STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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| **ROSS M. CELLINO, JR.**,<br><br>Petitioner,<br><br>- v -<br><br>**CELLINO & BARNES, P.C.** and **STEPHEN E. BARNES**,<br><br>Respondents. | Index No.: 806178/2017 |

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS THE PETITION**

Buffalo, New York
July 27, 2017

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## INTRODUCTION

Respondents Cellino & Barnes, P.C. ("C&B") and Stephen E. Barnes ("Barnes") (collectively "Respondents") submit this Memorandum of Law, pursuant to CPLR §§ 404, 3211(a)(7), and 3212, in opposition to Petitioner Ross M. Cellino, Jr.'s ("Cellino" or "Petitioner") petition to dissolve C&B (the "Petition") and in support of Respondents' Motion to Dismiss and Deny the Petition.

Respondents have submitted numerous affidavits in support of their motion, which, at the very least, demonstrate that Petitioner is not entitled to dissolution as a matter of law. The same cannot be said of Petitioner. Petitioner cannot rebut the ample evidence and factual affidavits submitted by Respondents and dissolution should be summarily denied and dismissed as a matter of law.

Petitioner initiated this action to dissolve C&B, an enormously successful law firm he and Barnes co-founded in 1998. The Petition erroneously alleges shareholder and director dissension and deadlock under New York Business Corporation Law ("BCL") § 1104(a). Cellino further attempts to paint Barnes as an usurper of Cellino's opportunities; this is patently false.

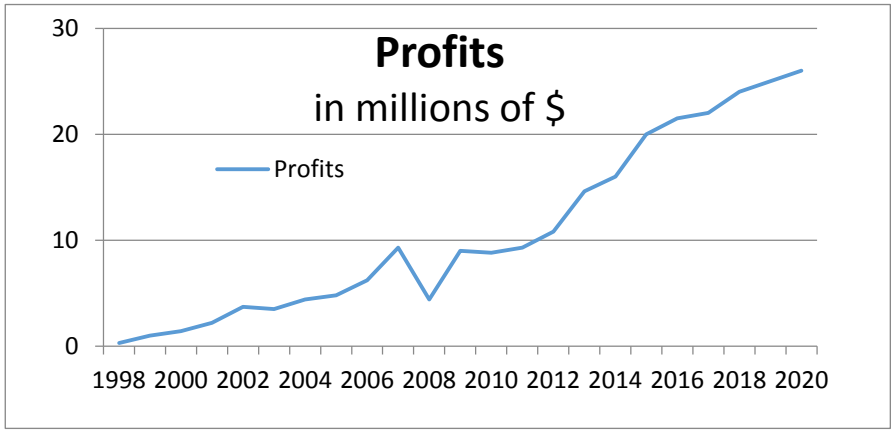
Barnes had no choice but to step-up and run C&B for the last several years, beginning in 2005. Cellino was suspended from the practice of law in 2005 for six (6) months as a result of "engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer" as well as "conduct involving dishonesty, fraud, deceit or misrepresentation." Matter of Cellino, 21 A.D.3d 229, 234 (4th Dept. 2005). Cellino's suspension was extended to nineteen (19) months—due to additional alleged ethical violations—during which Barnes accepted the role of running, managing, and growing the firm. (Barnes Aff. ¶¶ 20-21).

When Cellino was finally reinstated from his suspension, he was a changed man. Id. at ¶22. The suspension drastically altered and affected Cellino and caused him to withdraw from his prior roles and duties with C&B. Id. at ¶23. Cellino did not desire to take up his prior role as C&B's president and even went so far as to largely disengage himself from C&B's practice. Id. at ¶24.

Barnes expected and welcomed his co-owner's return and for Cellino to resume his prior duties and obligations. Id. at ¶25. Instead, Barnes found himself having to continue running the firm as he had while Cellino was suspended. Id. He did so admirably and extremely successfully.

C&B became one of the largest, if not the largest, personal injury law firms in the country. Id. at ¶58. Cellino and Barnes worked for over twenty (20) years to build the C&B firm, reputation, and brand into a multi-million dollar professional corporation. Id. at ¶9. Over the past five (5) years, C&B yielded more than $88 million in profits—$44 million **each** to both Cellino and Barnes. Id. at ¶¶ 69-70.

Despite voluntarily withdrawing from C&B's operations and still being paid $44 million over the past five (5) years—**plus** $7 million so far in 2017—Cellino petitioned the Court for dissolution. Id. Cellino completely ignores and overlooks the great success C&B has achieved **and** the projected success the firm is expected to achieve (as can be seen in the graphic below).




Id. at Ex. 2.

Ironically, despite his collection of $50 million in profits over the past five-and-a-half years and his projected distributions of over $30 million in the next two-and-a-half years, Cellino erroneously alleges that "it would be beneficial to the shareholders, the employees of the firm and the firm's clients to dissolve the corporation." (Photiadis Aff. Ex. 1 at ¶262).

Petitioner also erroneously claims that C&B is a "50/50 partnership" and "marriage" and focuses primarily on alleged distrust he has of Barnes. C&B is not a partnership; rather, Cellino and Barnes made the conscious decision to incorporate C&B as a professional corporation—an act that cannot be trivialized. Cellino and Barnes opted to subject C&B to New York Corporations Law rather than Partnership Law. As such, Cellino's reliance on allegations of distrust are insufficient to warrant dissolution under the BCL's barriers to dissolution.

Petitioner's allegations are conclusory, factually deficient, and do not sustain a claim for dissolution under BCL § 1104. Barnes denies and vigorously disputes Cellino's allegations, including, without limitation, self-dealing, misappropriation of resources, and excluding Cellino from C&B. However, even if Cellino's allegations are accepted as true, no genuine issue of material fact exists to prevent this Court from denying and dismissing the Petition as a matter of law.

Petitioner has failed to satisfy his burden to demonstrate entitlement to dissolution and the Petition should be dismissed because: (a) the allegations of deadlock among the directors and shareholders are a pretext for Cellino's personal desires, entirely fabricated, non-existent, and insufficient to warrant dissolution; and (b) dissolution would not be beneficial to the shareholders because C&B has thrived throughout its corporate existence, is extremely profitable, and the alleged dissension has not and does not impede the ability of the firm to function effectively.

In fact, contrary to the BCL's mandate in Section 1104(a)—that dissolution only be granted where it benefits the shareholders—dissolution would be catastrophic to C&B's shareholders. Indeed, Petitioner admitted that dissolution would be **"financial suicide."** (Manske Aff. ¶11). Moreover, despite erroneous allegations that Cellino can no longer work with Barnes, Cellino made multiple admissions to the contrary and recognizes that he can "work things out" with Barnes. (Barnes Aff. Ex. 11). Simply put, dissolution would benefit no one involved with C&B and would substantially harm C&B employees, clients, and shareholders—including Petitioner.

Therefore, and for the reasons set forth herein, this Court should dismiss the Petition in its entirety.

## FACTS

### I. C&B's History

Barnes joined the law firm that would later become C&B in 1992 and soon became a named partner. (Barnes Aff. ¶6). In 1994, the firm changed its name to Cellino & Barnes, LLP, and was ultimately incorporated, becoming Cellino & Barnes, P.C., in 1998. Id. at ¶9. Upon incorporating C&B, Cellino and Barnes both agreed to appoint Cellino as the President of the firm. Id. at ¶11.

Messrs. Cellino and Barnes also made the strategic decision to focus C&B on handling personal injury matters. Id. at ¶12. As such, C&B currently handles all personal injury matters, including, without limitation, automobile accidents, premises liability, medical malpractice, products liability, mass tort liability, and asbestos litigation. Id.

In 2005, C&B changed its name to The Barnes Firm, P.C. because Cellino was suspended from the practice of law for six (6) months by the New York Supreme Court, Appellate Division, Fourth Department. Id. at ¶13. The suspension was extended to nineteen (19) months while he applied for and obtained reinstatement to the bar. Id.

During Cellino's suspension, he was required to divest himself of his shares in C&B, which precipitated the changing of the firm's name. Id. at ¶14. Once Cellino was readmitted to the practice of law in 2007, Barnes welcomed him back to the firm and reinstated his shareholder status. Id. at ¶15. At Cellino's request, Barnes agreed to change the firm name back to Cellino & Barnes, P.C. Id. Upon his return, Cellino also received every dollar to which he was entitled. Id.

During Cellino's suspension, Barnes kept the firm alive and furthered their joint desire of creating an extremely successful personal injury firm. Id. at ¶16. Even though the firm's name was changed back to C&B, Cellino did not wish to remain President. Id. at ¶17. Accordingly, on March 23, 2007, Cellino and Barnes executed a corporate resolution appointing Barnes as President and Treasurer and Cellino as Vice President and Secretary of C&B. Id. at ¶17, Ex. 1.

## II. The effect the suspension had on Cellino and the resulting voluntary transition of C&B's management to Barnes

Cellino was suspended from the practice of law as a result of "engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer" as well as "conduct involving dishonesty, fraud, deceit or misrepresentation." Cellino, 21 A.D.3d at 234. Due to additional alleged ethical violations, Cellino's suspension was extended to nineteen (19) months. (Barnes Aff. ¶20). The suspension resulted in Cellino losing his license to practice law for the nineteen (19) months, and thus, he could not continue his role with C&B. Id. Accordingly, Barnes accepted the role of running, managing, and growing the firm until Cellino returned. Id. at ¶21.

Barnes did not foresee the drastic effect the suspension would have on Cellino, and when Cellino was finally reinstated from his suspension he was a changed man. Id. at ¶22. The co-owner of C&B that Barnes previously knew did not return from the suspension. Id. Rather, a drastically altered and affected Cellino returned and withdrew from his prior roles and duties with C&B. Id.

at ¶23. For instance: (a) Cellino did not desire to take up his prior role as C&B's president; (b) he was extremely reluctant to sign his name to corporate documents and refused to be a signatory on the firm's attorney escrow account; (c) he no longer engaged in managing the firm's day-to-day business operations; (d) he stopped interacting with clients; and (e) he stopped interacting with C&B attorneys relating to their cases. Id. at ¶24. Cellino went so far as to largely disengage himself from C&B's entire practice and retained only minimal obligations within the firm. Id.

Barnes expected and welcomed his co-owner's return and for Cellino to resume his prior duties and obligations. Id. at ¶25. Instead, Barnes found himself having to continue running the firm as he had while Cellino was suspended. Id. He did so extremely successfully.

## III. Duties of and services performed by Barnes as President and Cellino as Vice President of C&B

Pursuant to the C&B by-laws (the "By-Laws"), the President

> shall have the general powers and duties of supervision and management of the corporation which usually pertain to his or her office, and shall perform all such other duties as are properly required of him or her by the board of directors.

(Photiadis Aff. Ex. 1 at Ex. B). On the other hand, the Vice-President's obligations are limited to acting on behalf of the President "in the absence or disability of the President, or at his request[.]" Id.

Accordingly, as President of C&B, Barnes is in charge of the day-to-day management and operations of C&B and for long-term strategies for the success of the firm. His specific responsibilities include, without limitation:

a. Attorney management – contacting every attorney in the firm at least once every two (2) weeks (often times more frequently) to discuss their work;

b. Case settlement approvals – being responsible for approving settlements for any case to be settled for $20,000 or greater;

c. Major case litigation – being involved in virtually every major case that the firm has ever handled, collaborating with attorneys regarding case strategy and assisting in research and writing;

d. Fee disputes – screening fee disputes as well as assigning the handling of the majority of disputes to Gregory Pajak for upstate cases and Dylan Brennan for downstate cases;

e. Client issues – regularly speaking to clients experiencing problems or concerns;

f. Strategic planning – including coming up with strategies for market planning, expansion, advertising, case intake, attorney hiring, and management of subgroups within C&B.

(Barnes Aff. ¶29). On the other hand, Cellino does not have an active role in C&B's day-to-day management or operations, and has not had such a role in over ten (10) years. Id. at ¶30; see Ciambella Aff. ¶¶ 13 & 24; Schreck Aff. ¶¶12-14; Brennan Aff. ¶¶ 6 & 12-13.

During that time, Cellino has been fully disengaged from the practice of law and management of C&B. (Barnes Aff. ¶30). Cellino does not contact the individuals managing the daily operations of C&B (specifically Barnes, C&B Chief Operating Officer Daryl Ciambella, and C&B's head managing attorney Robert Schreck) to ensure his involvement in the firm's management or operations. (Id. at ¶31; see Ciambella Aff. ¶¶ 13 & 24; Schreck Aff. ¶¶12-14; Brennan Aff. ¶¶ 6 & 12-13). Cellino in no way inquires into C&B's daily operations or management despite multiple instances of Barnes and Mr. Ciambella reaching out to him to request his involvement over the past ten (10) years. (Barnes Aff. ¶¶ 32-33 & 45).

Even upon request, Cellino did not respond or demonstrate any interest in involving himself in the firm's operations. Id. at ¶33. In fact, during the summer of 2014, Mr. Ciambella and Barnes were in a meeting with Cellino during which Cellino admitted that he "has done nothing at the firm for the past ten years." Id. at ¶34.

Cellino has not become any more involved despite Barnes' willingness to continue the relationship and roles he and Cellino once had. Id. at ¶¶ 30-45. Rather, since his return from suspension in 2007, Cellino has largely absented himself from the firm's affairs and instead focused on personal ventures. Id. at ¶23. Cellino does not have a client he is currently responsible for, on whose case he is working or listed, or to whom he is even remotely connected. Id. at ¶39.

## IV. C&B's growth and continued success

At the time of incorporation in 1998, C&B had one office in Buffalo, New York, and three (3) attorneys, including Cellino and Barnes. (Barnes Aff. ¶53). C&B began advertising its services and, slowly, added additional lawyers and employees to the firm. Id.

In 2000, C&B opened an office in Rochester, New York, with one (1) attorney. Id. at ¶54. The Rochester office has grown to include nine (9) attorneys. Id.

In 2002, C&B built a satellite office on Grider Street in Buffalo across from Erie County Medical Center ("ECMC"), the area's largest trauma hospital. Id. at ¶55. The Grider office was expanded in 2015 and now has two (2) attorneys and five (5) employees. Id.

In 2008, Cellino and Barnes began focusing on creating a "downstate presence" for C&B and opened an office on Long Island in Melville, New York. Id. at ¶56. In 2009 and 2010, C&B opened offices in Garden City, New York, and Midtown Manhattan, New York, respectively. Id. The goal was to provide legal services to clients in Nassau County and all five (5) boroughs of New York City. Id. at ¶57. Today, C&B has thirty-three (33) attorneys in its downstate offices, including ten (10) attorneys in Garden City, eight (8) attorneys in Melville, and fifteen (15) attorneys in Manhattan. Id.

Overall, C&B currently has over fifty (50) attorneys and about two-hundred thirty (230) employees throughout its offices. Id. at ¶59. Many employees have worked at C&B for more than a decade, some for as long as twenty (20) years. Id.

The attorneys and employees have helped C&B settle more than 35,000 cases in its history and retain over 12,000 current clients. Id. at ¶62. C&B is currently operating at a high level, extremely profitable, and more successful than it has ever been. Id. at ¶63.

In 2016, the firm achieved settlements of more than $165 million and generated profits of more than $21.5 million. Id. at ¶64. Over the last five (5) years, C&B's settlements have increased by approximately 54% and profits have increased over 100%. Id. at ¶65. C&B's profits have consistently increased from approximately $8.8 million in 2010 to $21.5 million in 2016. Id. at ¶68, Exs. 2 & 3.

In terms of the profits C&B's shareholders received as a result of C&B's success, the following figures reflect the distributions paid to **each of** Cellino and Barnes over the past five (5) years:

2012 - $5.4 million
2013 - $7.3 million
2014 - $8 million
2015 - $10 million
2016 - $10.75 million

Id. at ¶69, Ex. 3. In 2017, to date, Cellino and Barnes have each received profit distributions of $7 million—$2 million of which has been post-Petition. Id. at ¶70. The shareholder distributions to Cellino are forecasted to continue to increase over the next three years to total:

2017 - $11 million
2018 - $12 million
2019 - $12.5 million

Id. at ¶ 71.

## V. The catastrophic harm that dissolution will cause Cellino and Barnes as shareholders

As previously mentioned, Cellino and Barnes had profit distributions of approximately $11 million each in 2016—a value that is expected to continue to increase in future years. (See Barnes Aff. Ex. 3). More than just the lost profits, there is more than $5 million in debt for the firm's disbursements being carried by M&T Bank for the 12,000 current cases being handled by the firm. Id. at ¶78. In the event of dissolution, Cellino and Barnes would immediately become liable for repaying $2.5 million each to M&T Bank. Id.

C&B has also invested significant amounts of capital in marketing which will be completely undone upon dissolution, including, without limitation:

- Utilizing and investing in internet search engine prioritization and optimization tools and services;
- Creating a national brand out of the firm name itself through tens of millions of dollars
- Purchasing the principal telephone numbers used by the firm, 888-8888 and 800-888-8888, and then joining those telephone numbers with the national brand of C&B through investing scores of millions of advertising dollars;
- Developing a cutting-edge and extremely proficient IT and case management system, including and especially the telephone lines;
- Website development;
- Re-building the Grider Street office building at a cost of $1 million, but which has a value significantly greater than that to C&B due to the strategic location of the office;
- Investment in procuring, maintaining, and providing legal services for the 12,000 or more cases C&B currently has; and
- Leasing and purchasing commercial real estate for offices.

Id. at ¶¶ 79-94.

In specific regards to the commercial leases, dissolution of the law firm would create legal jeopardy for the firm because the landlords would demand payment irrespective of whether the firm occupies the space. Id. at ¶92. There is approximately $3 million that Cellino and Barnes would owe (over $1.5 million each) to the various landlords on these leases upon dissolution. Id. The millions of dollars that Cellino and Barnes would each become personally liable for does not even take into account the fact that they would lose the income from the 12,000 cases C&B currently has. Id. at ¶94.

## VI. The harm dissolution will cause to C&B clients and employees

C&B employs approximately two-hundred thirty (230) people and has over 12,000 current clients. (Barnes Aff. ¶ 95). Many of the approximate 12,000 current cases are scheduled to be tried in 2017 and 2018. Id. at ¶96. Dissolution of C&B would result in the disruption of the clients' claims and likely cause significant delays. Id. at ¶97. The potential delays would be prejudicial to the clients and add strain to the court calendaring. Id.

As for the C&B employees, there would be approximately two-hundred thirty (230) people who would immediately become unemployed if C&B were dissolved. Id. at ¶98. This would have catastrophic effects to the employees and their families—who rely on the C&B employees' jobs for financial support and stability. Id. Indeed, almost all of C&B's attorneys wrote letters to Cellino pleading with him to consider them and C&B's clients and withdraw the Petition. See id. at Ex. 4.

Dissolution would result in extreme detriment to C&B's clients and employees.

## VII. Cellino's Reprehensible Conduct

Since filing the Petition, Cellino has been soliciting C&B employees to join a "new firm" he contends he will form upon C&B's dissolution. (Barnes Aff. ¶¶ 103-05, Exs. 5-7). Around the

same time that Cellino filed the Petition, he sent an e-mail to every attorney at C&B titled "Vision for your Future", which contained the express purpose of explaining "Why you should join my new Law Firm". Id. at ¶105.

Cellino has also visited numerous C&B offices in New York State post-Petition—including Buffalo, Rochester, Manhattan, and Long Island—and attempted to solicit C&B employees in person. Id. at ¶109. Cellino even had a private chartered airplane scheduled and waiting to take him to New York City on the day the Petition was filed. Id. at ¶111. He flew to the New York City offices immediately after meeting with the attorneys in the Buffalo and Rochester offices and attempted to solicit them to join his "new firm." Id. at ¶112.

In addition to soliciting C&B employees, the e-mails Cellino sent to C&B employees contain C&B confidential and proprietary information, including, without limitation, C&B's marketing strategies, annual budget, case management, and proprietary operational information. Id. at ¶114. Cellino's conduct resulted in the public disclosure of his e-mails containing C&B confidential and proprietary information as well as information this Court ordered to remain under seal. Id. at ¶115.

On the morning of May 11, 2017, a local radio station, WBEN, read portions of one of Cellino's solicitation e-mails on the air. Id. at ¶116. The e-mail had been posted to Facebook. Id.

Additionally, numerous articles have been released in prominent newspapers, both locally and nationally, including, The New York Times, Huffington Post, The Buffalo News, and New York Magazine. Id. at ¶117, Exs. 8-10. These articles contain information both in the instant lawsuit and extraneous information not contained therein. Id. at ¶121.

As a direct result of Cellino's conduct, the Court set forth the May 15, 2017, Status Quo Directive. The directive was geared towards maintaining C&B's business and to ensure the firm

continued to function in a business-as-usual manner. The Court expressly prohibited either party, and their agents or representatives, from soliciting C&B personnel or clients from leaving C&B.

Notwithstanding the Court's Status Quo Directive, on or around July 27 and 28, 2017, Ross and two individuals acting on Ross's behalf visited C&B's downstate offices and solicited C&B employees on Cellino's behalf. (Barnes Aff. ¶¶ 122-23). The message that was being delivered to C&B employees was that they should join Ross and it would be in their best interest if C&B were dissolved. Id. Indeed, they went so far as to explain where the employees would work in Cellino's new firm. Id.

Cellino also engaged in an interview on June 26, 2017, during which he disparaged C&B and suggested that it would be in C&B's clients' best interests if C&B was dissolved. Id. at ¶124. Cellino's statement was tantamount to stating that that the clients should not stay with C&B and should leave and/or choose a firm other than C&B.

C&B has experienced an influx of telephone calls from clients expressing angst over Cellino's disclosures. Id. at ¶125. Some clients are frantic and panicking as to what will happen with their cases. Id.

Moreover, as a result of the pending Petition, outside firms have begun pirating and pillaging C&B attorneys and clients. Id. at ¶125. C&B has lost clients due to the pending proceedings, including one case that is worth approximately $20 million. Id. at ¶126. The client explained that he left because an outside attorney misrepresented that C&B was "going under" and would be dissolved. Id.

C&B has also lost two (2) attorneys to competing firms since the Petition was filed. Id. at ¶127.

In addition to the aforementioned acts of bad faith, Cellino recently sent an e-mail to C&B's bank stating:

> As a 50% owner of the PC, I am revoking Daryl Ciambella's authority to wire or transfer any funds to either of our personal accounts (Steve or Ross) for any distributions unless both Steve and I jointly authorize the distribution.

(Barnes Aff. Ex 11). Cellino's conduct would have led to C&B not being able to make payroll and pay C&B's employees. Id. at ¶128.

Cellino does not have the authority to take such action. He is not the President of C&B, his status as a 50% shareholder holds no weight in terms of conducting business, and he is not an authorized user of the bank account. Id. at ¶130. Indeed, the Bank responded stating:

> The accounts Cellino & Barnes, PC maintain at the Bank are governed by various documents previously entered into by the parties, which include Resolutions/Signature Cards naming authorized signers on each of the Accounts. . . . After review, the Bank has determined it cannot accommodate [Ross's] request for several reasons. Primarily, the Bank does not have the ability to monitor and enforce such limits to the authority of an authorized individual such as Mr. Ciambella. The account documentation must continue to govern the Accounts unless and until the parties agree to supplement, amend or replace that documentation.

Id. at Ex. 11. However, Cellino was not satisfied. He wrote back to the bank and stated:

> I hereby revoke my personal guarantees for the two line [sic] of credit accounts for Cellino & Barnes, PC. . . . [o]ur current balance in our attorney account is $5,131,230.31. According to the latest [] Bank statement, the outstanding balance on the disbursement line of credit is $4,589,365.28. The bank has the legal authority to set off from the cash bank balances and pay off this indebtedness.

Id.

Cellino's attempt to interfere with C&B's relationship with the bank was unsuccessful and so he immediately tried to interfere with the relationship in another way. Cellino clearly is ignoring C&B's corporate documents, its corporate structure, and the contracts it previously entered into as well as the Court's Status Quo Directive.

Cellino knows the harm that C&B could suffer if the disbursement line was immediately called due by the bank—he was involved in the initial determination to take out the loan and initiated the conversations that C&B alter its disbursement-paying practices. (Barnes Aff. ¶36). C&B's daily functioning will be significantly hampered by the disbursement line becoming immediately due, id. at ¶¶ 38-39, and Cellino is trying to bring about that harm to C&B.

Here, Respondents have retained a legal ethics expert, Ronald C. Minkoff, Esq., to evaluate Cellino's conduct and issue an opinion as to its reasonableness. One of the conclusions Mr. Minkoff came to was that "Cellino's actions constituted an attempted raid on the business and employees of Cellino's own P.C., and were likely to impair C&B's ability to attract and keep clients, make it harder to retain lawyers and non-lawyer staff, and damage the firm's reputation." (Minkoff Rpt. ¶2(b)). Mr. Minkoff explains:

> Unlike in an ordinary Lateral Transition, a contested dissolution proceeding may go on for months or years, and may ultimately be resolved without the firm being dissolved. With the future so uncertain, and with the firm's business ongoing, it is neither reasonable nor customary for a shareholder or partner to begin recruiting firm employees to a competitive new venture, to do so without approval from other firm principals, and especially to suggest that the new venture will begin immediately.

Id. at ¶52. Mr. Minkoff opined that "to a reasonable degree of certainty, [] Cellino's actions could only harm C&B's business – which Cellino appears to admit." Id. at ¶54. Ultimately, he concludes that "Cellino's actions were contrary to the standards and practices of New York lawyers – particularly a law firm principal – and would inevitably undermine the stability of the firm's business for his own personal advantage." Id. at ¶60.

## VIII. Cellino's ulterior motive for applying for dissolution

The alleged "deadlock and dissension" in the Petition are mere pretexts for Cellino's true reasons for seeking dissolution. Cellino wants to create a new "legacy" firm for his family. Cellino

has six (6) children, five (5) of whom are either lawyers or will soon be lawyers. (Barnes Aff. ¶139).

At the meeting in 2014, discussed above, Cellino admitted to Barnes and Mr. Ciambella that he wanted to bring his children into the firm and dole out his shares to them over time. Id. at ¶140. C&B's corporate documents prevent him from doing so. Id.

Moreover, in his May 10, 2017, e-mail titled "Vision for your Future", Cellino focused on the "Cellino brand". Id. at ¶141, Ex. 7. Within minutes of sending that e-mail, Cellino met with C&B's Buffalo attorneys to solicit them to his new firm and focused on his family's role in his "Cellino firm." (See Goldstein May 12 Aff. ¶¶ 12, 13, & 18). Specifically, Cellino mentioned:

- His new firm name could be "Cellino & Cellino" if his wife joins the firm in some capacity;
- That one of his daughters was likely to join the firm;
- That two of his children have jobs in fields outside of personal injury and were unlikely to join his new firm, but then retracted and stated that his other daughter may have a role with the firm; and
- The compensation his daughter would receive upon joining the firm.

Id. It is no coincidence that Cellino brought the Petition for dissolution at a time where he has two sons who have graduated from law school (one recently), two daughters who are lawyers, and another daughter who will be in her last year of law school next year. (Barnes Aff. ¶143). His wife is also an attorney. Id.

For a full recitation of the pertinent facts, Respondents respectfully refer the Court to and hereby incorporate the Affidavit of Stephen E. Barnes, with exhibits, sworn to July 27, 2017; the Affidavit of Daryl Ciambella, sworn to July 27, 2017; the Affidavit of Ed Arcara, sworn to July 13, 2017; as well as the Affidavits of C&B Attorneys Richard Amico, sworn to June 22, 2017; Alex Bouganim, sworn to June 21, 2017; Dylan Brennan, sworn to July 18, 2017; Joseph Capetola,

sworn to June 22, 2017; Erik Centner, sworn to June 23, 2017; Michael J. Cooper, sworn to June 21, 2017; Aybike Donuk, sworn to June 22, 2017; Steven M. Fleckner, sworn to June 21, 2017; Brian A. Goldstein, sworn to May 12, 2017 (the "Goldstein 5/12 Aff."); Brian A. Goldstein, sworn to June 21, 2017 (the "Goldstein 6/21 Aff."); Timothy R. Hedges, sworn to June 20, 2017; Mark Huboda, sworn to June 21, 2017; Igor Grichanik, sworn to June 21, 2017; Lisa King, sworn to June 23, 2017; John Lavelle, sworn to June 22, 2017; William Loyd, sworn to June 23, 2017; Brett L. Manske, sworn to June 20, 2017; Joshua C. Olmstead, sworn to June 21, 2017; Sean L. Sasso, sworn to June 22, 2017; Robert J. Schreck, sworn to July 27, 2017; John A. Sheehan, sworn to June 25, 2017; David E. Silverman, sworn to June 20, 2017; Ellen Sturm, sworn to June 20, 2017; Erica B. Tannenbaum, sworn to June 21, 2017; Princess M. Tate-Burriss, sworn to June 21, 2017; and Joe Vazquez, sworn to June 21, 2017; submitted in further support herewith.

## ARGUMENT

The Petition should be dismissed because Petitioner has failed to satisfy his burden of demonstrating that he is entitled to dissolution. Cellino has filed the instant Petition and proceeded as though he is entitled to unfettered dissolution as a matter of right. However, he and Barnes incorporated C&B and, as such, the firm is governed by the New York Business Corporation Law. Under New York corporate law, "[t]here is no absolute right to dissolution[.]" In re Radom & Neidorff, Inc., 307 N.Y. 1, 7 (1954); Matter of Schneck v. Schneck, 2010 N.Y. Slip. Op. 31497(U) (Sup. Ct. Nassau Cnty. 2010).

A dissolution proceeding commenced by petition and order to show cause under BCL § 1106 is a special proceeding governed by CPLR Article 4. A respondent in a special proceeding such as the instant matter "may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition." CPLR § 404. Further, CPLR § 409(b) provides 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. The court may make any orders permitted on a motion for summary judgment."

Thus, the initial stage of a dissolution proceeding is the equivalent of a summary judgment motion and the focus is on whether there are genuine issues of material fact. Here, Respondents move for a denial of dissolution and to dismiss the Petition pursuant to CPLR §§ 404, 3211(a)(7), and 3212.

A party may move for the dismissal of one or more causes of action asserted against it where "the pleading fails to state a cause of action[.]" CPLR § 3211(a)(7). While courts typically assume the truth of allegations and afford petitioner every reasonable inference, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary

evidence are not entitled to any such consideration." Simkin v. Blank, 19 N.Y.3d 46, 52 (2012). "When documentary evidence is submitted by a [movant] the standard morphs from whether the plaintiff has **stated** a cause of action to whether it **has** one." Basis Yield v. Goldman Sachs Grp., Inc., 115 A.D.3d 128, 135 (1st Dept. 2014) (emphasis added).

Similarly, summary judgment should be granted where no doubt exists as to the absence of triable issues of material fact. See Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." Rotuba, 46 N.Y.2d at 231; see Coughlin v. Bartnick, 293 A.D.2d 509, 510 (2d Dept. 2002).

In the instant case, Petitioner moves for dissolution pursuant to BCL §§ 1104(a)(1), (2), and (3), which provide that a shareholder who holds one-half (1/2) of the voting shares in a corporation may petition the court for judicial dissolution on one or more of three **specific** grounds:

> (1) That the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained;
>
> (2) That the shareholders are so divided that the votes required for the election of directors cannot be obtained; and/or
>
> (3) That there is internal dissension and two or more factions of shareholders are so divided that dissolution would be beneficial to the shareholders.

BCL § 1104(a).

The Petition must contain facts "that would require court-ordered dissolution" in order to be entitled to the same under Section 1104(a). Matter of Skoler v. Country Grp. Inc., 2016 N.Y. Slip Op 31924(U), *8 (Sup. Ct. N.Y. Cnty. 2016). Where, as here, a petition contains conclusory

allegations and is bare of facts, the petition is deficient on its face and should be dismissed. See Matter of Klein Law Grp., P.C., 134 A.D.3d 450, 450 (1st Dept. 2015).

## POINT I

## THE PETITION SHOULD BE DISMISSED BECAUSE IT FAILS TO AND CANNOT ALLEGE SUFFICIENT GROUNDS FOR DISSOLUTION PURSUANT TO BCL § 1104(A).

### A. Dissolution is not in the best interest of C&B's shareholders because the firm remains functioning, successful, and prosperous.

New York law provides that dissolution may be granted where "there is internal dissension **and** two or more factions of shareholders are so divided that **dissolution would be beneficial to the shareholders**." BCL § 1104(a)(3) (emphasis added). It is well settled that "[t]he ultimate remedy of dissolution . . . should only be applied as a **last resort**." Klein, 134 A.D.3d at 450 (emphasis added); In re Ng, 174 A.D.2d 523, 526 (1st Dept. 1991) (same).

Even where dissension is proven, said dissension alone is insufficient to establish a right to dissolution. Wollman v. Littman, 35 A.D.2d 935 (1st Dept. 1970). "Irreconcilable differences even among an evenly divided board of directors do not in all cases mandate dissolution." Id.

"Rather, the critical consideration is the fact that dissension exists **and** has resulted in a deadlock **precluding the successful and profitable conduct of the corporation's affairs**." Goodman v. Lovett, 200 A.D.2d 670, 671 (2d Dept. 1994) (emphasis added). Where the dissension does not "pose an irreconcilable barrier to the continued functioning and prosperity of the corporation", dissolution is not the proper remedy. In re Kaufmann, 225 A.D.2d 775 (2d Dept. 1996).

Both the legislation and case law demonstrate the well-settled standard that dissolution should only be granted where the shareholders will benefit. In fact, BCL § 1111(b)(2) instructs

courts that "[i]n making its decision, the court shall take into consideration" the Legislature's decree that "the benefit to the **shareholders** of a dissolution is of **paramount importance**." (Emphasis added). Paramount means "superior to all others" and "chief in importance or impact". MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/paramount (last visited June 26, 2017); DICTIONARY.COM, http://www.dictionary.com/browse/paramount (same).

New York case law is replete with cases adhering to the long-standing and well-settled standard that dissolution should not be granted merely because alleged dissension exists. In 2015, the First Department denied dissolution on circumstances virtually identical to the case at hand. See Klein, 134 A.D.3d at 450.

In Klein, the First Department affirmed the dismissal of a petition for dissolution of a law firm organized as a professional corporation with two 50% shareholders. See id.; Photiadis Aff. Exs. 4-5. The petition and supporting affidavit consisted primarily of conclusory allegations with virtually no supporting documentation. (See Photiadis Aff. Exs. 4-5).

As in the instant case, the respondent-shareholder filed a motion to dismiss the petition under CPLR §§ 404(a), 3211(a)(7), and 3212. See id. The lower court granted the respondent-shareholder's motion and held:

> The petition is denied. As the 1st Department held in Application of Ng, court-ordered dissolution is the ultimate remedy and should be applied only as a last resort. . . . Here, **the firm is still profitable for both partners** and there is no showing of facts that would require court-ordered dissolution[.]

(See Photiadis Aff. Ex. 5) (emphasis added).

The First Department affirmed the lower court's holding and elaborated on the well-settled principal that the "ultimate remedy of dissolution . . . should only be applied as a last resort." Klein, 134 A.D.3d at 450. The court explained:

> [T]he motion court providently exercised its discretion when it denied the petition for dissolution of the subject corporation. **The areas of dissension, as alleged in the petition and affidavits, do not impede the ability of the firm to function effectively**. Nor did the motion court abuse its discretion when it dismissed the petition at the pleading stage, as a hearing is **only required where there is some contested issue determinative of the validity of the application**.

Id. (emphasis added) (internal quotations and citations omitted).

The Klein court merely explained and applied well-established, pre-existing law. Years earlier, the First Department made a similar decision regarding a petition for dissolution of a close corporation. See In re Cantelmo, 275 A.D. 231 (1st Dept. 1949).

In Cantelmo, there was a "complete absence of factual proof in th[e] record to indicate that corporate success and efficiency of management ha[d] been interfered with by" the alleged dissension. Id. at 233. The court held that "[t]he language of the statute that dissolution will be ordered where it 'will be beneficial to the stockholders' is not mere empty verbiage. It is intended to mean something[.]" Id.

The court further explained that the "entire objective of the petitioner was to force the respondent out of the business" and to "obtain for himself (the petitioner) the benefits of the corporation built up over the years by the joint efforts of both parties." Id. As such, it was clear that "[t]he object of the dissolution sought [was] personal . . . and [was] certainly not for the benefit of either [petitioner] or of [respondent], as stockholders." Id. Thus, the court dismissed the petition for dissolution. Id.

Shortly after the Cantelmo decision, the Court of Appeals reaffirmed that "the prime inquiry is, always . . . whether judicially-imposed death will be beneficial to the stockholders or members." Radom, 307 N.Y. at 7. In Radom, the undisputed facts demonstrated that:

(1) The two equal shareholders disliked and distrusted each other;

(2) Despite the feuding, there was no stalemate or impasse as to corporate policies;

(3) The corporation was not sick but flourishing—"that not only have the corporation's activities not been paralyzed but that its profits have increased";

(4) Dissolution was not necessary for the corporation or for either stockholder; and

(5) The petitioner, "though he is in an uncomfortable and disagreeable situation for which he may or may not be at fault, has no grievance cognizable by a court[.]"

Id. at 6-7.

The Court of Appeals affirmed the dismissal of the petition, holding that "[t]here is no absolute right to dissolution[.]" Id. at 7. In doing so, the court explained that dissolution "is granted only when the competing interests are so discordant as to prevent efficient management and the object of its corporate existence cannot be attained." Id. (internal quotations omitted).

Importantly, Klein, Cantelmo, and Radom are not outliers; rather, these cases exemplify the well-established and long-standing standard applicable to judicial dissolution. See Fazio Realty Corp. v. Neiss, 10 A.D.3d 363, 365 (2d Dept. 2004) ("While it cannot be disputed that there exists considerable and apparently ever-increasing internal corporate conflict, under the circumstances, the petitioners failed to demonstrate that the dissension between them and the appellant resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs."); Kaufman, 225 A.D.2d at 775 (dismissing the petition for dissolution without a hearing because "petitioner did not show that the disagreements between him and the respondent posed an irreconcilable barrier to the continued functioning and prosperity of the corporation[.]"); In re Dissolution of Glamorise Founds., 228 A.D.2d 187, 189 (1st Dept. 1996) ("The fact that the parties disagree over petitioner's plan for the company's future is not dispositive of the fundamental issue

of whether the conditions of the statute have been satisfied such that the extraordinary step of judicial dissolution is warranted."); Hayes v. Festa, 202 A.D.2d 277, 277 (1st Dept. 1994) (dismissing the petition where the records established "that the subject corporation[] could still function on a day-to-day basis," regardless of the allegation that the principals "were not speaking directly with each other").

The application of this well-settled law requires dismissal of the Petition for dissolution.

1. Dissolution is not in the best interests of the shareholders because the firm is enormously profitable, continues to function effectively, and dissolution would actually cause catastrophic harm to the shareholders.

The instant case is directly analogous to Klein, and the instant Petition should be similarly dismissed. Both instances involve: (a) a law firm organized as a closely held professional corporation; (b) two 50% shareholders; (c) one disgruntled attorney-shareholder petitioning for dissolution; and (d) the responding attorney-shareholder opposing dissolution and attempting to maintain the firm/corporation as formed. Most importantly, similar to Klein, "[t]he areas of dissension, as alleged in the petition and affidavits, do not impede the ability of the firm to function effectively." Klein, 134 A.D.3d at 450.

Indeed, C&B has experienced extraordinary growth and continues to provide legal services and operate as a functioning law firm. (See Barnes Aff. ¶63). The firm maintains over 12,000 current clients, continues to provide services to those clients, and operates on a business-as-usual basis despite the allegations of dissension. Id. at ¶¶ 62, 139.

In fact, since the Petition has been filed, Cellino has consented to certain C&B decisions, demonstrating that the firm can and does continue to function despite the alleged dissension. See id. at ¶195(g). For instance, C&B recently hired three (3) attorneys in the downstate market; Cellino consented to all three (3) hirings. Id.

Moreover, the following facts demonstrate that C&B's effective management is beyond contestation:

- C&B has managing attorneys for its various offices who control the day-to-day management of the firm—a receiver is not necessary for them to continue to do the job they have been performing since the Petition was filed;

- The firm clearly is functioning effectively because in the eleven weeks since the Petition has been filed, C&B's client intake has increased roughly 8.8% from the eleven weeks prior to the filing;

- The firm's settlement proceeds in 2017 have increased approximately 7 % from the same time period in 2016; and

- **Cellino and Barnes each received $2 million in profit disbursements since filing the Petition**.

The alleged dissension clearly does not prevent the firm from performing the necessary duties to continue functioning as usual.

The instant case is similar to Cantelmo and Radom in that there is a complete absence of factual proof in the record to indicate that C&B's success and efficiency of management have been interfered with by the alleged dissension between Messrs. Cellino and Barnes. In fact, the record is clear that C&B has not suffered at all, continues to function, and has had substantial growth and success over recent years.

Just as in Radom, despite the alleged animosity and distrust between Petitioner and Barnes, "not only have the corporation's activities not been paralyzed but [] its profits have increased." 307 N.Y. at 7. C&B's profits have consistently increased from approximately $8.8 million in 2010 to $21.5 million in 2016. (See Barnes Aff. ¶¶ 64-69, Exs. 2 & 3). Since 2010, there has not been a single year in which profits have decreased. See id.

In fact, the distributions Messrs. Cellino and Barnes each received over the past five (5) years are as follows:

2012 - $5.4 million
2013 - $7.3 million
2014 - $8 million
2015 - $10 million
2016 - $10.75 million

See id. Moreover, to date in 2017, Messrs. Cellino and Barnes have each received $6.5 million in profit distributions, including $2 million **since the filing of the Petition**. See id. at ¶70. Cellino even admits in the Petition that C&B is "highly profitable." (Photiadis Aff. Ex. 1 at ¶104).

Thus, C&B continues to function and remains extremely profitable to the shareholders despite any alleged dissension or deadlock and even through the significant negative impacts the instant Petition has had on the firm. Based on these indisputable facts, an order of dissolution would contravene the express language and intent of the Legislature in: (1) BCL § 1104(a) stating that dissolution will only be ordered where it will be beneficial to the stockholders; and (2) BCL § 1111(b) stating that benefit to the shareholders is a factor of **paramount importance**.

It is of vital importance that dissolution in the instant case is not merely contrary to the BCL's mandate that dissolution be granted only where beneficial to the shareholders, but rather, **dissolution will be catastrophic to C&B's shareholders**. Specifically, C&B and its shareholders will suffer devastating harm if dissolution is granted including, without limitation:

- C&B's loans would become immediately due – For example, C&B currently has approximately $5 million in debt with M&T Bank for the firm's disbursements; dissolution of C&B would cause the debt to become immediately due and each shareholder to be personally liable for $2.5 million to the bank.

- C&B's capital investments in marketing would be rendered worthless – C&B and the shareholders individually have invested millions of dollars in various marketing resources and strategies, including the Grider office and its immense value, all of which would be completely lost in a dissolution.

- The value of C&B's leases will become immediately due – For example, C&B's leases, including 10,000 square feet of prime real estate in mid-town Manhattan, are worth about $3 million; dissolution would create legal

jeopardy for C&B and the shareholders because the landlords would demand payment irrespective of whether the firm occupies the space, and Barnes and Cellino would owe millions of dollars (over $1.5 million for the Manhattan office alone) for the various leases.

- The income from C&B's more than 12,000 current cases – If the firm is dissolved, the shareholders will cease receiving distributions from the firms profits, including the profits from the current cases, which are estimated to contribute scores of millions of dollars.

- C&B's goodwill and brand, including the investment in the "888" numbers, will be destroyed – The firm has invested scores of millions of dollars into creating its brand, goodwill, and becoming a household name. C&B's "888" phone numbers, jingle, and all other assets, worth millions of dollars, will be lost and rendered worthless.

(Barnes Aff. ¶¶ 77-94).

As such, dismissal and denial of the instant Petition is even more warranted than the First Department's dismissal of the dissolution petition in Klein. The First Department held that the allegations of dissension **as plead** did not impede the ability of the firm to function effectively as a matter of law. Klein, 134 A.D.3d at 450. Here, the issue is not merely that Petitioner has failed to plead that dissolution is in the best interest of the shareholders or that C&B cannot function effectively; rather, Barnes has conclusively proved that dissolution would cause definitive and overwhelming harm to the shareholders.

Granting a dissolution that results in such extreme and calamitous harm would not merely be contrary to the purpose and intent of the BCL, it would directly contravene it. The language in the BCL "is not mere empty verbiage" and "is intended to mean something[.]" Cantelmo, 275 A.D. at 233. The meaning and application of Sections 1104(a) and 1111(b) in the instant case is plain: dissolution is improper because it is not in the best interest of Messrs. Cellino or Barnes as stockholders.

Cellino's allegations that dissolution is in the best interest of the shareholders is wildly speculative and based on no factual evidence or support. Cellino's speculation as to the potential success of non-existing future law firms holds no weight of credibility or reliance. **Factual demonstrations of benefit to the shareholders are required**. On the other hand, the aforementioned facts Barnes submits in support of the motion to dismiss dissolution definitively demonstrate that dissolution is **not** in the best interest of the shareholders.

As explained by the lower court in Klein, dissolution is only proper where "[n]o significant corporate action is possible." (See Photiadis Aff. Ex. 4, p. 22). Simply put, just as in Klein, "[t]hat's not true with this law firm. It's not even close to being true." Id.

2. Cellino concedes that dissolution would be "financial suicide."

It is of critical importance that Cellino sent numerous e-mails and text messages wherein he acknowledges and admits that dissolution is not in the best interest of the shareholders and that the alleged dissension does not prevent the firm from functioning effectively.

On June 15, 2017, Cellino sent a text message to a C&B attorney discussing the instant Petition. In discussing dissolution and its effects on the company, Cellino explained: "**I truly understand and appreciate that it will be financial suicide**[.]" (See Manske Aff. ¶11 (emphasis added)).

Cellino's admission is in direct contradiction to his advocating for dissolution. Needless to say, causing "financial suicide" to the shareholders is clearly not in the best interest of the shareholders. Moreover, Cellino's admission amounts to more than admitting that it is financial suicide to himself, but is tantamount to admitting that dissolution is financial murder to Barnes. Dissolution is clearly not warranted in view of the Legislature's express decree that "the benefit to the shareholders of a dissolution is of **paramount importance**." BCL § 1111(b)(2).

Cellino has made additional statements that undercut the Petition for dissolution. In another e-mail, dated May 15, 2017, Cellino states: "if the court rules in Steve's favor that the firm of Cellino & Barnes should not be dissolved and must remain as a legal entity, I too will respect the court order and Steve and I will be forced to work things out." (Barnes Aff. Ex. 11). He further states "if the court rules that the C&B must remain as a legal entity, we must move forward in a positive manner and forgive past comments." Id.

These are not the sentiments made about a corporation for which "the competing interests are so discordant as to prevent efficient management and the object of its corporate existence cannot be attained." Radom, 307 N.Y. at 7. These statements are an express recognition that **C&B can and will continue as a firm absent dissolution**.

Importantly, Cellino has expressed that his filing for dissolution is **not** about dissension or deadlock, but rather "[t]he main issue is trust and whether I can move forward trusting Daryl and Steve." (Manske Aff. ¶11). The allegation of lack of trust is also peppered throughout the Petition. (See generally Photiadis Aff. Ex. 1). Cellino's trust, or lack thereof, on its own is not a viable ground for dissolution.

Even if his allegations are taken as true, Cellino is merely in "an uncomfortable and disagreeable situation for which he may or may not be at fault, [but he] has no grievance cognizable by a court[.]" Radom, 307 N.Y. at 7. Based on Cellino's admissions, it is clear that dissolution is not in the best interest of the shareholders and that other avenues/remedies exist. Accordingly, the "ultimate remedy of dissolution" is not warranted in this case because it should "only be applied as a last resort." Klein, 134 A.D.3d at 450.

3. Cellino's disengagement and lack of involvement with C&B undercuts any argument that the firm cannot operate or function effectively.

In examining whether the alleged dissension poses a threat to the continued functioning and prosperity of the corporation, New York courts focus on "the shareholders who are **actively** conducting the business of the corporation[.]" In re T.J. Ronan Paint Corp., 98 A.D.2d 413, 422 (1st Dept. 1984) (emphasis added). Cellino does not have an active role in C&B's day-to-day management or operations. (See Barnes Aff. ¶30; Ciambella Aff. ¶¶ 13 & 24; Schreck Aff. ¶¶12-14; Brennan Aff. ¶¶ 6 & 12).

Cellino voluntarily withdrew from the practice of law upon being suspended for "engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer" as well as "conduct involving dishonesty, fraud, deceit or misrepresentation." Cellino, 21 A.D.3d at 234. When Cellino was finally reinstated he did not desire to take up his prior role as C&B's president and even went so far as to largely disengage himself from C&B's practice. (Barnes Aff. ¶24). Barnes found himself having to continue running the firm as he had while Cellino was suspended. See id. at ¶25.

Accordingly, Cellino and Barnes both agreed to delegate control of C&B's daily management to Barnes, the President. (Barnes Aff. at ¶17 & Ex. 1). The C&B by-laws (the "By-Laws") provide that the President

> shall have the general powers and duties of supervision and management of the corporation which usually pertain to his or her office, and shall perform all such other duties as are properly required of him or her by the board of directors.

(Photiadis Aff. Ex. 1, at Ex. B). On the other hand, Cellino, the Vice-President, agreed that his obligations are limited to acting on behalf of the President "in the absence or disability of the President, or at his request[.]" Id.

Thus, Barnes as the President of C&B is, and at all relevant times was, in charge of the management and operation of the firm. Any dissension, even if true, has not affected the running of C&B. Barnes is intimately involved with C&B's business operations on a daily basis as well as in relation to long-term strategic planning. (Barnes Aff. ¶¶ 28-29). Barnes' day-to-day responsibilities include, without limitation, participating in settlement negotiations, firm management and operations, addressing employee concerns and issues, case management, and development of case strategy. Id.

On the other hand, Cellino has not been actively engaged in the practice of law and management of C&B over the past ten (10) or more years. Id. at ¶¶ 30-31. Cellino does not contact or reach out to the C&B officers running the firm, Barnes and C&B's Chief Operations Officer Daryl Ciambella, to inquire or try to be involved in the management of the company. Id.

In fact, Messrs. Barnes and Ciambella reached out to Cellino on multiple occasions over the past ten (10) years to request his involvement in the operations of the firm. Id. at ¶32. Even upon request, Cellino did not respond or demonstrate any interest in involving himself in the firm's operations. Id. at ¶33.

Multiple attorneys at the various C&B offices confirm Cellino's disengagement during recent years; this can be seen in the numerous affidavits submitted in support of this motion. Specifically, two of C&B's managing attorneys, Robert Schreck and Dylan Brennan, as well as C&B's Chief Operations Officer Mr. Ciambella, expressed their view of the level of involvement of Barnes and Cellino respectively. (See generally Schreck Aff.; Brennan Aff.; Ciambella Aff.). The attorneys who submitted affidavits in support herewith universally support Mr. Schreck's statement that interaction with Cellino typically must be initiated by the attorney and the "bulk of [] interaction regarding the attorneys at C&B has been with Steve." (Schreck Aff. ¶¶ 12-13).

Moreover, C&B has managing attorneys, such as Messrs. Schreck and Brennan, to control the finer details of the firm on a daily basis. (Barnes Aff. ¶148). These offices have continued to function and prosper under the managing attorneys' guidance, despite the alleged dissension, causing the firm as a whole to continue on its successful track. Id.

A deadlock presumes two engaged but opposing factions; Cellino's voluntary disengagement undercuts his claim that a deadlock is preventing the corporation from operating and functioning effectively. Cellino has not been sufficiently involved in the operations of C&B to establish that any dissension would interrupt or adversely impact its business operations to the shareholders' detriment. The record of the firm's phenomenal growth and success over the past ten (10) years conclusively refutes Petitioner's meritless allegations of deadlock and dissension.

Thus, the Court is left to speculate not only as to the scope and validity of Cellino's alleged dissension, but also as to the manner in which any purported deadlock on those various items has impacted the corporation's functioning. On the other hand, Barnes has submitted conclusive proof that there has been **no adverse impact** on C&B's functionality and prosperity.

4. Petitioner fails to adequately support his claims that dissolution is warranted.

Cellino erroneously argues that dissolution is in the best interest of the shareholders and especially warranted since C&B is a law firm. The arguments that dissolution is in the best interest of the shareholders rely on the misplaced claims that (1) the profitability of C&B is irrelevant—Cellino ignores the substantial prosperity and continued functioning of the firm—and (2) Cellino's alleged personal disagreements and lack of trust with Barnes mandate dissolution. Moreover, Petitioner relies on distinguishable and misapplied case law in support of such claims.

Petitioner incorrectly equates the language in BCL § 1111—that "dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a

profit[]"—as standing for the proposition that C&B's profitability is immaterial. On the contrary, the Second Department expressly established that profitability is a determining factor, and indeed, one that can overcome alleged dissension and deadlock. See Fazio, 10 A.D.3d 363, 365 (2d Dept. 2004) ("While it cannot be disputed that there exists considerable and apparently ever-increasing internal corporate conflict, under the circumstances, the petitioners failed to demonstrate that the dissension between them and the appellant **resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs**." (emphasis added)). Indeed the New York Supreme Court in Klein responded to this exact argument that profitability is immaterial by explaining: "It may not be the controlling factor or the only factor, **but it's definitely a factor**." (Photiadis Aff. Ex. 4, p. 20 (emphasis added)).

Here Respondents do not argue that dissolution should be denied ipso facto because C&B is profitable. C&B's profitability is certainly one reason dissolution should be denied, but C&B's profitability is also irrefutable evidence that (a) C&B continues to function effectively and (b) dissolution is not in the best interest of the shareholders—which is of paramount importance.

The reason that Petitioner attempts to disregard C&B's profitability is plain: C&B is indisputably an extremely profitable multi-million dollar professional corporation and has remained so despite any alleged dissension even if true. Instead, Petitioner attempts to skirt around the success and prosperity of C&B by focusing on pretextual, conclusory, and fabricated allegations of dissension, deadlock, and "lack of trust." Cellino's allegations are insufficient as a matter of law to be entitled to dissolution.

Cellino has made numerous allegations of C&B policies he disagrees with. However, he has failed to set forth any proof that he has attempted to change, or otherwise express any displeasure with, said policies. Unexpressed disagreement is not deadlock or dissension. In

addition to submitting **no evidence** that the alleged deadlock has affected C&B's functioning in any way, Cellino cannot credibly claim that his disagreements have caused deadlock absent submitting actual proof of deadlock. See In re Parveen, 259 A.D.2d 389, 391 (1st Dept. 1999) (holding that the claim "that one 50% shareholder [] exercised sole control over the daily management of the Corporation does not create a cause of action for dissolution" where "there are no allegations that . . . control gave rise to deadlock over a management decision."); see also Glamorise, 228 A.D.2d at 189 ("The fact that the parties disagree over petitioner's plan for the company's future is not dispositive of the fundamental issue of whether the conditions of the statute have been satisfied such that the extraordinary step of judicial dissolution is warranted.").

Even if Cellino's allegations are accepted as true, despite the complete lack of proof, "[i]reconcilable differences even among an evenly divided board of directors do not in all cases mandate dissolution. Wollman, 35 A.D.2d at 935. "[N]ot every unresolved conflict to corporate management is fatal. The stymie must pertain to matter material and essential to the existence of the corporation." Application of Bankhalter, 128 N.Y.S2d 81, 85 (Sup. Ct. N.Y. Cnty. 1953).

The issues Petitioner raises are not even issues that would affect the functioning of C&B if true. For instance, Petitioner claims that some of his most significant differences with Barnes are: (a) disagreements over the California LC—Cellino claims this may be the most significant dispute; (b) employment decisions such as compensation; (c) policies and case management; (d) succession planning; and (e) marketing strategies. None of these are issues that would cripple C&B's operations if disagreements were had over them. In fact, if Cellino's allegations are accepted as true, it is clear that C&B has continued to function and create over $10 million in annual profits despite the alleged disputes.

It is irrelevant that Cellino's allegations may alter certain activities or conduct of C&B because the critical factor is that they do not prevent C&B from functioning. Indeed, even the cases Petitioner cites in favor of dissolution set forth the clear standard that dissension and deadlock must result in **complete paralysis of the corporation's functioning**. See, e.g., DelCasino v. Koeppel, 177 A.D.2d 464, 464 (2d Dept. 1991) (explaining that one 50% owner withdrew from the corporation and both owners attempted to operate the corporation to the exclusion of the other); Weiss v. Gordon, 32 A.D.2d 279, 281 (1st Dept. 1969) (explaining that "[n]o significant corporate action is possible."); Application of Sheridan Constr. Corp., 22 A.D.2d 390, 391-92 (4th Dept. 1965) (holding that the disagreements were so great that "management became impossible[,]" the company was paralyzed, and there was "complete frustration and standstill[.]"); Patti v. Fusco, 809 N.Y.S.2d 482 (Sup. Ct. N.Y. Cnty. 2005) (explaining that one shareholder changed the locks on the building such that the other shareholder literally could not continue corporate affairs); Application of Pivot Punch & Die Corp., 182 N.Y.S.2d 459 (Sup. Ct. Erie Cnty. 1959) (explaining that the petitioner alleged a "stalemate" and "that the corporation is weak and declining[.]").

In fact, even the two First Department cases Petitioner cites relating to law firms—In re Cunningham & Kaming, P.C., 75 A.D.2d 521 (1st Dept. 1980) and Molod v. Berkowitz, 233 A.D.2d 149 (1st Dept. 1996)—are entirely distinguishable and pre-date the First Department's recent, factually analogous Klein decision. The Molod case is distinguishable because respondent did "not deny his differences with petitioner" and the evidence of dissension left "no doubt that the firm [could not] continue to function effectively." 233 A.D.2d at 149. Similarly, in Cunningham one of the 50% owners actually withdrew from the firm. 75 A.D.2d at 521. The

dissension between the owners was such that "[p]lainly, no law practice [could] continue under the circumstances revealed." Id.[1]

Such is not the case here. Dissolution is not the proper remedy and should not be granted in the instant case because dissolution is not in the best interest of the shareholders and C&B continues to function effectively and prosperously. Therefore, Respondents' motion to dismiss should be granted and the Petition for dissolution should be dismissed in its entirety.

**B. Dissolution is not warranted because no deadlock exists between directors to prevent the effective management of the firm or between shareholders to prevent the election of additional directors.**

New York law provides for dissolution, in pertinent part, where:

> (1) the directors are so divided respecting the management of the corporation's affairs that the votes required for action by the board cannot be obtained; and/or
>
> (2) the shareholders are so divided that the votes required for the election of directors cannot be obtained;

BCL §§ 1104(a)(1) & (2). Importantly, the Petition must contain facts "that would require court-ordered dissolution" in order to be entitled to the same under Section 1104(a). Skoler, 2016 N.Y. Slip Op 31924(U) at *8.

The BCL "requires" an actual "showing of deadlock" not mere allegations of deadlock. Parveen, 259 A.D.2d at 391. "[T]here can be no deadlock where, as here, the contending factions have not even attempted" the actions for which deadlock is claimed. Id. Instead, where a petition contains conclusory allegations and is bare of facts, the petition is deficient on its face and should be dismissed. See Klein, 134 A.D.3d at 450.

[1] In specific response to Petitioner's claims that dissolution is "especially appropriate" for a law firm, Petitioner has submitted **no support** for such a claim. The Molod and Cunningham cases contain nothing—neither analysis nor citation—supporting the view that a law firm Professional Corporation is subject to a different or more lenient standard under the BCL.

Cellino fails to allege that he or Barnes ever called a shareholders or Board of Directors ("Board") meeting, nor does he allege any specific acts requiring Board action that are being hindered by a deadlock. Dissolution is only proper pursuant to BCL § 1104(a)(1) where the alleged deadlock prevents any meaningful action by the corporation. Cf. Matter of Greater Capital Region Ass'n of Realtors, Inc., 2015 N.Y. Slip. Op. 51857(U) (Sup. Ct. Albany Cnty. 2015). On the other hand, Barnes affirmed that no such meetings have taken place, nor has Cellino even requested that such meetings be held. (Barnes Aff. ¶¶ 44 & 51).

Cellino has utterly failed to make any specific factual allegations to refute Barnes' factual submission. Indeed, **Cellino fails to make any allegations that he has taken any affirmative action**—indeed his allegations indicate that he admits that he has failed to do so. (See V. Petition ¶¶ 211-12).

Cellino's conclusion that his taking contrary action would result in corporate paralysis is based on nothing but speculation. The fact of the matter is that this Court cannot know and is left to speculate what would have resulted had Cellino attempted affirmative action—it may not (and likely would not) have resulted in deadlock. This is precisely why BCL § 1104 "requires a showing of deadlock[.]"In re Parveen, 259 A.D.2d 389, 391 (1st Dept. 1999). Otherwise, courts are left to their own speculation as to whether such deadlock could exist. As such, the law is clear that "there can be no deadlock where, as here, the contending factions have not even attempted to elect directors." In re Parveen, 259 A.D.2d 389, 391 (1st Dept. 1999).

Moreover, even were Cellino's allegations deemed to constitute satisfactorily alleging a shareholder's meeting and/or deadlock, dissolution still would not be warranted. "[T]he inability of two 50% shareholders to agree on the election of a third director does not constitute grounds for

dissolution, **absent factual proof that the competing interests prevent efficient management and corporate success**." Fazio, 10 A.D.3d at 364 (emphasis added).

As discussed in full above, and similar to countless factually analogous cases, "[t]he record shows that the subject corporation[] could still function on a day-to-day basis." Hayes, 202 A.D.2d at 277. Thus, even if Cellino's Petition were deemed to sufficiently allege factual allegations that shareholder and/or Board meetings were held and resulted in deadlock, it is clear that C&B continues to function on a day-to-day basis. C&B continues to have over 12,000 clients, its attorneys perform legal services for those clients every day, and the firm has continued to prosper and grow its profits—and all of this has continued post-Petition.

Accordingly, Cellino's Petition fails to sufficiently allege any basis under BCL § 1104(a) for which dissolution is a proper remedy. Therefore, the Respondents motion to dismiss the Petition should be granted.

## POINT II

## THE PETITION SHOULD BE DISMISSED BECAUSE DISSOLUTION IS NOT IN THE PUBLIC INTEREST DUE TO THE HARM C&B'S CLIENTS, EMPLOYEES, AND EMPLOYEES' FAMILIES WILL SUFFER.

Dissolution is not the proper remedy where it would be injurious to the public. The Fourth Department and Court of Appeals have both expressed that the public interest is a prime inquiry in dissolution proceedings initiated by shareholders and/or directors. Specifically, the Court of Appeals explained that "[t]he prime inquiry is, always, as to necessity for dissolution, that is, whether judicially-imposed death will be beneficial to the stockholders or members **and not injurious to the public**." Radom, 307 N.Y. at 7; Sheridan, 22 A.D.2d at 392 (quoting Radom).[2]

[2] Respondents note and acknowledge that BCL § 1111(b)(2) provides that the consideration of paramount importance in dissolution proceedings brought by shareholders or directors is whether dissolution will benefit the shareholders;

Here, C&B currently has over 12,000 clients who have chosen C&B to represent their legal interests and pursue their legal rights. (Barnes Aff. ¶62). These clients have trusted C&B with their cases—and certainly in some instances their livelihood—due to C&B's reputation and past success.

Dissolution would result in the disruption of the 12,000 clients' cases and likely cause significant delays. In the event of dissolution, clients would be forced to obtain new representation and the logistics of filing for substitution of counsel in 12,000 cases would cause significant disruption and strife. The resulting delays would be significantly prejudicial to the clients and add strain to court calendaring.

In addition to C&B's clients, C&B currently employs approximately two-hundred thirty (230) people who rely on the firm for their livelihood. (Barnes Aff. ¶¶ 59-60). Many of these employees have worked for C&B for twenty (20) years. Id. These employees are dedicated professionals who have chosen C&B as the place they desire to build their careers. Id.

In fact, almost all of C&B's attorneys wrote a letter to Cellino expressing that they "do not feel as though the dissolution filing on May 10 showed the same loyalty to [them] and the firm [they] have all helped build together over the years." Id. at Ex. 4. The letter goes on to say, "**None of us want dissolution**. The ramifications of that would be disastrous for not only you and Steve, but for each of us and all staff that work here. We do not want to work for a 'new firm'. We want to work for Cellino & Barnes." Id.

section 1111(b)(1) establishes that the interest of the public is of paramount importance in a proceeding brought by the Attorney General. That being said, BCL § 1111 does not provide that public interest is not to be considered at all in a director or shareholder initiated petition. Rather, the Radom and Sheridan cases definitively establish that it is still a consideration to be had. See Radom, 307 N.Y. at 7; Sheridan, 22 A.D.2d at 392.

Dissolution would cause upheaval in the lives of the roughly two-hundred thirty (230) employees. Furthermore, dissolution would cause immense upheaval and strain on the families of those employees, all of whom rely on the C&B family member for financial support.

Simply put, dissolution would cause significant harm to the public, including C&B's clients, employees, and their families, and would cause a ripple that would be felt by the public across the country due to C&B being a national firm. Granting dissolution is an entirely improper remedy for a petition filed solely for self-interested, personal reasons with no legal validity. Therefore, dissolution should be denied as being adverse to the public interest.

## POINT III

## C&B HAS BEEN SUBSTANTIALLY HARMED BY CELLINO'S BREACH OF FIDUCIARY DUTIES AND OTHER ACTS OF BAD FAITH.

Cellino clearly has not learned his lesson regarding engaging in dishonest and bad faith conduct. Despite being suspended from the practice of law for "engaging in illegal conduct that adversely reflects on his honesty, trustworthiness or fitness as a lawyer" as well as "conduct involving dishonesty, fraud, deceit or misrepresentation", Cellino, 21 A.D.3d at 234, Cellino still brought the instant action with no legal or factual bases in support of the Petition, and engaged in reprehensible and wrongful conduct after filing for dissolution—including planning and attempting to orchestrate a raid of C&B attorneys and cases. Moreover, Cellino's conduct constitutes a breach of his fiduciary duties to C&B and Barnes. (See generally Minkoff Rpt.).

"Allegations of petitioner's bad faith constitute a defense to a dissolution proceeding[.]" Myers v. Gold, 77 A.D.2d 652, 653 (2d Dept. 1980); see Kavanaugh v. Kavanaugh Knitting Co., 226 N.Y. 185, 195 (1919) (establishing that shareholders seeking dissolution must be "acting for the corporation and for each other and they cannot use their corporate power in bad faith or for

their individual advantage or purpose."). Accordingly, it is "appropriate to deny summary dissolution under Business Corporation Law § 1104(3) where one shareholder faction intentionally creates a dispute which may not be genuinely irreconcilable[.]" In re Dissolution of Eklund Farm Mach., Inc., 40 A.D.3d 1325, 1326-27 (3d Dept. 2007).

Simply put, dissolution is not warranted where a petitioner "deliberately created the underlying dispute for the very purpose of securing judicial dissolution[.]" Glamorise, 228 A.D.2d at 189. Along the same line, dissolution will not be granted, and the petition denied, where the petitioner's entire objective was to "force the respondent out of the business" and to "obtain for himself [] the benefits of the corporation built up over the years by the joint efforts of both parties." Cantelmo, 275 A.D. at 233.

Here, Cellino has attempted to manufacture dissension for the purpose of misappropriating C&B's infrastructure, personnel, and goodwill for his future "family legacy firm." Since filing the Petition, Cellino has been illicitly soliciting C&B employees to join his new "Cellino firm." (Minkoff Rpt. ¶¶ 17-33, 53). It is clear that said solicitation was a planned and deliberate attack against C&B and Barnes.

On May 10, 2017, around the same time that Cellino filed the Petition, he sent three e-mails to C&B personnel within a seven (7) minute span. Id. One of the e-mails was sent to every attorney at C&B, titled "Vision for your Future", and contained the express purpose of explaining "Why you should join my new Law Firm". Id. at Ex. 7. In fact, Cellino did not even wait for the Petition's supporting papers to be electronically filed before attempting to pillage and pirate C&B employees. (Compare Barnes Aff. Ex. 7 (sent May 10, 2017, at 12:03 p.m.) with Cellino Aff. (date stamped by the Erie County Clerk May 10, 2017, at 12:12: p.m.)).

The e-mails also disparaged Barnes, C&B, and certain C&B employees. (Minkoff Rpt. ¶¶ 58-59). Cellino's intent, as expressed in the e-mails, was to convince the C&B employees to join his new law firm rather than stay employed by C&B/Barnes. See id. The e-mails ultimately became public, posted to Facebook, and read on the radio, causing substantial negative local, national, and international publicity. (Barnes Aff. ¶116).

Based on the length, wording, and time between e-mails, it is clear that Cellino pre-drafted them as part of his plot to raid C&B. (Minkoff Rpt. ¶¶ 53, 58). Additionally, Cellino immediately visited numerous C&B offices in New York State to illicitly solicit C&B attorneys in person. (Minkoff Rpt. ¶¶ 30-33).

The first meeting, in the Buffalo office, began at approximately 12:10 p.m. on May 10, 2017 (again, even before all of the Petition's supporting papers had been e-filed). (Goldstein May 12 Aff. ¶3). Cellino used the meeting to reiterate much of his "pitch" from the e-mails, continuing to solicit the attorneys to join his new firm. (See id. at ¶14; Minkoff Rpt. ¶¶ 30-33). He then left Buffalo and traveled directly to C&B's Rochester office to meet with the attorneys there and engage in the same solicitous meeting. (Minkoff Rpt. ¶¶ 30-33). Tellingly, after speaking with the attorneys in Rochester, Cellino **had a chartered airplane waiting** to take him to New York, where he met with and solicited the attorneys in C&B's downstate offices. Id.

Despite the Court entering into a Status Quo Directive prohibiting Cellino from engaging in such solicitation, he and two of his representatives/agents went to C&B's downstate offices on July 20 and 21, 2017, to engage in further solicitation of C&B employees. (Barnes Aff. ¶123). He made a pitch to C&B's personnel, including, but not limited to, statements such as: (a) "You will be better off if C&B is dissolved"; (b) "We are on Ross's team"; and (c) "Ross will have the Melville office and you can work there". Id.

Cellino also engaged in an interview on June 26, 2017, during which he disparaged C&B and encouraged clients to leave the firm. Id. at ¶124. Cellino stated: "I believe it'd be best for our clients . . . to just move forward." Id.

Beyond solicitation of C&B employees, Cellino also attempted to eliminate C&B's banking relationship and terminate a line of credit necessary for the firm to operate. Id. at ¶¶ 128-37. Cellino ignored that he did not have the authority to engage in such action and persisted despite the bank informing him of the same. Id. He was fully aware of the importance the line of credit is to C&B, as he spearheaded the initiation of the program and was intimately involved with its establishment. Id. His goal was to attempt to manufacture an illusion of malfunction within C&B.

Based on Cellino's conduct, it is clear that his sole basis for petitioning for the dissolution of C&B is to pillage C&B and obtain "the benefits" of the firm "built up over the years by the joint efforts" of both he and Barnes. See Cantelmo, 275 A.D. at 233. There is a distinct difference between Cellino's personal interests and his interests as a C&B shareholder. His alleged personal interests are irrelevant in filing for and supporting dissolution; only his shareholder interests are pertinent.

Like the petition in Cantelmo, "[t]he object of the dissolution sought is personal to [Cellino], and is certainly not for the benefit of either himself or of [Barnes], **as stockholders**." Id. (emphasis added). The First Department explained that "the sole desire of the petitioner to get control of the business entirely for himself **is not one of the purposes for which the dissolution section was enacted**." Id. (emphasis added).

Moreover, Cellino's conduct is a breach of his fiduciary duties to C&B and Barnes. An officer or director of a corporation is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in

performance of his duties." Duane Jones Co. v. Burke, 306 N.Y. 172, 188 (1954). This includes surreptitiously raiding the corporation's employees, see id., and clients, Matter of Silverberg, 81 A.D.2d 640, 640 (2d Dept. 1981). For instance, soliciting firm attorneys is not permissible and violates a principal's fiduciary duties where it occurs before the ultimate outcome of separation between firm and attorney has been definitively established. See Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associés, 20 Misc. 3d 1145(a) (Sup. Ct. Monroe Cnty. 2008).

The fiduciary obligations between principals is the same regardless of whether they are partners in a partnership or co-owners of a corporation. See, e.g., Graubard Mollen Dannett & Horowitz v. Moskowitz, 86 N.Y.2d 112, 118 (1995). Moreover, one's fiduciary duties are not relieved merely because one files a petition for dissolution, but rather survive through the duration of the action until dissolution is actually granted. Cf. Silverberg, 81 A.D.2d at 640 ("The solicitation of a firm's clients by one partner for his own benefit, **prior to any decision to dissolve the partnership**, is a breach of the fiduciary obligation owed to each other and the partnership[.]").

Silverberg discusses the "decision to dissolve" a partnership, but the reasoning behind the decision is applicable herein. See id. In a partnership, dissolution can be done at will, see N.Y. P'SHIP LAW § 62, and, thus, deciding to dissolve leaves no doubt that dissolution will occur. In a professional corporation, the inevitability for dissolution only arises upon court order. Thus, in a professional corporation, the principal's fiduciary duties survive until dissolution is actually ordered.

As such, Cellino's conduct since filing the Petition has been in breach of his fiduciary duties—regardless of his filing for dissolution—and demonstrative of his bad faith in filing the

Petition in the first instance. Cellino had a fully pre-orchestrated plan to file his dissolution petition and immediately begin recruiting C&B attorneys to his new prospective firm.

Not only did he pre-draft the e-mails, but he devised a schedule for meeting all C&B attorneys face-to-face—including chartering a private plane to ensure those meetings would occur quickly and before Barnes could intervene and protect his and the firm's legal rights. He subsequently encouraged C&B clients to leave the firm and "move forward." This is the exact type of breach of fiduciary duties and bad faith conduct condemned and forbidden by New York law.

Respondents retained a legal ethics expert, Ronald C. Minkoff, Esq., to objectively evaluate Cellino's conduct and issue an opinion as to its reasonableness. One of the conclusions Mr. Minkoff came to was that "Cellino's actions constituted an attempted raid on the business and employees of Cellino's own P.C., and were likely to impair C&B's ability to attract and keep clients, make it harder to retain lawyers and non-lawyer staff, and damage the firm's reputation." (Minkoff Rpt. ¶2(b)). Mr. Minkoff explains:

> Unlike in an ordinary Lateral Transition, a contested dissolution proceeding may go on for months or years, and may ultimately be resolved without the firm being dissolved. With the future so uncertain, and with the firm's business ongoing, it is neither reasonable nor customary for a shareholder or partner to begin recruiting firm employees to a competitive new venture, to do so without approval from other firm principals, and especially to suggest that the new venture will begin immediately.

Id. at ¶52. Mr. Minkoff expertly opined that "to a reasonable degree of certainty, [] Cellino's actions could only harm C&B's business – which Cellino appears to admit." Id. at ¶54. Ultimately, Mr. Minkoff concluded that "Cellino's actions were contrary to the standards and practices of New York lawyers – particularly a law firm principal – and would inevitably undermine the stability of the firm's business for his own personal advantage." Id. at ¶60.

As a result of Cellino's conduct and the continuation of the pending Petition, C&B has suffered significant harm, including, without limitation: (a) the loss of two (2) attorneys; and (b) the loss of a $20 million case due to an outside attorney misrepresenting to the client that the firm was "going under" and being dissolved. The harm to C&B will continue to occur unless and until the Petition is dismissed and denied.

## POINT IV

## PETITIONER'S ATTEMPT TO APPLY PARTNERSHIP LAW TO THE INSTANT CASE IS IMPROPER.

Petitioner attempts to argue that since C&B is a close corporation it should be treated as a partnership and dissolved merely upon the allegation that the personal relationship between Cellino and Barnes has disintegrated and the trust is gone. Petitioner's argument is contrary to the BCL and established caselaw—including the cases Petitioner cites in support of its claim.

"A partnership and a corporation are mutually exclusive, each governed by a separate body of law." Notar-Francesco v. Furci, 149 A.D.2d 490, 491 (2d Dept. 1989). A partnership can be dissolved at will, see N.Y. P'SHIP LAW § 62, whereas there are specific grounds limiting when a corporation may be judicially dissolved, see BCL § 1104(a).

In Furci, the Second Department examined a case where medical doctors, once members of a partnership, formed a professional corporation. See 149 A.D.2d at 491. The court held that "[o]nce the doctors formed a professional corporation, the partnership was no longer in existence, and the partnership agreement was a nullity. . . . Once they adopted the corporate form, they ceased to be partners, and had only the rights, duties and obligations of stockholders." Id. at 491-92. Nothing in the BCL provides "exit rights" or dissolution to corporate stockholders akin to partnership law.

Moreover, the lower court in Klein expressly rejected a similar argument regarding applying partnership law to a closely held professional law corporation. (Photiadis Aff. Exs. 4 & 5). Ignoring this recent precedent, Petitioner relies on cases that, regardless of the language relating close corporations to partnerships, **still apply the BCL standard**. See Greer v. Greer, 124 A.D.2d 707 (2d Dept. 1986) (granting dissolution of the corporation because the alleged dissension and deadlock "effectively crippled [the owners] ability to operate the corporations"); Sheridan, 22 A.D.2d at 392 (granting dissolution where "paralysis in management" was "abundantly present" and the "impasse is actual and definitive and no more classical example of deadlock could be found"); Patti, 809 N.Y.S.2d 482 (granting dissolution, not at will of the petitioner, but because it was "the only viable alternative" and because dissension "resulted in a deadlock precluding the successful and profitable conduct of the corporation's affairs"); Pivot Punch & Die Corp., 182 N.Y.S.2d 459 (granting dissolution because board action could not be conducted because the shareholders "were deadlocked" and had been for approximately five (5) years).

None of the cases Petitioner cites granted dissolution merely because the petitioner applied for it—despite the fact that partnerships may be dissolved at will. As such, it is clear that more is needed.

Here, Messrs. Cellino and Barnes made the conscious decision to subject themselves to corporate law rather than partnership law by forming a professional corporation in 1998. (Barnes Aff. ¶10). C&B was a partnership before incorporating, but the shareholders wanted to avail themselves of the benefits of corporate law rather than partnership law. Id. The long-term stability associated with the corporate form and its high barriers to exit/dissolution was, and is, all the more essential for a firm such as C&B which has invested scores of millions of dollars to develop a highly valuable brand.

Specifically, the long term stability associated with the corporate form and its high barriers to exit was essential to protect Barnes in investing scores of millions of dollars in building the C&B brand through advertising the firm name—quite literally branding "Cellino" and "Barnes"—and firm telephone numbers. Such massive, long-term investment in the persona of a law firm's only two equity owners would pose intolerable risk if one owner could walk out the door for any reason. Moreover, Cellino's mere allegations of distrust, even if true, are insufficient to eclipse the BCL's high barriers to dissolution.

Once they adopted the corporate form, Cellino and Barnes ceased to be partners, and had only the rights, duties, and obligations of stockholders." Furci, 149 A.D.2d at 491. Their action cannot be trivialized or deemed any less than a conscious decision to subject themselves to **all** of the requirements of corporate law—not just the ones that benefit Cellino. Therefore, dissolution is improper in the instant case because C&B continues to function and is enormously prosperous.

## POINT V

## IF THE COURT IS UNWILLING TO SUMMARILY DENY AND DISMISS DISSOLUTION, THE COURT SHOULD APPOINT AN INDEPENDENT DIRECTOR TO THE C&B BOARD TO RESOLVE ANY ALLEGED DEADLOCK.

While Respondents contend that dissolution should be dismissed and denied as a matter of law, the Court should, in the alternative, exercise its discretion and Order a third, independent director to be appointed to the C&B Board of Directors.

"The ultimate remedy of dissolution . . . should only be applied as a **last resort**." Klein, 134 A.D.3d at 450 (emphasis added); Ng, 174 A.D.2d at 526 (same). The BCL further provides:

> At any stage of an action or special proceeding under [Article 11], **the court may, in its discretion, make all such orders as it may deem proper** in connection with preserving the property and **carrying on the business of the corporation** . . . .

BCL § 1113 (emphasis added).

The Court of Appeals in Radom explained:

> It is worthy of passing mention, at least, that respondent has, in her papers, formally offered, and repeated the offer on the argument of the appeal before us, 'to have the third director named by the American Arbitration Association, any Bar Association or any recognized and respected public body'.

307 N.Y. at 1. Ultimately, the Court of Appeals affirmed the dismissal of the dissolution petition, but deemed the instant issue important enough to note in any event.

With the well settled law definitively establishing that dissolution is only proper as a last resort, Respondents hereby submit a viable alternative to dissolution. Any allegations of deadlock, even if true, would be remedied by the appointment of a neutral third party to serve as a tie-breaking vote on the alleged deadlock. In addition to resolving the allegations of deadlock, such an Order will protect the corporation, its clients, employees, and shareholders.

Therefore, despite Respondents' firm contention that the Petition is insufficient as a matter of law and that dissolution should be denied summarily, this Court should, in the alternative, exercise its discretion pursuant to BCL § 1113 and appoint an independent director to resolve any deadlock to the extent it exists and then dismiss the Petition. In the further alternative, if the Court determines that the Petition raises contested issues of fact that precludes summary dismissal, Respondents herein request an evidentiary hearing.

## CONCLUSION

For all the reasons set forth herein, Respondents Cellino & Barnes, P.C. and Stephen E. Barnes respectfully request that this Court grant their Motion to Dismiss and Deny the Petition in its entirety and grant any and all further relief as this Court deems just and proper.

Dated: July 27, 2017
Buffalo, New York

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