthew and James were at-will employees of Consumers, subject to termination either "voluntarily or involuntarily." R. 447–48. Because Matthew ceased providing services to Consumers, his employment at Consumers was terminated for cause. R. 877–79. Likewise, James was terminated for cause on May 31, 2022, for violating a prohibition on entering the Company's premises without permission and removing Company property. R. 883–84. In these circumstances, Matthew and James "could have had no reasonable expectation that [they] would continue to be employed." *Matter of Schlachter (Ideal Handbag Grame Mfg. Corp.)*, 154 A.D.2d 685, 686, 546 N.Y.S.2d 891, 892 (2d Dep't 1989) (dismissing petition for involuntary dissolution by wife of terminated at-will employee where her husband "was an employee at will.").

Importantly, termination of an employee shareholder for cause or for legitimate business reasons is objectively reasonable and does not amount to oppressive conduct sufficient to state a cause of action for judicial dissolution. *See Matter of Can Plant Maintenance (Blake)*, 270 A.D.2d 829, 829, 705 N.Y.S.2d 454, 454 (4th Dep't 2000) ("Respondent failed to establish as a matter of law . . . that petitioner was *discharged for good cause* . . . so as to render dissolution

inappropriate.") (emphasis added); *Matter of Maybaum*, 6 Misc. 3d 1019(A), 800 N.Y.S.2d 349, 2005 WL 287391, at *4 (Sup. Ct. Nassau County 2005) ("[Petitioner] has not established a *prima facie* case of oppressive conduct. [Petitioner] was discharged from his employment with Stony Creek for cause."). The Petitioners cite only cases in which a petitioning shareholder was "frozen out" or "squeezed out" of the company, including by having his or her employment terminated, "for no legitimate reason." *Matter of Wiedy's Furniture Clearance Center Co., Inc.*, 108 A.D.2d at 84, 487 N.Y.S.2d at 904; *see also Matter of Williamson v. Williams, Picket, Gross*, 259 A.D.2d 362, 362, 687 N.Y.S.2d 53, 54 (1st Dep't 1999) (petitioner allegedly "involuntarily ousted from any involvement or ownership"); *Matter of DiMino v. DeVeaux Servs., Inc.*, 238 A.D.2d 943, 943–44, 661 N.Y.S.2d 550, 550 (4th Dep't 1997) ("respondents abruptly cut off his weekly salary, bonuses and other perquisites, denied him unrestricted access to corporate records and facilities, prevented his active participation in the business and terminated the employment of his family members"); *Matter of HGK Asset Mgmt., Inc. (Greenhouse)*, 228 A.D.2d 246, 644 N.Y.S.2d 26, 26–27 (1st Dep't 1996) ("shareholders summarily expelled [petitioner] from his directorship, fired him as an officer and employee of the corporation"); *Matter of Burack*, 137 A.D.2d 523, 525, 524 N.Y.S.2d 457, 459 (2d Dep't 1988) (petitioner removed as director,

officer, and employee after refusing other shareholder employees' request for salary increase). Those cases, which lacked cause for termination, are inapposite.

The Petitioners state that a long "history" of employment and management "is sufficient" to establish a reasonable expectation of continued employment. Petitioners Br. 28. But the cases they cite do not support that proposition. Rather, in each case they cite the court required more than termination from long tenured employment, such as simultaneous removal of the petitioner as director or officer or a change in control where the petitioner was pushed out of management. *See Matter of Gould Erectors & Rigging, Inc.*, 146 A.D.3d 1128, 1130, 45 N.Y.S.3d 270, 272 (3d Dep't 2017) (petitioner sharing responsibility for management terminated as director, officer, and employee and not paid profit-sharing bonus); *Matter of Burack*, 137 A.D.2d at 525, 524 N.Y.S.2d at 459 (shareholder with history of active participation removed as director, officer, and employee); *Matter of Gunzberg v. Art-Lloyd Metal Prod. Corp.*, 112 A.D.2d 423, 424, 492 N.Y.S.2d 83, 84–85 (2d Dep't 1985) (shareholders removed from long-held positions and fired as employees following election of new president of corporation).

This case is different, and the terminations here lack the circumstances courts have found elsewhere to be oppressive. Here there has been no change in control of Consumers, and neither Matthew nor James has lost a "voice in protecting his . . . interests." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64

N.Y.2d at 72, 848 N.Y.S.2d at 805. Matthew remains both a director and officer of the Company. R. 905. James remains assistant secretary of the Company. *Id.* Both continue to have a voice in its operation if they choose. *See Matter of Burack*, 137 A.D.2d at 527, 524 N.Y.S.2d at 460 (finding "no oppression . . . since [petitioner] is still officer and director of these enterprises").

Matthew and James are also wrong to present their responses to their father's survey as possible evidence of their expectation of continued employment. Petitioners Br. 29. Their survey responses can show only subjective expectations. The standard for whether a shareholder's "expectations" are "reasonable" is, however, an objective one. *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 805 ("oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, *objectively viewed*, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.") (emphasis added). The Petitioners' subjective views are irrelevant to whether an expectation, when "objectively viewed," is reasonable, and the Petitioners' survey responses do not raise any issue of material fact. *Id.* ("Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled.").

> Oppressive conduct is generally found when a minority shareholder has been excluded from participation in corporate affairs or management for no legitimate business reason or personal animus, or where an employee/shareholder is discharged without cause and, thus, is deprived of

> his or her salary or when corporate policies are changed by the majority to prevent the minority shareholder from receiving a reasonable return on their investment.

Pappas v. Fotinos, 28 Misc. 3d 1212(A), 911 N.Y.S.2d 694, 2010 WL 2891194, at *9 (Sup. Ct. Kings County 2010) (collecting cases). That is simply not true here, and Matthew's and James' terminations for cause are not a reason for dissolution.

ii. Matthew And James Have Not Stated A Claim For Oppression Under Either The Business Corporation Law Or The Common Law Because The Share Purchase Agreement Precludes Any Objectively Reasonable Expectation Of Continued Employment.

What is more, an expectation of continued employment under these circumstances is not reasonable under the terms of the SPA. The SPA explicitly provides that shareholder employees like Matthew and James may "cease[] to be employed by the Corporation *for any reason whatsoever, whether voluntarily or involuntarily*." R. 447–48. The SPA also explicitly ends shareholder employees' right to hold voting common stock upon termination of employment.[14] Such termination cannot be oppressive conduct under Bus. Corp. L. § 1104-a because its possibility, contemplated in the SPA ever since Matthew and James signed it, was part of any "expectations that, objectively viewed, were . . . reasonable." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 805.

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[14] The Share Purchase Agreement was made December 27, 1986, and has included since that time this limitation on voting rights of common shares in Consumers. R. 447–48.

This Court applied that reasoning to dismiss a dissolution petition in a case with striking resemblance to this one, *Matter of Apple (Apple Rubber Prods.)*, 224 A.D.2d 1016, 1016, 637 N.Y.S.2d 534, 535 (4th Dep't 1996). In that case, Peter Apple filed a petition to dissolve Apple Rubber Products, Inc., on the basis of "allegedly oppressive conduct in that his employment was terminated." *Id.* at 1016, 637 N.Y.S.2d at 537. The termination triggered a mandatory offer to sell his stock at a price set in the share purchase agreement. *See id.* The motion court denied a motion to dismiss and concluded that a purchase offer by Steven Apple constituted an election under Bus. Corp. L. § 1118.

This Court, however, reversed, granted the motion, and dismissed the petition. *See Matter of Apple (Apple Rubber Prods.)*, 224 A.D.2d at 1016, 637 N.Y.S.2d at 535. Because "the basis for [the] petition [wa]s allegedly oppressive conduct in that [Peter Apple's] employment was terminated," this Court noted that "the share purchase agreement . . . explicitly [bound] 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." *Id.* (emphasis added). This Court held "[t]hat agreement is enforceable and Peter Apple cannot be heard to argue that he had a reasonable expectation that he would be employed and would be a shareholder for life." *Id.*

So, too, here, the SPA provides that shareholders may "cease[] to be employed by the Corporation *for any reason whatsoever, whether voluntarily or involuntarily*, [and] such Shareholder shall deliver all certificates representing voting common shares owned by such Shareholder, if any, to the Corporation to be redeemed . . . in exchange for an equal number of non-voting common shares." R. 447–48 (emphasis added). That agreement is enforceable, and it prevents Matthew and James from having a reasonable expectation that they would be employed or remain a voting shareholder for life. *See Matter of Apple (Apple Rubber Prods.)*, 224 A.D.2d at 1016, 637 N.Y.S.2d at 535. In other words, the language of the SPA makes the possibility of involuntary terminations of shareholder employees a part of any expectations that when "objectively viewed, were . . . reasonable under the circumstances." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 73, 484 N.Y.S.2d at 805.

The Petitioners argue now, for the first time on this appeal, that this provision of the SPA has been waived. Petitioners Br. 29-31. In any event, the questionnaires the Petitioners cite in support of waiver do not demonstrate that the Company or its shareholders waived any rights. In fact, there is no evidence in the record of past circumstances in which Article 11 of the SPA could apply, let alone a waiver of rights by the Company or its shareholders.

The Petitioners argue in the alternative that this Court overrule its holding in *Matter of Apple*. There is no reason to do so. This Court in *Matter of Apple* correctly applied the law of New York — as stated by the Court of Appeals in *Matter of Kemp & Beatley, Inc.* — that oppressive conduct sufficient to dissolve a corporation must substantially defeat expectations that are *reasonable under the circumstances* when it held that an employee shareholder was not oppressed when his employment was terminated exactly as the share purchase agreement contemplated. *See Matter of Apple (Apple Rubber Prods.)*, 224 A.D.2d at 1016, 637 N.Y.S.2d at 535. The Petitioners are wrong that *Matter of Apple* imposed an "illogical" bright-line rule about agreements "confirm[ing]the default status of at-will employment," Petitioners Br. 32–33, and their argument both misconstrues this Court's holding in *Matter of Apple* and underscores that the termination of Matthew and James' at-will employment here does not amount to oppression under Bus. Corp. L. § 1104-a. Finally, the decision's length and citations do not matter, notwithstanding the Petitioners' argument otherwise. *See* Petitioners Br. at 32. The panel in *Matter of Apple* unanimously found that the petitioner failed to state of claim for dissolution in strikingly similar circumstances to this case. It is a persuasive and controlling precedent.

iii. Matthew And James Have Not Stated A Claim For Common Law Dissolution.

In an apparent effort to circumvent the statutory threshold for standing under Bus. Corp. L. §1104-a, Matthew and James invoke the common law to seek judicial dissolution. Although the Petitioners conflate the common law standard for dissolution with the requirements of Bus. Corp. L. § 1104-a, *see* Petitioners Br. 27, the common law requires more, and they nonetheless fall short of stating a claim.

A common law claim for involuntary judicial dissolution of a corporation exists only when the "directors and majority shareholders have so palpably breached the fiduciary duty they owe to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute." *Leibert v. Clapp*, 13 N.Y.2d 313, 317, 247 N.Y.S.2d 102, 105 (1963) (internal quotation marks omitted).

> A claim for common-law dissolution is properly stated where it is alleged with sufficient factual detail that the shareholders in control have been looting the company's assets at the expense of the minority shareholders, 'continuing the corporation's existence . . . for the sole purpose of benefitting those in control', and have sought 'to force and coerce [the minority shareholders] to sell and sacrifice their holdings to those in control.'

Ferolito v. Vultaggio, 99 A.D.3d 19, 28, 949 N.Y.S.2d 356, 363 (1st Dep't 2012) (quoting *id.* at 315–16, 247 N.Y.S.2d at 108). This case is a far cry from circumstances so egregious as to justify an exercise of the judiciary's inherent equitable power under the common law.

In arguing that termination of their employment is grounds for common law dissolution, Matthew and James cite only inapposite cases decided under Bus. Corp. L. § 1104-a in which a shareholder-employee was terminated without cause.[15] *See* Petitioners Br. 27–29. Indeed, they cite no case in which a corporation was dissolved under the common law based on simple termination of a shareholder's employment. *See id.*

Nor could they. As this Court recognized in *Feldmeier v. Feldmeier Equip., Inc.*, 164 A.D.3d 1093, 1095, 84 N.Y.S.3d 609, 613 (4th Dep't 2018), the viability of an action for common law dissolution "turns on whether there was any breach of fiduciary duty." Terminating an at-will employee — especially for cause — does not breach any fiduciary duty. *See, e.g.*, *Gallagher v. Lambert*, 74 N.Y.2d 562, 566, 549 N.Y.S.2d 945, 946 (1989). Sound business judgment may in fact require it.

The termination of Matthew's and James' at-will employment simply fails to "evince a palpable breach . . . of fiduciary duties" necessary for common-law dissolution. *Matter of Quail Aero Serv., Inc.*, 300 A.D.2d at 803, 755 N.Y.S.2d at 107. So, too, for the same reasons the Petitioners' allegations fail to state a claim under Bus. Corp. L. § 1104-a, they also fail to state a claim under the more

[15] Those "freeze out" cases are distinct from this matter where the terminations were for cause, as discussed *supra* in Part III.B.i.

stringent common-law standard that requires "certain egregious conduct," *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 69, 484 N.Y.S.2d at 803.

Furthermore, like the Petitioners' statutory cause of action, common law dissolution is an equitable remedy and should be unavailable when a legal remedy could suffice. Allegations that "may be adequately adjudicated in a shareholders' derivative action . . . are not . . . sufficient to justify the exercise of the Supreme Court's inherent power to order nonstatutory judicial dissolution." *Matter of Nelkin*, 25 N.Y.2d at 550, 307 N.Y.S.2d at 459. And here, Appellants are actively pursuing remedies at law, including in a shareholder derivative suit based on identical allegations, *see* R. 832–63. The motion court properly dismissed their parallel claim for the drastic and equitable remedy of nonstatutory judicial dissolution, and this Court should affirm. *See Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 70, 484 N.Y.S.2d at 803; *Nelkin*, 25 N.Y.2d at 550, 307 N.Y.S.2d at 459.

C. The Petition Does Not Allege Oppression, Waste, Or Any Other Cause Sufficient to Justify Involuntary Judicial Dissolution Of Consumers Beverages, Inc.

i. The Appellants Have Not Alleged Oppression Or Waste Or Otherwise Stated A Claim For Dissolution Based On Payment Of Distributions.

To the extent the Appellants rely on the lack of distributions paid by the Company to state a claim for dissolution, this fails. R. 121. Consumers is an S-

corporation, meaning that its shareholders are taxed on their pro-rata share of the corporation's income. The longstanding practice at Consumers is to pay distributions to the shareholders sufficient to cover the shareholders' tax liabilities owed as a result of their owning shares in an S-corporation. R. 903. In circumstances such as these, where "it was the policy of the corporation during [Petitioner's] long tenure not to declare dividends," the continued "failure to do so in and of itself would not constitute oppression." *Matter of Burack (I. Burack, Inc., Burn-Rite Valve Mfg. Corp.)*, 137 A.D.2d at 526, 524 N.Y.S.2d at 460; *see Matter of Smith (Koslowitz Constr. Co.)*, 154 A.D.2d at 539, 546 N.Y.S.2d at 384 ("failure to declare dividends did not constitute oppression under these circumstances since, as is common with closely held corporations, no policy of declaring dividends appeared to exist"); *Matter of Schlachter (Ideal Handbag Frame Mfg. Corp.)*, 154 A.D.2d at 686, 546 N.Y.S.2d at 892 ("the record reveals that the corporations have never paid any dividends"); *Matter of Maybaum*, 6 Misc. 3d 1019(A), 800 N.Y.S.2d 349, 2005 WL 287381, at *4 ("[Petitioner] fails to establish that Stony Creek ever paid a dividend or that corporate policy was changed after he was terminated to deprive him payment of dividends.").

In other words, the Appellants had no reasonable expectation of distributions beyond those sufficient to cover their tax liabilities, because the longstanding Company practice has been to pay them only as a means to cover shareholders'

income tax. As they admit, the Appellants have received their distributions, Petitioners Br. 7, and for that additional reason their claims concerning distributions cannot support dissolution.

ii. The Appellants Have Not Alleged Oppression Or Waste Or Otherwise Stated A Claim For Dissolution Based On Payment Of Bonuses Because Each Employee Shareholder Received Discretionary Bonuses Supported By Sound Business Judgment.

Historically, each employee shareholder — Matthew, James, Helen, and Neil — received a year-end bonus. Bonuses were always paid to the employee shareholders on a discretionary basis. R. 901.

The Petitioners' recent bonuses were substantial. For the years 2016–21 Helen received total bonuses of $985,000. R. 902. James received total bonuses of $1,090,000. *Id.* And Matthew received total bonuses of $1,030,000. R. 902–03; 1194.

As President of the Company, Neil received larger bonuses than other employee shareholders, but each of those bonuses was commensurate with the work that he performed for and the value he added to Consumers, according to ordinary, sound business judgment. R. 302. It should come as no surprise when the chief executive officer or president of a corporation receives higher compensation than other employees, and that bare allegation is not sufficient to support dissolution.

In light of the Company's success with Neil at the helm, no "person of ordinary business judgment" could say that Consumers did *not* "receive[a] fair benefit" from Neil's services. *Aronoff*, 85 A.D.2d at 5–7, 446 N.Y.S.2d at 371. Consumers has thrived under Neil's leadership. R. 568–73, 898. The Company should compensate him accordingly, and doing so does not allege that its assets are being "looted, wasted, or diverted." Bus. Corp. L. § 1104-a(a)(2). Even allegations of Neil's "failure to regularly account . . . concerning corporate operations, laxness in maintaining certain records, and failure to allow them access to corporate records, [are] insufficient to establish the requisite oppressive action." *Matter of Brickman*, 253 A.D.2d at 813, 677 N.Y.S.2d at 601 (internal quotation marks omitted).

Furthermore, on the matter of bonuses as with many others, the Petitioners failed to make a demand of the Board or exhaust their rights in their shareholder derivative suit, and in light of these available alternative remedies dissolution is unnecessary. A "shareholder's derivative suit . . . is the only proper form of action when recovery is sought for waste of corporate assets." *Lewis*, 107 A.D.2d at 933, 483 N.Y.S.2d at 869–70; *see also Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 70, 484 N.Y.S.2d at 803; *Matter of Nelkin*, 25 N.Y.2d at 550, 307 N.Y.S.2d at 459. For their personal losses, the Appellants are actively pursuing breach of fiduciary duty claims and remedies beside dissolution for the same

allegations. R. 784–98, 800–53, 855–67. Dissolution therefore cannot be "the only feasible means" of relief or "reasonably necessary," and the motion court was correct to dismiss the petition and cross-petitions. *See* Bus. Corp. L. § 1104-a(b).

iii. The Appellants Have Not Alleged Oppression Or Waste Or Otherwise Stated A Claim For Dissolution Based On Loans To The Company.

The Appellants' allegations that Neil has looted the Company by loaning it money also fall flat. R. 119–20. Aside from the illogical notion that putting cash in to a closely-held business somehow loots the company, the Appellants' allegations fail to show how these loans amount to "misappropriation of corporate assets for private purpose," i.e., waste. *Matter of Cunningham*, 256 A.D.2d at 407, 681 N.Y.S.2d at 594. Neil *gave* cash to the Company — he did not "loot[], waste[], or divert[]" its assets, Bus. Corp. L. § 1104-a(a)(2) — and so in this respect too the petition fails to state a claim.

Over the years, it was the custom of Kavanaugh family members to make similar loans to Consumers. Matthew, James, and Helen have each loaned money to Consumers and were or are paid the same 6% interest rate that they now claim is a waste of corporate assets. R. 899. For example, on August 31, 1993, Matthew loaned $30,295.88 to Consumers at a 6% interest rate, which amount was adjusted several times over the years following. R. 908–16. Again, on July 27, 2012, Matthew loaned $300,000 to Consumers at a 6% interest rate. R. 525. On August

28, 2012, Matthew loaned an additional $250 at the same 6% rate. R. 526. Similarly, on January 1, 2013, Matthew loaned $527,222.23 to Kavcon. R. 527.

On July 31, 1993, Helen loaned Consumers $54,445.17 at a 6% interest rate, which amount was adjusted several times over the years following. R. 918–31. And most relevantly here, since July 27, 2012, Helen has a loan of $70,000 to Consumers on which she is currently earning 6% interest. R. 542.

On July 31, 1993, James loaned Consumers $36,744.51 at a 6% interest rate, which amount was gradually reduced over the following two years. R. 933–43. Again, on July 27, 2012, James loaned $30,000 to Consumers at a 6% interest rate. R. 554.

Neil's loans at 6% interest were not waste because if they were, the Petitioners are guilty of the same. Petitioners shared in any "non-corporate" purpose they allege with respect to loans to the Company.

These loans were not made for "non-corporate purposes," Bus. Corp. L. § 1104-a, nor were they made "for [a] private purpose." *Matter of Cunningham*, 256 A.D.2d at 407, 681 N.Y.S.2d at 594–95. This customary method of financing is supported by ordinary, sound business judgment because it is unlikely the Company could find such a low rate for unsecured debt from another lender without personal guarantees by the shareholders. R. 900. In other words, a "person of ordinary sound business judgment would say that the corporation

received [a] fair benefit" by paying Neil (and the Petitioners) 6% interest for unsecured debt. *Aronoff*, 85 A.D.2d at 5, 446 N.Y.S.2d at 371. These loans advantaged Consumers, and so they cannot state a claim for waste.

Interestingly, James has also borrowed large sums of money from Consumers over the years at a 0% interest rate. R. 945–53. The other notes cited by the Petitioners were all paid long ago, and each served a purpose supported by ordinary, sound business judgment. R. 1215–26. The loan at 0% interest to James is the only such note in the record that remains outstanding, and it carries a current balance due by James of $30,000. *Id.*; R. 901.

iv. The Appellants Have Not Alleged Oppression Or Waste Or Otherwise Stated A Claim For Dissolution By Alleging Various Other Transactions Had A Non-Corporate Purpose.

The Appellants also take issue with allegations of various other transactions that cannot amount to oppression or waste to justify dissolution. For example, the Appellants' allegations concerning payments to Zita Courtney-Kavanaugh fail to demonstrate waste because Consumers was obligated to pay deferred compensation death benefits to her per an agreement with the Company's founder, Lawrence Kavanaugh, Sr. R. 401. The Appellants' allegations about Neil's other businesses also fail to show waste because Consumers was reimbursed for any and all goods or services it provided, sometimes at a profit. R. 402–03, 569–70.

Additionally, any money that Neil Kavanaugh allegedly "embezzled" from Kavcon does not state a claim of oppression or waste sufficient to support dissolution of Consumers. R. 113–14. Importantly, the allegations about Kavcon concern disputed management of an entirely separate company and are thus irrelevant to this appeal, notwithstanding the Appellants' frequent references to Kavcon. *See* Petitioners Br. at 3, 15, 45; Brief of Respondent-Respondent-Appellant Mary Ellen ("Mary Ellen Br.") 3, 6. The allegations concerning Kavcon — like the vast majority of the allegations in the petition — merely repeat the allegations in a different lawsuit (in which Neil has asserted cross-claims against Kavcon Development LLC). R. 855–67.

The Appellants also rehash the disputed share sales by Mary Ellen and Martha previously adjudicated by this Court, *see* Petitioners Br. 2, Mary Ellen Br. 2–5; R. 255–66, but those allegations are also irrelevant to this appeal. First, they are not properly raised in the petition. These allegations concern Mary Ellen and Martha, not the petitioners, and *even if* they stated a claim of oppression (they do not), any such "oppressive actions" were "toward" Mary Ellen or Martha, not the "complaining shareholders," i.e., Matthew, James, or Helen. Bus. Corp. L. § 1104-a(a)(1). But neither Mary Ellen nor Martha was employed by the Company, and thus neither is "entitled to vote in an election of directors" such that she has standing. Bus. Corp. L. § 1104-a(a); R. 453, 447–48, 903.

The Petitioners also argue, again for the first time on appeal, that an alleged use of Company funds to pay Neil's legal fees in connection with the sales by Mary Ellen or Martha alleges waste or oppression sufficient to support involuntary judicial dissolution. *See* Petitioners Br. 10–11. Notwithstanding that this argument was not made before the motion court, it is nonetheless meritless it light of FreedMaxick's conclusion that "all related party transactions between the Organization and its owners and with related family members and entities have been properly accounted for." R. 501. The Appellants thus fail to state a claim for waste.

v. The Appellants Have Not Alleged Oppression Or Waste Or Otherwise Stated A Claim For Dissolution Related To Leases Between Consumers And Kavcon.

The Petitioners refer in their brief to allegations that Neil altered leases between Consumers and Kavcon to Kavcon's detriment. Petitioners Br. 5–6. Here they once again conflate issues between their lawsuits. Not only did they fail to raise this argument before the motion court, they recite statements from outside the record on this appeal. Petitioners Br. 6. The Appellants' argument about altered leases is not properly before this Court.

In any event, allegedly wrongful alteration of leases between Consumers and Kavcon to Kavcon's detriment presumably ***benefits*** Consumers. These irrelevant

allegations of harm to Kavcon obviously fail to state a claim for dissolution of Consumers.

In sum, the Appellants' various allegations that the assets of Consumers are being looted or wasted simply do not state a claim for judicial dissolution. Bus. Corp. L. § 1104-a. Likewise, the "respondent's alleged conduct did not defeat petitioner's reasonable expectations or otherwise amount to oppressive conduct within the meaning of the statute." *Matter of Tehan (Tehan's Catalog Showrooms, Inc.)*, 144 A.D.3d 1530, 1533, 40 N.Y.S.3d 858, 860 (4th Dep't 2016) (dismissing dissolution petition). The Appellants' repeated allegations simply do not justify liquidating a financially-strong Western New York business that employs over 270 people. They failed to meet their prima facie burden to demonstrate oppression or waste, and accordingly this Court should affirm the order of the motion court dismissing the petition and cross-petitions.

IV. Mary Ellen Raises Arguments For Only The First Time On Appeal That Are Not Properly Before This Court.

A. Mary Ellen Was Never Entitled To Vote In An Election Of Directors And So Has No Standing To Bring Her Purported Cross-Petition.

Mary Ellen has never held voting shares in Consumers. R. 453, 903. Therefore, for all the reasons explained in Part II.A., *supra*, with respect to Matthew and James, Mary Ellen had no standing to petition for involuntary judicial dissolution pursuant to Bus. Corp. L. § 1104-a by filing a purported cross-petition.

R. 357–61. So, too, she has not stated a claim for common law dissolution for the reasons explained *supra* in Part III.B.iii.

B. Mary Ellen Raises New And Unfairly Prejudicial Claims That Have Not Been Pleaded For The First Time In Her Brief On This Appeal.

Relying heavily on facts and proceedings outside the record, Mary Ellen raises new arguments for the first time on appeal that are not ripe for this Court to consider. She makes factual misstatements about an Order to Show Cause in one of the related actions, Mary Ellen Br. 3–4, and raises new arguments about the meaning of "null and void" and recission. Mary Ellen Br. 5. Neil did not have an opportunity to respond to these arguments before the motion court because Mary Ellen did not raise them. The record on this appeal does not permit Neil to respond now. Mary Ellen's flagrant disregard of the basic rules of appellate practice unfairly prejudices Neil. Because these "argument[s] [are] raised for the first time on appeal, [this Court should] not consider" them. *Rew v. Beilein*, 151 A.D.3d 1735, 1736–37, 57 N.Y.S.3d 808, 810 (4th Dep't 2017); *accord, e.g., Gardner v. Honda Motor Co.*, 214 A.D.2d 1024, 1024, 627 N.Y.S.2d 492, 493 (4th Dep't 1995) ("that argument is raised for the first time on appeal, and we do not consider it.").

For these reasons as well as all those stated *supra* with respect to the other Appellants, this Court should disregard Mary Ellen's brief, dismiss her cross-

appeal, and affirm the order of the motion court dismissing the petition and cross-petitions.

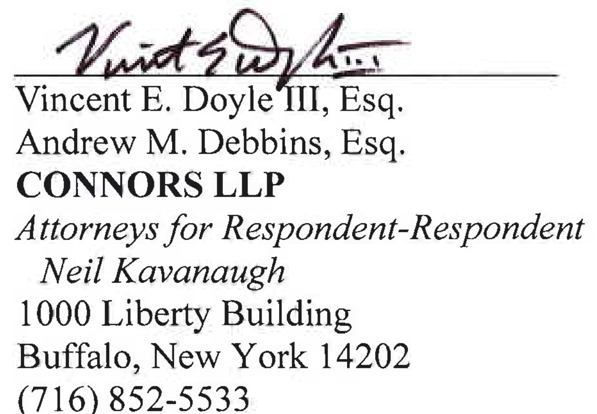
Conclusion

The Court of Appeals has cautioned against abuse of corporate dissolution "by minority shareholders as merely a coercive tool." *Matter of Kemp & Beatley, Inc. (Gardstein)*, 64 N.Y.2d at 74, 484 N.Y.S.2d at 806. This action, which duplicates years' old legal disputes between siblings over their inherited shares in the family company, is an excellent example of abusive use of a petition for dissolution as a coercive tool.

Simply put, no petitioner has stated a cause for dissolution of Consumers. Every Appellant but one lacks standing. And all the Appellants are actively pursuing adequate remedies short of the drastic remedy of involuntary judicial dissolution. The motion court was therefore well within its discretion when granting Respondent-Respondent Neil's motion.

For all these reasons, the motion court correctly dismissed the petition and cross-petitions, and this Court should affirm.

Dated: Buffalo, New York
January 31, 2024



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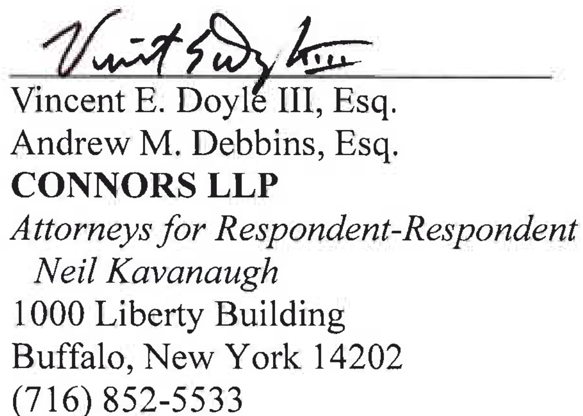

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