BUSINESS ASSOCIATIONS

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INTRODUCTION

During the Survey Period, legislation addressed the inability of many corporations to hold in-person shareholder meetings because of the COVID-19 pandemic.[1] That legislation lapsed on June 25, 2021, and virtual shareholder meetings have unclear validity thereafter.[2]

Case law applied black-letter corporate law rules to specific fact situations and offered technical points for corporate law practice.[3] Of special note during this Survey Period was a court-ordered dissolution

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1. 2020 N.Y. Sess. Laws Ch. 122 (McKinney) (codified at N.Y. BUS. CORP. LAW § 708(b) (McKinney 2021)).

2. *Id.*

3. *See e.g.*, Celauro v. 4C Foods Corp., 187 A.D.3d 836, 836, 132 N.Y.S.3d 159, 162 (2d Dep't 2020).

of a corporation which was found to have engaged in egregious, widespread fraud.[4]

I. LEGISLATION

A. COVID-19 and Virtual Meetings

The COVID-19 pandemic made public shareholder meetings problematic. On March 7, 2020, the Governor issued Executive Order No. 202, declaring a State disaster emergency due to COVID-19.[5] Executive Order No. 202.8[6] and subsequent Executive Orders "closed or otherwise restricted public or private businesses or places or public accommodation" and "required postponement or cancellation of all non-essential gatherings of individuals of any size for any reason . . . ."[7] Executive Orders began lifting the restrictions on May 15, 2020,[8] and the restrictions were ultimately rescinded effective June 25, 2021.[9]

During the *Survey* Period, a legal issue affecting New York corporations which have more than a handful of shareholders was how to hold the annual meeting.[10]

Before COVID-19, paragraph (a) of section 602 of the business corporation law (BCL) provided that "Meetings of shareholders may be held at such place, within or without this state, as may be fixed by or under the by-laws, or if not so fixed, at the office of the corporation in this state."[11] The phrase "such place, within or without this state" implies that the shareholders meeting must take place at a physical location.[12] Section 605(a) of the BCL contains a similar implication because it requires that a notice of a meeting of shareholders must state

4. People v. N. Leasing Sys., Inc., 193 A.D.3d 67, 72–74, 142 N.Y.S.3d 36, 40–41 (1st Dep't 2021).

5. Exec. Order No. 202, *reprinted in* 2020 McKinney's Sess. Law News No. 202 (Mar. 7, 2020).

6. Exec. Order No. 202.8, *reprinted in* 2020 McKinney's Sess. Law News No. 202.8 (Mar. 20, 2020).

7. Exec. Order No. 202.31, *reprinted in* 2020 McKinney's Sess. Law News No. 202.31 (May 14, 2020).

8. *Id.*

9. Exec. Order No. 210, *reprinted in* 2021 McKinney's Sess. Law News No. 210 (June 24, 2021).

10. Exec. Order No. 202.8, *reprinted in* 2020 McKinney's Sess. Law News No. 202.8 (Mar. 20, 2020).

11. N.Y. BUS. CORP. LAW § 602(a) (McKinney 2021) (as in effect prior to the effectiveness of S. 8412).

12. *Id.*

the "place, date and hour of the meeting . . . ."[13] If a shareholders meeting is adjourned, BCL section 605(b) governs whether notice is required to be given of the "time and place to which the meeting is adjourned . . . ."[14] Section 602(c) requires that the corporation have an annual meeting of shareholders "on the date fixed by or under the by-laws."[15] The by-laws of a corporation might give the Board of Directors authority to choose the date of an annual meeting.[16] That authority cannot authorize the Board to delay the date of the next annual shareholders meeting indefinitely because, if more than thirteen months have passed since the last annual meeting, section 603 of the BCL requires that the existing board of directors call a special meeting for the election of directors.[17] For corporations with annual meetings scheduled in the initial months of the COVID-19 pandemic, their obligation to hold the annual shareholders meeting came into conflict with the Executive Orders mandating that non-essential gatherings be postponed or canceled.[18]

Executive Order No. 202.8 relieved the conflict by "temporarily suspend[ing] and modify[ing] … Subsection (a) of Section 602 and subsections (a) and (b) of Section 605 of the Business Corporation Law, to the extent they require meetings of shareholders to be noticed and held at a physical location."[19] The requirement was further postponed by subsequent Executive Orders.[20]

On June 17, 2020, the Legislature approved a longer-lasting solution by temporary amendments to sections 602 and 708 of the BCL authorizing virtual meetings of shareholders and boards of

13. N.Y. BUS. CORP. LAW § 605(a) (McKinney 2021).
14. BUS. CORP. LAW § 605(b).
15. BUS. CORP. LAW § 602(c).
16. *Id.*
17. N.Y. BUS. CORP. LAW § 603(a) (McKinney 2021).
18. Exec. Order 202.10, *reprinted in* 2020 McKinney's Sess. Law News No. 202.10 (Mar. 23, 2020) (modifying the previously declared state of emergency to prohibit nonessential gatherings, among other things).
19. Exec. Order 202.8, *reprinted in* 2020 McKinney's Sess. Law News No. 202.8 (Mar. 20, 2020) (modifying the previously declared state of emergency to suspend the requirement for in-person shareholders' meetings, among other things).
20. *E.g.*, Exec. Order 202.14*, reprinted* 2020 McKinney's Sess. Law News No. 202.14 (Apr. 7, 2020); Executive Order 202.18, *reprinted in* 2020 McKinney's Sess. Law News No 202.18 (Apr. 16, 2020) (both extending the previously declared state of emergency, among other things).

directors.[21] Section 602(a) of the BCL was amended to read as follows:

> (a) Meetings of shareholders may be held at such place, within or without this state, as may be fixed by or under the by-laws, or if not so fixed, as determined by the board of directors. For the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, or until December thirty-first, two thousand twenty-one, whichever is later, if, pursuant to this paragraph or the by-laws of the corporation, the board of directors is authorized to determine the place of a meeting of shareholders, the board of directors may, in its sole discretion, determine that the meeting be held solely by means of electronic communication, the platform/service of which shall be the place of the meeting for purpose of this article.[22]

The state disaster emergency was ended by Executive Order, effective June 25, 2021,[23] and the second sentence of section 602(a), set forth above, is no longer in effect.[24]

The phrase which previously ended the first sentence of section 602(a), which read, "at the office of the corporation in this state[,]" was replaced by the phrase "as determined by the board of directors.[25]" This change remains permanent. Before this change, section 602(a) provided a default location for a shareholders meeting, specifically "the office of the corporation in this state."[26] The BCL does not, however, require a corporation to have a physical location in New York. Section 402(a)(3) of the BCL requires that the certificate of incorporation specify "The county within this state in which the office of the corporation is to be located,"[27] but this location can be a post office box or the office of an agent.[28] The annual statement of a corporation under section 408 of the business corporation law sets

21. Act of June 17, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 122, at 8412 (codified at N.Y. BUS. CORP. LAW § 602, § 708 (McKinney 2021)).

22. N.Y. BUS. CORP. LAW § 602(a) (McKinney 2021) (as amended by 2020 N.Y. Sess. Laws ch, 122). "[T]his article" at the end of § 602(b) refers to Article 6, "Shareholders," of the Business Corporation Law. *Id.*

23. Exec. Order 210, *reprinted in* 2020 McKinney's Sess. Law News No. 210 (June 24, 2021) (rescinding Executive Orders 202 through 202.11 and 205 through 205.3 and ending the state of emergency).

24. N.Y. BUS. CORP. LAW § 602(a) (McKinney 2021).

25. *Id.* (amended Nov. 8, 2021).

26. *Id.*

27. N.Y. BUS. CORP. LAW § 402(a)(3) (McKinney 2021).

28. *Id.* § 402(a)(7)–(8).

forth "The name and business address of its chief executive officer[,]" which need not be in the State of New York; "The street address of its principal executive office[,]" which need not be in New York; and "The post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him or her."[29]

Removing the phrase "at the office of the corporation in this state" from section 602(a)[30] eliminates an implication that the corporation must have an office at a physical location in New York.[31]

In the same Act which authorized all-virtual shareholder meetings also adopted a temporary amendment to paragraph (b) of section 708 of the BCL[32] to specify that a unanimous written consent of the Board of Directors can include one or more consents via email.[33] The Act added the second sentence to paragraph (b), which is here set out in full:

> (b) Unless otherwise restricted by the certificate of incorporation or the by-laws, any action required or permitted to be taken by the board or any committee thereof may be taken without a meeting if all members of the board or the committee consent in writing to the adoption of a resolution authorizing the action. For the duration of the state disaster emergency declared by executive order two hundred two that began on March seventh, two thousand twenty, or until December thirty-first, two thousand twenty-one, whichever is later, notwithstanding any provision of law to the contrary, the written consent of a member may be made electronically, where such consent is submitted via electronic mail along with information from which it can be reasonably determined that the transmission was authorized by such member.[34]

Without the foregoing amendment to paragraph (b), a director who approved an action by email might change their mind and wish to invalidate the supposed consent by the technical argument that the email did not constitute a "consent in writing" for purposes of the first

29. N.Y. BUS. CORP. LAW § 408.1(a)–(c) (McKinney 2021).
30. *See* Act of May 27, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 122, at 8412, § 2 (codified at N.Y. BUS. CORP. LAW § 602 (McKinney 2021)).
31. *See id.*
32. N.Y. BUS. CORP. LAW § 708(b) (McKinney 2021) (as amended by 2020 N.Y. Sess. Laws ch. 122, s. 8412, § 1 (McKinney)).
33. *Id.*
34. *Id.*

sentence of paragraph (b).[35] The term "consent in writing" in section 708(b) is not defined in the BCL.[36]

The New York Electronic Signatures and Records Act[37] ("ESRA") almost answers the question whether email alone can constitute a "consent in writing" under BCL section 708(b).[38] The ESRA defines an "electronic record" to "mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities."[39] An email is a basic electronic record.[40] Under section 305.3 of the state technology law, "An electronic record shall have the same force and effect as those records not produced by electronic means."[41] Therefore an electronic consent should have the same force and effect as a written consent; but does an email constitute a consent? An "electronic signature" is defined in section 302(3) of the state technology law to "mean an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record."[42] Logically, if typing one's name at the end of an email is an "intent to sign the record[,]" the email should constitute a written consent.[43] However, the ESRA does not expressly say this.[44]

Nor does the federal E-SIGN Act[45] expressly state that an email can constitute a consent in writing.[46] It provides in relevant part:

> (a) In general—Notwithstanding any statute, regulation, or other rule of law … with respect to any transaction in or affecting interstate or foreign commerce—

35. *See id.*

36. *See id.*; N.Y. BUS. CORP. LAW § 102 (McKinney 2021).

37. Electronic Signatures and Records Act, N.Y. STATE TECH. LAW §§ 301–306 (McKinney 2021).

38. *See id.*

39. STATE TECH. LAW § 302.2.

40. *See, e.g.*, *In re* O'Connor, 630 B.R. 384, 387 (Bankr. W.D.N.Y. 2021).

41. N.Y. STATE TECH. LAW § 305.3 (McKinney 2021).

42. *See* N.Y. STATE TECH. LAW §§ 301–06 (McKinney 2021).

43. *Id.*

44. STATE TECH. LAW § 304.

45. *See generally* 15 U.S.C. §§ 7001–06, 7021, 7031 (2000).

46. *See id.*

> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form. . . .[47]

While the amendment to business corporation law section 708(b) was in effect, there was statutory authority that an email could constitute "consent in writing."[48] The amendment has expired, but logically an email should constitute a "consent in writing" if there is "intent to sign. . . ."[49]

B. Virtual Meetings Before COVID-19

When the amendment to business corporation law section 602(a) expired on June 25, 2021,[50] the question whether a corporation may have a virtual shareholder's meeting reverted to that section as it stood before the amendment.[51]

Before the COVID-19 pandemic, the Legislature amended section 602 of the BCL to permit a corporation to conduct a meeting where any number of shareholders could, at their option, attend electronically.[52] Amended section 602 added a new paragraph (b),[53] under which a corporation may, if the board of directors so authorizes:

> implement reasonable measures to provide shareholders not physically present at a shareholders' meeting a reasonable opportunity to participate in the proceedings of the meeting substantially concurrently with such proceedings; and/or provide reasonable measures to enable shareholders to vote or grant proxies with respect to matters submitted to the shareholders at a shareholders' meeting by means of electronic communication . . . .[54]

"Reasonable measures" are described in section 601(b)(iii), as amended, "(iii) For purposes of this paragraph, 'reasonable measures' with respect to participating in proceeding shall include, but not be limited to, audio webcast or other broadcast of the meeting and for

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47. § 7001(a).

48. N.Y. BUS. CORP. LAW § 708(a) (McKinney 2021) (amended Jan. 2020).

49. STATE TECH. LAW § 302.3.

50. N.Y. BUS. CORP. LAW § 602(a), (McKinney 2021) (amended Apr. 2021); Exec. Order 210, *reprinted in* 2020 McKinney's Sess. Laws No. 210 (June 24, 2021) (expiration of executive orders 202 and 205).

51. N.Y. BUS. CORP. LAW § 602(a) (McKinney 2021).

52. BUS. CORP. LAW § 602(b) (amended Nov. 2021).

53. *Id.* (former paragraphs (b), (c) and (d) were renumbered (c), (d), and (e)).

54. BUS. CORP. LAW § 602(b)(i) (amended Oct. 2019).

voting shall include but not be limited to telephonic and internet voting."[55] A corporation allowing electronic participation shall:

> if applicable, (A) implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of electronic communication is a shareholder of record and (B) keep a record of any vote or other action taken by a shareholder participating and voting by means of electronic communications at a shareholders' meeting.[56]

Before this legislation, there was nothing in the BCL which prevented a corporation from allowing a shareholder to listen remotely to a shareholders meeting; however, the traditional method to attend and vote remotely is to authorize another person or persons to act for the shareholder by proxy.[57] It was not clear that a shareholder who was participating remotely could be counted as present at the meeting and voting.[58] Under amended section 602, "[a] shareholder participating in a shareholders' meeting by this means [electronic communication] is deemed to be present in person at the meeting."[59]

The same legislation added to business corporation law section 605(a), regarding the notice of meeting, a requirement to include "the means of electronic communications, if any, by which shareholders and proxyholders may participate in the proceedings of the meeting and vote or grant proxies at such meeting[.]"[60]

As a result of new section 602(b), a New York corporation may hold what is sometimes referred to as a "hybrid meeting," where the corporation invites all shareholders to an in-person meeting at a specified time and place but allows any shareholder to attend electronically.[61]

Paradoxically, the statutory authorization of a hybrid meeting does not expressly authorize an entirely virtual annual meeting. According to the Legislative Memorandum[62] regarding the 2020

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55. BUS. CORP. LAW § 602(b)(iii).
56. BUS. CORP. LAW § 602(b)(i).
57. N.Y. BUS. CORP. LAW § 609(a) (McKinney 2021).
58. *See id.*
59. BUS. CORP. LAW § 602(b)(i).
60. N.Y. BUS. CORP. LAW § 605(a) (McKinney 2021) (amended Oct. 2019).
61. BUS. CORP. LAW § 602(b).
62. *See generally* Legislative Memorandum in Support of Senate Bill 8412 *reprinted in* N.Y. Sess. Laws ch. 122 (McKinney 2020) ("allow not-for-profit corporations, religious institutions, and cooperatives to hold meetings of shareholders, members, etc. through remote communication if authorized").

amendment, which authorized virtual-only meetings for the duration of the COVID-19 emergency, in the absence of the 2020 amendment: "The New York State Business Corporation Law . . . neither expressly authorize(s) nor expressly prohibit(s) shareholder . . . meetings . . . to take place solely via electronic communications."[63]

At the time of this writing, the COVID-19 pandemic is not over and safety precautions are still recommended by the United States Centers for Disease Control and Prevention (CDC) at public meetings.[64] The logistics for holding an entirely virtual meeting are simpler than for holding a hybrid meeting.[65] In those relatively few cases where a New York corporation has thousands of shareholders, a shareholders meeting entirely in person could raise health concerns, and therefore a hybrid meeting or virtual-only meeting could be preferable.[66] It would be illogical if the practical effect of business corporation law section 602 were to allow a meeting to be entirely in person or hybrid, but not allow an entirely virtual meeting.[67]

After the Survey Period, on November 8, 2021, the Legislature expressly authorized virtual-only shareholder meetings. (N.Y. Bus. Corp. Law § 602(a), amended November 8, 2021, L. 588, § 2, in Assembly Bill A1237.)

II. FIDUCIARY DUTIES

A. Celauro v. 4C Foods Corp.

Celauro v. 4C Foods Corp.,[68] involving a dispute among members of the Celauro family, considered the application of majority shareholders' fiduciary duties to minority shareholders, an implied covenant of good faith and fair dealing, to the majority's actions under

63. *Id.*

64. *Interim Public Health Recommendations for Fully Vaccinated People*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html (last visited Apr. 1, 2021).

65. Bob Frisch & Carry Greene, *What It Takes to Run a Great Hybrid Meeting*, HARVARD BUS. REVIEW (June 3, 2021), https://hbr.org/2021/06/what-it-takes-to-run-a-great-hybrid-meeting.

66. *Virtual Shareholder Meetings in the Wake of COVID-19: Legal and Practical Considerations*, KATTEN MUCHIN ROSENMAN LLP (Mar. 26, 2020), https://katten.com/virtual-shareholder-meetings-in-the-wake-of-covid-19-legal-and-practical-considerations.

67. N.Y. BUS. CORP. LAW § 602 (McKinney 2021).

68. 187 A.D.3d 836, 836, 132 N.Y.S.3d 159, 162 (2d Dep't 2020).

shareholders agreement.[69] Plaintiffs Nathan Celauro (Nathan) and his deceased mother Gaetana Celauro (Gaetana) were feuding with John A. Celauro (John), who was the President and Chief Executive Officer of 4C Foods Corp. (4C Foods), and with the other shareholders.[70]

The shareholders and the corporation were parties to a shareholders' agreement under which any transfer of shares required majority consent, and, if consent was denied, the transferor was required to sell, and the corporation was required to purchase, the shares with respect to which consent was denied.[71] The outstanding stock of 4C Foods included voting and non-voting shares.[72] Nathan, as executor of Gaetana's estate,[73] attempted to transfer Gaetana's shares to himself in order to increase the total percentage of voting stock of 4C Foods owned by him above 20%, and thereby qualify for commencement of a dissolution proceeding under BCL section 1104-a.[74] The majority consented to the transfer of non-voting stock from Gaetana's estate to Nathan, but not the voting stock.[75] Nathan complained that, by refusing the transfer of Gaetana's voting shares to him, he was denied the right to use business corporation law section 1104-a to commence a dissolution proceeding. Accordingly, Nathan claimed that the majority shareholders breached their fiduciary duties to him and the implied covenant of good faith and fair dealing.[76]

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* Celauro v. 4C Foods Corp., No. 500373/12, 2018 N.Y. Slip Op. 30806(U), at 3, (N.Y. Sup. Ct. Kings Co. May 1, 2018) (lower court decision).

74. *See* N.Y. BUS. CORP. LAW § 1104-a (McKinney 2021). Section 1104-a(a) provides, in relevant part:

> (a) The holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation, … entitled to vote in an election of directors may present a petition of dissolution on one or more of the following grounds:
> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders;
> (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation. *Id.*

75. Celauro v. 4C Food Corp., 187 A.D.3d 836, 839, 132 N.Y.S.3d 159, 164 (2d Dep't 2020).

76. *Id.* (citing Staffenberg v. Fairfield Pagma Assoc., L.P., 95 A.D.3d 873, 875, 944 N.Y.S.2d 568, 571 (2d Dep't 2020)).

The court commenced with statements of the basic fiduciary duties: "Members of a board of directors of a corporation owe a fiduciary responsibility to the shareholders in general and to individual shareholders in particular to treat all shareholders fairly and evenly."[77] For majority shareholders, "[M]ajority shareholders in a close corporation are in a fiduciary relationship with the minority shareholders."[78]

In this instance, however, the majority's disapproval of the transfer of voting shares, from Gaetana's estate and trusts to Nathan, was not a breach of a fiduciary duty.[79] The sections in the shareholders agreement which restricted stock transfers had been approved by the Second Department in earlier *Celauro* litigation,[80] where the appellate division had observed that, for closely held corporations, stock transfer restrictions can be effective to protect day-to-day operations.[81] When the majority shareholders denied the transfer of Gaetana's voting shares to Nathan, they were rightly protecting the operations of 4C Foods from a threat to disrupt its business:

> Here, the defendants declined to consent to the transfer of the voting shares for the wholly proper purpose of protecting 4C Foods' day-to-day operations. The defendants submitted evidence that Nathan considered himself to be purportedly "waging war" with John and 4C Foods. Allowing Nathan to obtain a greater-than-20% voting interest in 4C Foods would have threatened 4C Foods' operations by allowing him to commence a dissolution proceeding pursuant to Business Corporation Law § 1104-a.[82]

77. *Id.* at 837, 132 N.Y.S.3d at 162 (quoting Deblinger v. Sani-Pine Prods. Co., Inc., 107 A.D.3d 659, 660, 967 N.Y.S.2d 394, 396 (2d Dep't 2013) (internal quotation marks omitted)) (citing Armentano v. Paraco Gas Corp., 90 A.D.3d 683, 685, 935 N.Y.S.2d 304, 306 (2d Dep't 2011)).

78. *Id.* (citing World Ambulette Transp., Inc. v. Lee, 161 A.D.3d 1028, 1033, 78 N.Y.S.3d 137, 142 (2d Dep't 2018) Richbell Info. Servs. v. Jupiter Partners, L.P., 309 A.D.2d 288, 300, 765 N.Y.S.2d 575, 585 (1st Dep't 2003)).

79. *Id.*

80. Celauro v. 4C Foods Corp., 88 A.D.3d 846, 847, 931 N.Y.S.2d 250, 251 (2d Dep't 2011).

81. *Celauro*, 187 A.D.3d at 837, 132 N.Y.S.3d at 162 (citing *Celauro*, 88 A.D.3d at 846, 931 N.Y.S.2d 250 at 250–51) (quoting Ferolito v. Vultaggio, 78 A.D.3d 529, 529–30, 911 N.Y.S.2d 323, 324 (1st Dep't 2010)).

82. *Id.* at 837, 132 N.Y.S.3d at 162–63.

The court ruled on the claim that denial of the share transfer was a breach of the implied covenant of good faith and fair dealing.[83] The court stated that the covenant is implied in every contract, including shareholders' agreements,[84] and quoted the following definition of the covenant:

> The implied covenant of good faith and fair dealing is a pledge that neither party to the contract shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruit of the contract, even if the terms of the contract do not explicitly prohibit such conduct.[85]

The covenant is limited, however, by the "other terms of the contractual relationship."[86] In this case, the shareholders' agreement expressly granted to the defendants the right to deny consent to transfer a portion of the shares being transferred.[87] To deny them that right, said the court, would be inconsistent with the shareholders' agreement,[88] and the court upheld summary judgment for the defendants.[89]

B. Borelli v. Thomas

In *Borrelli v. Thomas,*[90] the executrix of a deceased shareholder alleged in a shareholder derivative claim that defendant, a director and officer of the subject corporation, "breached his fiduciary duty by claiming to be the sole shareholder of" the corporation.[91]

In ruling against a motion to dismiss, the Court noted two governing principles.[92] First, the applicable statute of limitations for

83. *Id.* at 838–39, 132 N.Y.S.3d at 163.

84. *Id.* at 838, 132 N.Y.S.3d at 163 (citing MP Cool Invs. Ltd. v. Forkosh, 142 A.D.3d 286, 293, 40 N.Y.S.3d 1, 7 (1st Dep't 2016)).

85. *Id.* (quoting 25 Bay Terrace Assoc., L.P. v. Pub. Serv. Mut. Ins. Co., 144 A.D.3d 665, 667, 40 N.Y.S.3d 469, 471 (2d Dep't 2016) (internal quotation marks omitted), and then quoting Gutierrez v. Gov't Emps. Ins. Co., 136 A.D.3d 975, 976, 25 N.Y.S.3d 625, 627 (2d Dep't 2016)).

86. *Celauro*, 187 A.D.3d at 838, 132 N.Y.S.3d at 163 (citing 1357 Tarrytown Rd. Auto, LLC v. Granite Props., LLC, 142 A.D.3d 976, 977, 37 N.Y.S.3d 341, 343 (2d Dep't 2016)).

87. *Id.* at 839, 132 N.Y.S.3d at 163–64.

88. *Id.* at 839, 132 N.Y.S.3d at 164 (citing Staffenberg v. Fairfield Pagma Assocs., L.P., 95 A.D.3d 873, 875, 944 N.Y.S.2d 568, 571 (2d Dep't 2012)).

89. *Id.* at 836, 132 N.Y.S.3d at 161.

90. 195 A.D.3d 1491, 1515 N.Y.S.3d 275 (4th Dep't 2021).

91. *Id.* at 1493, 1515 N.Y.S.3d at 278.

92. *Id.* at 1493, 1515 N.Y.S.3d at 278–79.

breach of fiduciary duty is six years: "The breach of fiduciary duty cause of action "is subject to a six-year statute of limitations . . . , and . . . accrues when the fiduciary openly repudiates his or her obligation or the fiduciary relationship has otherwise been terminated."[93] In this case, the defense had not carried its "initial burden of establishing prima facie that the time in which to sue has expired . . . ."[94]

The second principle is that, to have standing to bring an action for breach of fiduciary duty, the plaintiff must actually be a shareholder.[95] In this ruling against defendants' motion to dismiss, it was sufficient that plaintiff had raised a triable issue of fact by offering evidence of that the deceased shareholder's estate owned shares in the corporation.[96]

C. Lebedev v. Blavatnik

In *Lebedev v. Blavatnik,*[97] the plaintiff claimed breach of a joint venture and accompanying fiduciary duty, and breach of contract.[98]

In 1997, Russia privatized a state-owned oil and gas company named Tyumen Oil Company (whose initials in Russian correspond to "TNK").[99] Defendants Leonard Blavatnik and Viktor Vekselberg purchased 40% of the shares of TNK, and plaintiff Leonid Lebedev acquired 12.3% of TNK.[100] The three joined forces to control[101] over 50% ownership of TNK, but disputed among themselves regarding their obligations to each other.[102]

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93. *Id.* (quotation marks omitted) (citing *In re* Trombley, 137 A.D.3d 1641, 1642–43, 29 N.Y.S.3d 712, 714 (4th Dep't 2016)).

94. *Id.* (quoting U.S. Bank N.A. v. Brown, 186 A.D.3d 1038, 1039, 130 N.Y.S.3d 146, 148 (4th Dep't 2020)).

95. *Borrelli*, 195 A.D..3d at 1494, 151 N.Y.S.3d at 279 (citing N.Y. BUS. CORP. LAW § 626(a) (McKinney 2021)).

96. *Id.*

97. 193 A.D.3d 175, 175, 142 N.Y.S.3d 511, 511 (1st Dep't 2021).

98. *Id.* at 177, 142 N.Y.S.3d at 513–14.

99. *Id.* at 178, 142 N.Y.S.3d at 514.

100. *Id.*

101. *Id.* In the court below, plaintiff Lebedev alleged that the agreement was an oral joint venture. Lebedev v. Blavatnik, No. 650369/2014, 2015 Slip. Op. 51770(U), at 2–3 (Sup. Ct. N.Y. Cty., Dec. 2, 2015), *aff'd,* 144 A.D.3d 24, 28, 38 N.Y.S.3d 159, 162 (1st Dep't 2016); Lebedev v. Blavatnik, No. 650369/2014, 2019 Slip. Op. 31995(U), at 13 (Sup. Ct. N.Y. Cty., July 9, 2019).

102. *See Lebedev*, 193 A.D.3d at 178, 142 N.Y.S.3d at 514.

Lebedev, Blavatnik, and Vekselberg met in New York City in March, 2001[103] and prepared a document, in Russian, whose title translates to "Investment Agreement" in English.[104] Lebedev stated that the purpose of the Investment Agreement was "to be an 'accounting of mutually owed payment.'"[105] Vekselberg characterized the Investment Agreement as "a 'mutual setoff or mutual calculation of our obligations.'"[106] The Investment Agreement stated that Lebedev had contributed 15% of the defendants' company, Oil and Gas Industrial Partners Ltd. ("OGIP")[107] and, going forward, would receive 15% of the net income of OGIP.[108]

In 2003, the three parties planned for the merger of TNK (which was controlled by OGIP) with BP International Ltd.[109] Because Lebedev was then the subject of a criminal investigation (for which he was later acquitted), which at that time might have interfered with the merger, Blavatnik and Vekselberg agreed to buy out Lebedev's rights under the Investment Agreement for $600 million.[110] It was undisputed that Lebedev received the $600 million.[111] Lebedev alleged, however, that the $600 million payment purchased only rights to receive 15% of the net income of OGIP and did not include the remaining value of his stake under the Investment Agreement.[112]

In 2013, TNK was purchased by Rosneft, a Russian state-owned oil company.[113] The defendants received $13.8 billion; Lebedev received nothing.[114] Lebedev claimed he was entitled to $2 billion and sued Vekselberg and Blavatnik for breach of contract, breach of joint venture, breach of fiduciary duty, and fraud.[115]

103. *See id.*
104. *See id.* at 179 n.1, 142 N.Y.S.3d at 514 n.1.
105. *Id.* at 179, 142 N.Y.S.3d at 514–15 (quoting from plaintiff Lebedev's deposition).
106. *Id.* at 179, 142 N.Y.S.3d at 515 (quoting from defendant Vekselberg's deposition).
107. *See Lebedev*, 193 A.D.3d at 179, 142 N.Y.S.3d at 515.
108. *See id.*
109. *See id.* at 180, 142 N.Y.S.3d at 515.
110. *Id.*
111. *Id.* at 180, 142 N.Y.S.3d at 515–16.
112. *Lebedev,* 193 A.D.3d at 179–80, 142 N.Y.S.3d at 515.
113. *See id.* at 181, 142 N.Y.S.3d at 516.
114. *Id.*
115. *Id.*

In reviewing the breach of joint venture and fiduciary duty claim, the court relied on precedential cases,[116] starting with the following definition from *Slabakis v. Schik*:[117]

> The elements of a joint venture are "acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses."[118]

The appellate division's decision in *Lebedev* focused on the absence of a provision for the sharing of losses. As had been noted by the court below, "[t]he 2001 Investment Agreement does not refer to sharing of losses."[119] The plaintiff pointed out, though, the existence of precedents where there was no express reference to sharing of losses: "This Court has, at times, dispensed with the requirement that a joint venture agreement expressly provide for the sharing of losses, but only where the record in a particular case establishes that there was 'no reasonable expectation of losses.'"[120]

The appellate division then stated this exception did not apply to the present case, and repeated the general rule that there must be an agreement to share losses.:

> The Court of Appeals has stated: "An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or

116. *See id.* at 185–86, 142 N.Y.S.3d at 519–20.

117. *Lebedev*, 193 A.D.3d at 185, 142 N.Y.S.3d at 519 (quoting Slabakis v. Schik, 164 A.D.3d 454, 455, 84 N.Y.S.3d 45, 46 (1st Dep't 2018) (concluding that plaintiff's conclusory allegation that losses would be borne equally by the parties did not adequately support plaintiff's claim of a joint venture with the defendant)).

118. *Id.*

119. Lebedev v. Blavatnik, No. 650369/2014, 2019 N.Y. Slip Op. 31995(U), at 13–14 (Sup. Ct. N.Y. Cty. July 9, 2019).

120. *Lebedev*, 193 A.D.3d at 185, 142 N.Y.S.3d at 519 (quoting Don v. Singer, 92 A.D.3d 576, 577, 939 N.Y.S.2d 363, 363–64 (1st Dep't 2012) (stating that even in the absence of written agreement to share losses, a joint venture claim could proceed if there was no reasonable expectation of losses, or if an agreement to share losses could be implied from the record)) (citing Cobblah v. Katende, 275 A.D.2d 637, 639, 713 N.Y.S.2d 723, 724 (1st Dep't 2000) (stating that an issue of fact existed whether an agreement among anesthesiologists to distribute net income, after deduction of costs, constituted a joint venture, if the agreement presented "no reasonable expectation that there would be any losses")).

> undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses."[121]

The appellate division observed that ownership of an oil company was subject to significant possibilities of loss, and hence the "no reasonable expectation of losses" exception did not apply:

> Here, plaintiff has failed to establish that his case falls within the scope of this limited exception. Indeed, a commodity such as oil is inherently volatile. Given the ever-changing, and often unanticipated, vagaries which can affect that particular market, such as political unrest, climate, economic downturns and global pandemics, plaintiff did not meet his burden.[122]

To produce the "sharing of losses" requirement, the plaintiff argued that he could lose some or all of his investment, but the court held that the putative joint venturer's risk of losing the original investment is no more than "the separate requirement that each joint venturer make some contribution of some kind property, financing, skill, knowledge or effort to the venture."[123] The risk of losing one's original investment does not satisfy the requirement of sharing of losses.

The plaintiff argued that his agreement to fund the ongoing expenses of the business was a loss sharing requirement.[124] The court stated that this agreement only established a "contractual obligation" and not a joint venture.[125] Although the plaintiff's claim for breach of contract survived due to the existence of triable issues of fact,[126] the court's examination of the loss-sharing element of a joint venture relationship defeated the joint-venture claim.[127]

121. *Id.* at 185–86, 142 N.Y.S.3d at 519 (quoting Steinbeck v. Gerosa, 4 N.Y.2d 302, 317, 151 N.E.2d 170, 178, 175 N.Y.S.2d 1, 13 (1958) (holding that an author's contract with a publisher does not constitute a "joint venture," because the author does not share any losses, such as losses for cash discounts or bad debts)).

122. *Id.* at 186, 142 N.Y.S.3d at 520 (quoting Cosy Goose Hellas v. Cosy Goose USA, Ltd., 581 F. Supp. 2d 606, 622 (S.D.N.Y. 2008)).

123. *Id.*

124. *See id.*

125. *See Lebedev*, 193 A.D.3d at 186, 142 N.Y.S.3d at 520 (citing *Steinbeck*, 4 N.Y.2d at 317–18, 151 N.E.2d at 179, 175 N.Y.S.2d at 13).

126. *See id.* at 183, 142 N.Y.S.3d at 518.

127. *See id.* at 186, 142 N.Y.S.3d at 520.

III. CORPORATIONS

A. Armentano v. Armentano

Armentano v. Armentano[128] interpreted transfer restrictions on the stock of Paraco Gas Corporation, a closely-held New York corporation ("Paraco").[129] Paraco is a provider of propane gas, which was started in 1968 by Pat Armentano and which became, by 2021, the Northeast's largest privately-held dealer in propane gas.[130] In 1985, Paraco's stock was split into Class A voting shares, and Class B non-voting shares.[131] In 1991, Pat made gifts of Class A shares and Class B shares, in differing amounts to his four sons Joseph, John, Robert, and Michael.[132] At that time, all of the shareholders and Paraco entered into a Redemption Agreement with respect to the Class A shares, and a Cross-Purchase Agreement with respect to the Class B shares.[133] A fact relevant to the court's analysis of the Redemption Agreement was that, in 1991, John was a signatory to the Redemption Agreement although he did not own any Class A shares at that time.[134]

The Redemption Agreement provided, in relevant part, that Paraco had a right of first refusal upon a shareholder's attempt to transfer Class A shares during his lifetime.[135] The Cross-Purchase Agreement contained rights of first refusal with respect to the Class B shares, in favor of both Paraco and the other Class B shareholders.[136]

Over the years, John, Robert, and Michael left the business, and by 2017 Joseph owned all of the outstanding Class A voting shares, which totaled five in number.[137] At the time of the dispute in this case,

128. *See* No. 57449/2020, 2021 N.Y. Slip Op. 50096(U), at 1 (Sup. Ct. Westchester Cty. Feb. 10, 2021). Other decisions involving members of the Armentano family include Armentano v. Paraco Gas Corp., 90 A.D.3d 683, 935 N.Y.S.2d 304 (2d Dep't 2011) (involving issuance of shares to controlling shareholders); Armentano v. Armentano, No. 60203/2018, 2019 N.Y. Misc. LEXIS 20900 (Sup. Ct. Westchester Cty. Feb. 28, 2019).

129. *See Armentano,* 2021 N.Y. Slip Op. 50096(U), at 1; *see also Entity Information*, N.Y. DEP'T OF STATE, https://apps.dos.ny.gov/publicInquiry/EntityDisplay (last visited Nov. 23, 2021).

130. *See Armentano*, 2021 N.Y. Slip Op. 50096(U), at 1.

131. *See id*.

132. *See id.*

133. *See id.*

134. *See id.* at 1, 3.

135. *See Armentano*, 2021 N.Y. Slip Op. 50096(U), at 4.

136. *See id.* at 5.

137. *See id.* at 1–2.

the Class B non-voting shares were held by Joseph, Robert, John, and two trusts referred to in the opinion as the "2012 Joseph Trust" and the "2012 John Trust."[138]

In 2019, Paraco and Joseph undertook corporate succession planning, and Joseph undertook corresponding estate planning.[139] Joseph, acting as Chief Executive Officer of Paraco and as sole holder of the Class A shares, purportedly terminated the Redemption Agreement on October 31, 2019 and transferred one Class A share to Christina Armentano.[140] In Paraco's succession plan, which plaintiffs received on February 20, 2020, Joseph indicated that Christina would succeed him as Chief Executive Officer.[141] On June 24, 2020, Joseph transferred five Class B shares to the 2012 Joseph Trust and transferred his remaining four Class A shares together with 20.71 Class B shares, to The Joseph A. Armentano Family Trust (2020) (the "2020 Trust").[142]

Robert and John alleged that they discovered Joseph's purported transfer of the Class A share to Christina on November 20, 2019, when they received Paraco's shareholder list in connection with the annual Paraco shareholders' meeting to be held on December 16, 2019.[143] By letter dated December 5, 2019, plaintiffs asked Paraco's counsel to provide documentation of compliance by Joseph, Christina, and Paraco with the right of first refusal under the Redemption Agreement.[144] In reply, Paraco's counsel sent a copy of the termination agreement dated October 31, 2019 with respect to the Redemption Agreement.[145] On June 30, 2020, plaintiffs received an updated shareholder list reflecting Joseph's transfers of Class A shares and Class B shares to the 2012 Joseph Trust and the 2020 Trust.[146]

The plaintiffs claimed that the Purchase Agreement required Joseph to offer the Class B Shares to Robert and John, and the

138. *Id.* at 2.

139. *Id.*

140. *See Armentano*, 2021 N.Y. Slip Op. 50096(U), at 2 (The opinion does not state what Christina's family relationship was with the other Armentanos. Paraco's website at www.paracogas.com notes that Christina Paraco is of the third Armentano generation in the family business. *See Meet the Executive Team*, PARACO, www.paracogas.com/meet-the-executive-team/ (last visited Apr. 12, 2022)).

141. *See id.* at 3.

142. *See id.*

143. *See id.*

144. *See id.*

145. *See Armentano,* 2021 N.Y. Slip Op. 50096(U), at 3.

146. *See id.*

Redemption Agreement required Joseph to offer the Class A shares to Paraco.[147] The plaintiffs brought claims against Joseph, the 2020 Trust and the 2012 Joseph Trust, seeking specific performance under the Purchase Agreement; a rescission of Joseph's transfers of the Class B shares to the Trusts; and the right to purchase the Class B shares at the price provided in the Purchase Agreement.[148] If specific performance was not granted, the plaintiffs asked in the alternative for the fair market value of the Class B shares, which the plaintiffs claimed was $77,130,000.[149]

For the Class A shares, the plaintiffs brought a derivative action against Paraco as nominal defendant, asking for a declaratory judgment that the supposed termination of the Redemption Agreement was ineffective because termination required the consent of all parties, including the plaintiffs.[150] Similar to their requests with respect to the Class B shares, for the Class A shares, the plaintiffs requested specific performance under the Purchase Agreement, rescission of Joseph's transfers, the right of Paraco to purchase the Class A shares, and a constructive trust.[151] In the alternative, if the Court awarded damages, the fair market value of the Class A shares was alleged to be $20,000,000.[152] The plaintiffs claimed that a demand upon the Paraco Board of Directors to bring the derivative claims was excused, because the Board was unable to make a disinterested decision.[153]

The defendants moved to dismiss, contending, among other arguments, that: (1) plaintiffs Robert and John no longer had any interest in the Class A shares and therefore had no rights under the Redemption Agreement;[154] (2) plaintiffs' derivative actions could not stand, because the approval by Paraco's Board of Directors of Joseph's share transfers was a valid exercise of business judgment;[155] and (3) if Paraco were forced to exercise its right of first refusal under

147. *See id.* at 1.
148. *See id.* at 5.
149. *See id.*
150. *See Armentano*, 2021 N.Y. Slip Op. 50096(U), at 5.
151. *See id.* at 6.
152. *See id.*
153. *See id.* at 5–6.
154. *See id.* at 7.
155. *See Armentano*, 2021 N.Y. Slip Op. 50096(U), at 7. New York BCL section 626(c), provides that "In any such action [that is, a shareholders' derivative action], the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." N.Y. BUS. CORP. LAW § 626(c) (McKinney 2021).

the Purchase Agreement and to purchase the Class A shares, then Paraco would own all of the Class A shares and be left controlling itself.[156]

The Court did not agree that the defendants could terminate the Redemption Agreement because they were the only persons who retained any interest in Class A shares.[157] The Court found that the language in the Purchase Agreement and the Redemption Agreement clearly stated that the Agreements were "interwoven,"[158] and that each of the shareholders had given up "his right to dispose of his [Class] A Shares and [Class] B Shares . . . in order to benefit all the shareholders and Paraco."[159] In fact, when the Agreements were originally signed, one of Pat Armentano's four sons, John, did not even own any Class A shares, but nevertheless John was a party to the Redemption Agreement governing the disposition of the Class A shares, as well as a party to the Purchase Agreement concerning the Class B shares.[160] Therefore, Joseph could not terminate the Purchase Agreement without plaintiffs' consent.[161]

The Court then considered whether the plaintiffs' derivative claims should be dismissed for failure to make demand upon the Board.[162] The Court stated that "Demand is futile and excused, when the directors are incapable of making an impartial decision as to whether to bring suit."[163] It cited the Court of Appeals' decision in *Marx v. Akers* for the ways in which the plaintiff can show demand futility:[164]

> (1) A majority of the Board of Directors is interested, either by self-interest, or they are controlled by a self-interested director;

156. *See Armentano*, 2021 N.Y. Slip. Op. 50096(U), at 7.

157. *See id.* at 16.

158. *Id.*

159. *Id.*

160. *See Armentano*, 2021 N.Y. Slip Op. 50096(U), at 16.

161. *See id.*

162. *See id.* at 17.

163. *Id.* (first quoting Bansbach v. Zinn, 1 N.Y.3d 1, 9, 801 N.E.2d 395, 401, 769 N.Y.S.2d 175, 181 (2003); then quoting Malkinzon v. Kordonsky, 56 A.D.3d 734, 735, 868 N.Y.S.2d 123, 124 (2d Dep't 2008)) (citations and quotation marks omitted).

164. *See* 88 N.Y.2d 189, 200–01, 666 N.E.2d 1034, 1040–41, 644 N.Y.S.2d 121, 127–28 (1996) (citing Barr v. Wackman, 36 N.Y.S.2d 371, 376–81, 329 N.E.2d 180, 185–88, 368 N.Y.S.2d 497, 503–07 (1975)).

> (2) The Board of Directors did not appropriately inform themselves; or
>
> (3) The transaction at issue was so egregious that it could not have been the product of sound business judgment of the directors.[165]

In *Armentano*, "the Board rubber stamped a 'clear and egregious' violation of the Stock Redemption Agreement"[166] thus satisfying the third method. The court raised an additional reason on its own, which was that the Board members might have been controlled by Joseph as the sole owner of Paraco's voting stock.[167]

The Court concluded that the plaintiffs' claim for a constructive trust on the Paraco shares was adequate, so the complaint survived in part.[168]

Since the plaintiffs had the right to enforce the Redemption Agreement with regard to the Class A shares, what was the appropriate remedy? The defendants pointed out that Joseph had to pass on at least one Class A share to another individual, in this case Christina, because if Paraco repurchased all of the Class A shares in accordance with the Redemption Agreement – either in the event Joseph were to die, or in the event the Court were to order specific performance of the right of first refusal – then "Paraco would own all the controlling interest in itself."[169] The Court deferred ruling on this question because, in a motion to dismiss, it was not necessary to decide upon the remedy:

> While Defendants seek to justify Joseph's actions on the grounds that, inter alia: (1) a sale upon Joseph's death of all of the A Shares to Paraco would be contrary to law because the corporation would be controlling itself; (2) Robert and John cannot compel Paraco to purchase Joseph's A Shares; and (3) a transfer of the one share to Christina is necessary so that there would be a person leading Paraco in the event Joseph dies unexpectedly, these are all hypotheticals unsupported by any evidentiary record that shall not be addressed in the procedural context of a motion to dismiss. [170]

165. *See Armentano*, 2021 N.Y. Slip Op. (U), at 17 (citing Marx v. Akers, 88 N.Y.2d 189, 200–01, 666 N.E.2d 1034, 1040–41, 644 N.Y.S.2d 121, 127–28 (1996)).

166. *Id.*

167. *See id.*

168. *See id.* at 19.

169. *Id.* at 8.

170. *Armentano*, 2021 N.Y. Slip Op. 50096(U), at 13–14 n.10.

For corporate law practitioners, a drafting point from the *Armentano* case is that a shareholders' agreement which covers both a voting class and a non-voting class of stock should make sure that, so long as any stock is outstanding, there should be at least one holder of voting shares.

B. Monitor Holding Corp. v. I. B. Distributing Corp.

In *Monitor Holding Corp. v. I. B. Distributing Corp.*,[171] a judgment creditor sued a corporation and several individuals, claiming that they had made a fraudulent conveyance of corporate assets to a defined benefit pension plan, instead of applying those assets to satisfy the creditor's judgments against the corporation.[172] The plaintiff moved for summary judgment on its claims under the debtor and creditor law[173] and under section 720 of the business corporation law.[174]

A judgment creditor of a corporation may bring suit under paragraph (a)(2) section 720 of the BCL against directors or officers of a corporation "to set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness."[175]

In *Monitor Holding Corp.*, the court denied summary judgment because the plaintiff had not proven, at that stage of the case, certain elements of a claim under section 720 or the debtor and creditor law:

> The plaintiff failed to establish that the funds deposited in the underfunded Plan were corporate assets in the first instance, that such funds were deposited without fair consideration, that the individual defendants made such deposits with the actual intent to defraud the plaintiff, or that the individual defendants made such deposits unlawfully . . . While the record supports a finding that the transactions at issue bear some circumstantial

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171. *See* 189 A.D.3d 1577, 1577, 139 N.Y.S.3d 337, 338 (2d Dep't 2020).

172. *Id.*

173. *See id.* at 1577–78, 139 N.Y.S.3d at 338–39; *see also* N.Y. DEBT. & CRED. LAW §§ 273–78 (McKinney 2021). Effective April 4, 2020, after the transactions at issue in *Monitor Holding*, sections 270–81-a of the Debtor and Creditor Law were superseded by the new Uniform Voidable Transactions Act. *See* PRACTICAL LAW BANKRUPTCY & RESTRUCTURING, NEW YORK GOVERNOR APPROVES UNIFORM VOIDABLE TRANSACTIONS ACT (2021).

174. *See Monitor Holding Corp.,* 189 A.D. at 1577, 139 N.Y.S.3d at 338.

175. *Id.* at 1578, 139 N.Y.S.3d at 339 (citing Planned Consumer Mktg. v. Coats & Clark, 71 N.Y.2d 442, 451, 522 N.E.2d 30, 35, 527 N.Y.S.2d 185, 190 (1988)) (quoting N.Y. BUS. CORP. LAW § 720(a)(2) (McKinney 2021)).

> indicia of fraud, the evidence submitted in support of the plaintiff's motion fails to rise to the level that would support an inference of intent.[176]

Because the plaintiff had not established the element of intent, the court denied the motion for summary judgment under BCL section 720 and the debtor and creditor law.[177]

C. City of Aventura Police Officers' Retirement Fund v. Arison

In *City of Aventura Police Officers' Retirement Fund v. Arison*,[178] sections 626 and 1319 of the BCL[179] were applied to a shareholders' derivative complaint against Carnival plc, its directors and its chief executive officer.[180] Carnival plc is incorporated under the laws of England and Wales.[181] The plaintiff owned American Depositary Shares (ADS) of Carnival, which were not themselves shares of Carnival but rather consisted of beneficial ownership of Carnival shares.[182] Under the laws of England and Wales, a holder of ADS was not a "member" of Carnival,[183] and therefore was not permitted to bring a derivative action.[184]

Under New York law, the plaintiff satisfied the requirement share ownership requirement under BCL section 626.[185] Regarding whether New York law should apply regarding the plaintiff's standing to bring a derivative lawsuit, the court noted that BCL section 1319[186] "simply confers jurisdiction upon New York courts over derivative suits on behalf of out-of-state corporations," but "does not require application

176. *Id.* at 189 A.D.3d at 1579, 139 N.Y.S.3d at 339–40 (comparing Dempster v. Overview Equities, Inc., 4 A.D.3d 495, 498, 773 N.Y.S.2d 71, 74 (2d Dep't 2004) (summary judgment for fraudulent conveyance granted where spouse's property was transferred for no consideration to a third party, weeks before an equitable distribution trial)).

177. *See id.* at 1577, 139 N.Y.S.3d at 338.

178. 70 Misc. 3d 234, 235, 134 N.Y.S.3d 662, 666 (Sup. Ct. N.Y. Cty. 2020).

179. *See id.*

180. *See id.*

181. *Id*. at 237, 134 N.Y.S.3d at 668.

182. *Id.* at 239, 134 N.Y.S.3d at 669.

183. *See Arison*, 70 Misc. 3d 234, 236, 134 N.Y.S.3d 662, 667 (Sup. Ct. N.Y. Cty. 2020).

184. *See id.*

185. *See id.* at 242–43, 134 N.Y.S.3d at 671.

186. *See* N.Y. BUS. CORP. LAW § 1319 (McKinney 2021).

of New York law in such suits."[187] The court stated that BCL section 1319 authorized it to determine the applicable law.[188] The applicable law, said the court, was the internal affairs doctrine.[189]

The internal affairs doctrine was described as the corporate law policy that only the laws of the state or country of incorporation should govern relations among a corporation and its shareholders, directors, and officers:

> Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation. The doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs — matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders because otherwise a corporation could be faced with conflicting demands.[190]

Since the First Department "routinely applies the internal affairs doctrine in derivative actions featuring foreign corporations,"[191] the

187. *Arison,* 70 Misc. 3d at 244, 134 N.Y.S.3d at 672, (first citing Stephen Blau MD Money Purchase Pension Plan Tr. v. Dimon, No. 540654/2014, 2015 N.Y. Slip Op. 32909(U), at 11 (Sup. Ct. N.Y. Cty. May 6, 2015); then citing David Shaev Profit Sharing Plan v. Bank of Am. Corp., No. 652580/11, 2014 N.Y. Slip Op. 33986(U), at 5 (Sup. Ct. N.Y. Cty. Dec. 29, 2014); then citing Potter v. Arrington, 11 Misc. 3d 962, 966, 810 N.Y.S.2d 312, 316 (Sup. Ct. Monroe Cty. 2006); and then citing Lewis v. Dicker, 118 Misc. 2d 28, 30, 459 N.Y.S.2d 215, 216 (Sup. Ct. Kings Cty. 1982)). New York BCL section 1319 provides, in relevant part, that "The following provisions, to the extent provided therein, shall apply to a foreign corporation doing business in this state, its directors, officers and shareholders: . . . (2) Section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor)." N.Y. BUS. CORP. LAW § 1319 (McKinney 2021).

188. *See Arison,*70 Misc. 3d at 244, 134 N.Y.S.3d at 672–73 (citing *Potter*, 11 Misc. 3d at 966, 810 N.Y.S.2d at 316).

189. *See id.* at 245, 134 N.Y.S.3d at 673.

190. *See id.* at 243, 134 N.Y.S.3d at 671–72 (first citing New Greenwich Litig. Tr., LLC v. Citco Funds Servs. (Eur.) B.V., 145 A.D.3d 16, 22, 41 N.Y.S.3d 1, 6 (1st Dep't 2016); and then citing Davis v. Scottish Re Group Ltd., 30 N.Y.3d 247, 253, 88 N.E.3d 892, 895, 66 N.Y.S.3d 447, 450 (2017)).

191. *Id.* at 244, 134 N.Y.S.3d at 673 (first citing CPF Acquisition Co. by Kagan v. CPF Acquisition Co., 255 A.D.2d 200, 200, 682 N.Y.S.2d 3, 4 (1st Dep't 1998); and then citing Levin v. Kozlowski, 45 A.D.3d 387, 388, 846 N.Y.S.2d 37, 38–39 (1st Dep't 2007)).

Court stated that English law applied,[192] and dismissed the complaint.[193]

D. Marlborough Gallery, Inc. v. Levai

In *Marlborough Gallery, Inc. v. Levai,*[194] the plaintiff Gallery sued Pierre Levai, its former President and Director, on the grounds that Pierre used the corporation's artwork assets for his personal benefit.[195] Pierre Levai moved for an order from the Court, allowed under BCL section 724, to require the plaintiff corporation to indemnify for him for the defense of his claims and to advance his costs and attorneys' fees.[196]

Section 722 of the BCL provides that a corporation may indemnify an officer or director made, or threatened to be made, a party to an action or proceeding, by reason of being as officer or director.[197] Section 723(a) of the BCL provides that "[a] person who has been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described in section 722 shall be entitle to indemnification as authorized in such section."[198]

Section 724(a) of the BCL provides that Section 723(a) indemnification after a successful defense is mandatory.[199] During the action or proceeding, Section 724(c) authorizes a court in its discretion to order advancement of expenses:

> (c) Where indemnification is sought by judicial action, the court may allow a person such reasonable expenses, including attorneys' fees, during the pendency of the litigation as are necessary in connection with his defense therein, if the court shall find that the defendant has by his pleadings or during the course of the litigation raised genuine issues of fact or law.[200]

192. *See id.* at 245, 134 N.Y.S.3d at 673.

193. *See* City of Aventura Police Officers' Retirement Fund v. Arison, 70 Misc. 3d. at 255, 134 N.Y.S.3d at 680.

194. No. 654459/2020, 2021 N.Y. Slip Op. 31677(U), at 3 (Sup. Ct. N.Y. Cty. May 17, 2021).

195. *See id.* at 3.

196. *See id.* at 11 (citing N.Y. BUS. CORP. LAW § 724 (McKinney 2021)).

197. *See* N.Y. BUS. CORP. LAW § 722 (McKinney 2021).

198. N.Y. BUS. CORP. LAW § 723(a) (McKinney 2021).

199. *See* N.Y. BUS. CORP. LAW § 724(a) (McKinney 2021).

200. *See* N.Y. BUS. CORP. LAW § 724(c). In *Marlborough Gallery*, the Court observed another that a condition of reimbursement or advancement is that it should "not be 'inconsistent' with the company's charter, bylaws, or other corporate action

In *Marlborough Gallery*, Defendant Pierre Levai moved for court-ordered indemnification at the same time as his motion to dismiss.[201] The Court denied the motion for indemnification as premature, although the defendant might move for renewal later.[202] The Court denied advancement of expenses, pointing out that "advancement is a matter of judicial discretion, not an entitlement," and emphasized the word "may" in BCL section 724(c).[203]

IV. SUCCESSOR LIABILITY

A. *McIntyre v. Bradford White Corp.*

McIntyre v. Bradford White Corp.[204] was a product liability case where the plaintiff sought to hold Honeywell International, Inc. ("Honeywell") liable for a defective mixing valve on a hot water heater which caused an infant, while being bathed, to be scalded by excessively hot water.[205] The mixing valve was installed sometime in the mid-1990's in the building where the plaintiff lived.[206] The accident occurred on September 11, 2011.[207]

The mixing valve was manufactured by another defendant, Sparco, Inc. ("Sparco"). Honeywell bought "substantially all" of the assets of Sparco, and assumed specified related obligations of Sparco, under an Asset Purchase Agreement ("APA") which closed on or about January 4, 2000,[208] which was more than 10 years before the accident.[209] In the APA, Honeywell expressly disclaimed liability for product liability claims sold before the closing:

> The APA specifically provided that Honeywell did not assume or otherwise have any liability for "product liability claims arising out of or in connection with injuries or damages to persons or property or economic loss caused by any product

in force at the time the purported claims accrued." *See* 2021 N.Y. Slip Op. 31677(U), at 11 (first citing N.Y. BUS. CORP. LAW § 724(c) (McKinney 2021); and then citing N.Y. BUS. CORP. LAW § 725(b)(2) (McKinney 2021)).

201. *See Malborough Gallery,* 2021 N.Y. Slip Op. 31677(U), at 1.

202. *See id.* at 11.

203. *Id.*

204. *See* No. 23421, 2020 N.Y. Slip Op. 51034(U), at 1 (Sup. Ct. Wash. Cty. Sept. 8, 2020).

205. *See id.*

206. *See id.*

207. *Id.*

208. *Id.*

209. *McIntyre*, 2020 N.Y. Slip Op. 51034(U), at 1.

> manufactured or sold by [Sparco] on or prior to the Closing Date" and that Sparco retained liability for such claims.[210]

Accordingly, Honeywell moved to dismiss the complaint as against itself.[211]

In ruling on the motion, the court provided a digest of New York case law regarding successor liability,[212] commencing with the rule that "[a] corporation that purchases another corporation's assets is not liable for the seller's torts, subject to four exceptions outlined in *Schumacher v. Richards Shear Co.*"[213] The court listed those four exceptions:

> In *Schumacher,* the Court of Appeals stated, "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations".[214]

Out of the four exceptions, the *McIntyre* court considered the second and third, which it referred to as the "de facto merger" and "mere continuation" exceptions.[215]

Regarding de facto merger, the court quoted from *Rosplock v. Upstate Management Associates, Inc.*[216]: "Factors to be considered in determining whether a de facto merger has occurred include whether there was any continuity of ownership, management, personnel,

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210. *Id.*

211. *Id.* at 1–2 (first citing N.Y. C.P.L.R. 3211(a)(1) (McKinney 2021); then citing N.Y. C.P.L.R. 3211(a)(7); and then citing N.Y. C.P.L.R. 3211(c)).

212. *Id.* at 5.

213. *Id.* (quoting Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 243, 451 N.E.2d 195, 197, 464 N.Y.S.2d 437, 439 (1983) (no strict liability for purchaser of "product line," but "special relationship" between purchaser and owner of the product was the source of a duty to warn) (citing Semenetz v. Sherling & Walden, Inc., 7 N.Y.3d 194, 196, 851 N.E.2d 1170, 1171, 818 N.Y.S.2d 819, 820 (2006) (declining to adopt strict liability for continuation of the "product line")).

214. *McIntyre,* 2020 N.Y. Slip Op. 51034(U), at 15, n.3 (quoting *Schumacher*, 59 N.Y.2d at 245, 451 N.E.2d at 198, 464 N.Y.S.2d at 440).

215. *Id.* at 5.

216. 108 A.D.3d 825, 827, 968 N.Y.S.2d 706, 709 (3d Dep't 2013) (debtor agreed to arbitrate creditor's claims; if debtor had diverted its business to a transferee, then transferee might also be subject to the debtor's agreement to arbitrate).

physical location, assets or general business operations."[217] The *McIntyre* court quoted *Bonanni v. Horizons Investors Corp.*[218] for the additional factors of "cessation of ordinary business and dissolution of the predecessor as soon as possible [and] assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor."[219] In addition, the *McIntyre* court cited *R & D Electronics Inc. v NYP Management., Co., Inc*., another decision listing relevant case precedents.[220]

Honeywell paid cash for Sparco's assets, and therefore there was no continuity of ownership, "which," said the *McIntyre* court, "has been held to be an essential element of de facto merger."[221] In addition, the APA provided for Sparco to keep the "minute books, stock books, shareholder lists and similar corporate records."[222] Hence, there was no de facto merger of Sparco into Honeywell.[223] The *McIntyre* court did not discuss the other indications for de facto merger, nor was there any logical need to do so.[224]

With regard to the exception for mere continuation of the selling corporation, the exception requires the predecessor corporation to be extinguished.[225] However, Sparco remained in existence for almost two years after the sale, changing its name to Rapsco, Inc. on the closing date, on or about January 4, 2000,[226] and being dissolved on or about December 21, 2001.[227]

The result in *McIntyre* was that none of the successor liability theories set forth in *Schumacher* applied to Honeywell.[228]

217. *McIntyre*, 2020 N.Y. Slip Op. 51034(U), at 5 (quoting *Rosplock*, 108 A.D.3d at 827, 968 N.Y.S.2d at 709).

218. 179 A.D.3d 995, 999, 118 N.Y.S.3d 137, 143 (2d Dep't 2020).

219. *McIntyre*, 2020 N.Y. Slip Op. 51034(U), at 5–6 (quoting *Bonanni*, 179 A.D.3d at 999, 118 N.Y.S.3d at 143).

220. *Id.* at 6 (citing R&D Elecs., Inc. v. NYP Mgmt. Co., Inc., 162 A.D.3d 1513, 78 N.Y.S.3d 834 (4th Dep't 2018)).

221. *Id.* (first citing Dritsas v. Amchem Prods., Inc., 169 A.D.3d 526, 526–27, 94 N.Y.S.3d 264, 264–65 (1st Dep't 2019); and then citing Oorah, Inc. v. Covista Commc'ns, Inc., 139 A.D.3d 444, 445, 30 N.Y.S.3d 626, 628 (1st Dep't 2016).

222. *Id.* (quoting from the APA § 2.1(b)).

223. *Id.*

224. *McIntyre*, 2020 N.Y. Slip Op. 51034(U), at 7.

225. *Id.* at 6 (quoting Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 245, 451 N.E.2d 195, 198, 464 N.Y.S.2d 437, 440 (1983)).

226. *Id.* at 1.

227. *Id.*

228. *Id.* at 7.

V. DISSOLUTION

A. People v. Northern Leasing Systems, Inc.

Section 1101 of the business corporation law authorizes the New York State Attorney General to bring an action to dissolve a corporation on several grounds, including persistent fraud.[229] *People v. Northern Leasing Systems, Inc.*[230] is a reminder that, if a corporation engages in systematic illegal activity, a court can order its dissolution.[231]

The Attorney General sued Northern Leasing Systems, Inc. and other defendants (the "Northern Respondents"[232] plus their lawyers, the "Attorney Respondents"[233]) in April 2016, alleging that since 2010 they had "tricked individuals, many of whom were small business owners, into entering into unconscionable equipment finance leases (EFLs) for credit card processing equipment."[234]

According to the Attorney General, Northern's sales representatives targeted owners of small businesses across country who were over "65 years old, disabled, new immigrants, or not proficient in English."[235] The salespeople did not give the equipment lessees adequate opportunity to review the EFLs, and sometimes did not even provide copies of the EFLs, before the lessees signed.[236] Sometimes the sales representatives forged the names of the lessees, or unilaterally altered the EFLs after they had been signed[237] After signature, the salespeople became unreachable.[238]

The Attorney General further alleged that the EFLs contained a "no-cancellation provision" and automatically renewed every

229. N.Y. BUS. CORP. LAW § 1101(a) (McKinney 2021). Provides, in part:
(a) The attorney-general may bring an action for the dissolution of a corporation upon one or more the following grounds:
* * *
(2) That the corporation has … conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.
* * *

230. *See generally* 193 A.D.3d 67, 142 N.Y.S.3d 36 (1st Dep't 2021).
231. *See id.* at 72–73, 142 N.Y.S.3d at 40–41.
232. *Id.* at 70, 142 N.Y.S.3d at 39.
233. *Id.* at 70–72, 142 N.Y.S.3d at 40.
234. *Id.* at 70, 142 N.Y.S.3d at 39.
235. *N. Leasing Sys. Inc.,* 193 A.D.3d at 71, 142 N.Y.S.3d at 40.
236. *Id.*
237. *Id.*
238. *Id.*

month.[239] The defendants made it "exceedingly difficult … to cancel an EFL or return unwanted equipment."[240] The defendants collected monthly payments after the initial term of an EFL, "even though the amounts paid grossly exceeded the value of the equipment."[241] The EFLs required all individual lessees to personally guarantee the EFLs and "consent to the jurisdiction of the New York City Courts regardless of where the lessee was physically located . . . (more than 95% of consumers dues by the Northern Respondents resided outside of New York)[.]"[242] The Attorney General alleged that the lawyer Respondents used "harassing debt collection processes[,]" and, since 2010, had:

> filed more than 30,000 actions in New York County Civil Court and obtained more than 19,000 default judgments, accounting for a large portion of the total general, commercial, and consumer debt filings and default judgments in New York County Civil Court.2 Consumers had 1,643 complaints to the AG for the period from January 1, 2010 to December 31, 2015.
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> ———
>
> Respondents' filings became so overwhelming that the Civil Court created a separate calendar part to hear only actions brought by the Northern Respondents.[243]

Thus, the action against Northern Leasing Systems not only responded to 1,643 complaints, but also addressed the extraordinary demands being made upon the New York County Civil Court. [244]

The Attorney General brought the proceeding to enjoin the defendants from the equipment finance leasing and debt collection business, to dissolve Northern Leasing Systems, and for restitution, damages, civil penalties, and related relief.[245] The proceeding was brought under Executive Law Section 63(12), which authorizes an action for "repeated fraudulent or illegal acts or . . . persistent fraud or illegality"[246] and (BCL) Section 1102(a)(2). Under Section 63(12), a court may enjoin individuals, as well as business entities, from fraud

239. *Id.*
240. *N. Leasing Sys. Inc.,* 193 A.D.3d at 71, 142 N.Y.S.3d at 40.
241. *Id.*
242. *Id.* at 71–72, 142 N.Y.S.3d at 40.
243. *Id.* at 72, 142 N.Y.S.3d at 40, n.2 (footnote in original).
244. *Id.*
245. *N. Leasing Sys. Inc.*, 193 A.D.3d at 72–73, 142 N.Y.S.3d at 40–41.
246. N.Y. EXEC. LAW § 63(12) (McKinney 2021).

and illegality.[247] Use of section 63(12) was essential to prohibit the individual respondents from continuing fraud and illegality under the charters of corporations or other entities which were not respondents in the *Northern Leasing* action.[248]

At the trial court level, Northern Leasing presented documentary evidence for the purpose of disputing the Attorney General's claims,[249] but the trial court ruled that Northern Leasing's evidence did not present any question over whether those claims were actually true.[250] Although subdivision (b) of BCL Section 1101 provides that "An action under this section is triable by jury as a matter of right[,]"[251] the trial court held that Northern Leasing's evidence raised no questions of fact, hence there was no requirement for a trial.[252] The appellate division affirmed the absence of material factual issues "warranting a trial."[253]

The *Northern Leasing* case is an example of the sort of conduct which can result in court-ordered dissolution under BCL Section 1101 and a reminder that the remedy exists as a weapon in the Attorney General's panoply for fighting illegal corporate conduct.

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247. *Id.*

248. *See* People v. Leasing Expenses Co. LLC, Index No. 452357/2020, (Sup. Ct. N.Y. Cnty. Feb. 25, 2021) https://ag.ny.gov/sites/default/files/452357_2020_the_people_of_the_stat_v_the_people_of_the_stat_decision_order_on_1.pdf. & https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=A_PLUS_3T1/TYVd96/n4pl9_PLUS_/gw==&system=prod (last visited Apr. 12, 2022) (enjoining Northern Leasing Respondents from using new limited liability companies to obtain funds from Northern Leasing's equipment leasing finance business).

249. People v. Northern Leasing Sys., Inc., 70 Misc. 3d 256, 260–62, 133 N.Y.S.3d 389, 397–99 (Sup. Ct. N.Y. Cnty. 2020).

250. *Id.*

251. N.Y. BUS. CORP. LAW § 1101(b) (McKinney, 2021).

252. *N. Leasing Sys. Inc.*, 70 Misc. 3d at 262, 133 N.Y.S.3d at 399 (first citing N.Y. C.P.L.R. 409(b) (McKinney 2021); then citing People *ex rel.* Robertson v. N.Y. State Div. of Parole, 67 N.Y.2d, 197, 203, 492 N.E.2d 762, 765, 501 N.Y.S.2d 634, 638 (1986); then citing Hotel 71 Mezz Lender, LLC v. Rosenblat, 64 A.D.3d 431, 432, 883 N.Y.S.2d 30, 32 (1st Dep't 2009); and then citing People v. Park Ave. Plastic Surgery, P.C.*,* 48 A.D.3d 367, 367, 852 N.Y.S.2d 111, 111–12 (1st Dep't 2008)). With regard to special proceedings, N.Y. C.P.L.R. 409(b) provides in relevant part that "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." N.Y. C.P.L.R. 409(b) (McKinney 2021).

253. *N. Leasing Sys. Inc.,* 193 A.D.3d at 73, 142 N.Y.S.3d at 41.

B. Kassab v. Kasab

In *Kassab v. Kasab*,[254] the second department described the standard for granting corporate dissolution under BCL Section 1104-a as follows:

> "[O]ppressive actions . . . refer to conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise."[255] In determining whether to proceed with involuntary dissolution, the court shall consider, among other things, "[w]hether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment."[256]

In contrast to the limited liability company in the companion case,[257] dissolution of the corporation was granted by the supreme court[258] and affirmed by the second department.[259]

CONCLUSION

The Survey Period included the end of temporary legislation addressing how to hold an annual meeting of a corporation's shareholders during the COVID-19 pandemic. In case law, complex disputes were amenable to decision by established business law rules.

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254. 195 A.D.3d 832, 151 N.Y.S.3d 94 (2d Dep't 2021). A companion limited liability decision is also named Kassab v. Kasab. *See* 195 A.D.3d 830, 145 N.Y.S.3d 836 (2d Dep't 2021).

255. *Kassab,* 195 A.D.3d. at 836–37, 151 N.Y.S.3d at 100 (quoting *In re* Kemp & Beatley, Inc., 64 N.Y.2d 63, 72, 473 N.E.2d 1173, 1179, 484 N.Y.S.2d 799, 805 (1984) (majority in close corporation paid profits to itself in the form of salaries and bonuses, and, by not paying any dividends, denied minority any share of profits)).

256. *Id.* at 837, 151 N.Y.S.3d at 100 (citing N.Y. BUS. CORP. LAW § 1104-a(b)(1) (McKinney 2021). Section 1104-a(b)(1) provides: "The court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account . . . . [w]hether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment." N.Y. BUS. CORP. LAW § 1104-a(b)(1) (McKinney 2021).

257. *See Kasab*, 195 A.D. at 835, 151 N.Y.S.3d at 98.

258. *Id.* at 835, 151 N.Y.S.3d at 99.

259. *Id.* at 837, 151 N.Y.S.3d at 100.