SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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GIORGIO FERRRANTINO,

Petitioner,

-against-

DZINENY LLC, JUMBO DESIGN AND BRANDS INC., and MORENO BRAMBILLA, as an individual,

Respondent.

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DECISION AND ORDER
Index No.: 650563/19
Motion Seq. Nos. 001 and 002

CAROL R. EDMEAD, J.S.C.:

In this action arising out of an employment dispute, Defendant Jumbo Design Brand's Inc. (JDB) moves, on its own behalf, and derivatively on behalf of DzineNY LLC (DNY), pursuant to CPLR 7503 and Limited Liability Company Law (LLC Law) § 703 (b), to dismiss or stay the action and compel arbitration (motion seq. No. 001). In the alternative, JBD moves, pursuant to CPLR §§ 2201, 7502, and 6301, to preclude Ferrantino from prosecuting claims against DNY outside of arbitration. In an additional alternative, JBD moves, pursuant to CPLR 3211, to dismiss pursuant to the doctrines of collateral estoppel and *res judicata.*

Defendant Moreno Brambilla (Brambilla) moves, pursuant to CPLR 3211, to dismiss based on lack of personal jurisdiction (motion seq. No. 002). Alternatively, Brambilla seeks dismissal on multiple other bases: failure to state a cause of action, *forum non conveniens*, and lack of service. As a final alternative, Brambilla seeks to stay pending the arbitration.

The motions were consolidated for disposition by an interim order issued by the court on May 14, 2019 (the interim decision) (NYSCEF doc No. 96). The interim decision fully denied JBD's motion and denied two branches of Brambilla's motion: the branch seeking dismissal based on an alleged failure to serve, as well as the branch seeking a stay pending arbitration. In

this memorandum decision, the court once again consolidates the motions to articulate the bases for the dispositions announced in the interim order and to resolve the balance of motion seq. No. 002.

BACKGROUND

This dispute involving elegant Italian furniture is inelegantly spread across three adjudicatory bodies in the United States: this court, American Arbitration Association (AAA), and federal court.[1] On February 6, 2017, defendant DNY was launched by an operating agreement executed by defendant JBD and nonparty DzineElements, Inc. (Elements), as "Members" of DNY (NYSCEF doc No. 89) (the Operating Agreement). The Operating Agreement was signed by Plaintiff Giorgio Ferrantino (Plaintiff, or Ferrantino), as president of Elements, and defendant Brambilla, as president of JBD (*id.* at 28). The DNY Operating Agreement also names Ferrantino as Manager of DNY.

DNY's dissolution was initiated, pursuant to section Section 9.1 (c) of the Operating Agreement in January 2019. Section 11.5 of the operating agreement is the arbitration clause. It provides, in relevant part that "[a]ny dispute arising out of in or in connection with this Agreement shall be resolved by binding arbitration administered by [AAA]"[2] (NYSCEF doc No. 89). On January 17, 2019, JBD initiated an arbitration, under Case No. 01—19-0000-1825, against DNY, as a nominal respondent, and Elements and Ferrantino as respondents (NYSCEF doc No. 11 [Demand for Arbitration]) (the Arbitration). JBD brings four causes of action in its Statement of Claim in The Arbitration: for dissolution, for an accounting against DNY and

[1] There is, also, apparently an action in Italy arising from the soured relationship between these parties and their affiliates (see NYSCEF doc No. 81, ¶ 8).

[2] The arbitration clause also provides that the arbitration will take place in New York, and section 11.4 of the Operating Agreement provides that disputes will be governed by New York law (NYSCEF doc No. 89).

Ferrantino, for breach of contract against Ferrantino and Elements, and for injunctive relief against Ferrantino and Elements (NYSCEF doc No. 12).

On February 7, 2019, Ferrantino brought a petition in this court to permanently stay the Arbitration as against him under index No. 650769/19 (the Petition to Stay). In that proceeding, Ferrantino argued that while he "signed the Operating Agreement on Elements' behalf as its President, he did not sign it in his individual capacity. As such, Ferrantino argued in the Petition to Stay, "the arbitration clause contained in the Operating Agreement does not apply to him, and he was therefore improperly named as a party to the Arbitration" (NSYCEF doc No. 1 under index No. 650769/19). Following an oral argument on February 8, 2019, the court ordered that Ferrantino's application "for an interim stay of [the Arbitration] is denied in accordance with the "So Ordered" transcript" (NYSCEF doc No. 17 under index No. 650769/19). The court also ordered that JBD "shall answer or otherwise move in response to the Petition in accordance with the CPLR" (*id.*).

On March 18, 2019, the parties stipulated to discontinue the Petition to Stay (NYSCEF doc No. 17, doc No. 36 under index No. 650769/19). The stipulation provided that the proceeding was "discontinued as to all claims between Petitioner and Respondent in this action, with each party to bear its own costs and attorneys' fees, without prejudice to Petitioner's right to assert Petitioner's claims in this proceeding (including, without limitation, that Petitioner is not a party to [the Operating Agreement]) in [the Arbitration]" (*id.*). The court dismissed the Petition to stay pursuant to the stipulation of discontinuance, ordering: "that the instant proceeding is withdrawn without prejudice to the rights, claims, and defenses that the parties may assert, and hereby retain in [the present action], and the action currently pending in the United States

District Court, Southern District of New York under the Docket Number 1: 19-cv-00799-ALC" (the Federal Action) (NYSCEF doc No. 37 under index No. 650769/19).

On January 29, 2019, the same month that JBD initiated the Arbitration, its counsel initiated the Federal Action on behalf of GIL S.r.l. (Gil), an entity that was created by JBD and Elements at the same time as DNY to serve as DNY's Italian buying office, against Elements, Ferrantino, and DNY, as well as other nonparties to this action (NYSCEF doc No. 71). In the complaint in the Federal Action, Gil brings: causes of action for breach of contract, account stated, fraud, unjust enrichment, and replevin against DNY; causes of action for breach of contract, fraud, unjust enrichment, and replevin against Elements; and causes of action for fraud, unjust enrichment, and replevin against Ferrantino (*id.*).

In the amended complaint of the present action (the Complaint, NYSCEF doc No. 6), Ferrantino brings nine causes of action against DNY, JBD, and Brambilla: (1) violation of the minimum wage provision of the federal Fair Labor Standards Act, (2) violation of the New York minimum wage act, (3) breach of contract claim based on Ferrantino's alleged status as an intended beneficiary of the Operating Agreement, (4) fraud in the inducement, (5) constructive discharge in violation of the New York State Human Rights Law (NYSHRL), (6) constructive discharge in violation of the New York City Human Rights Law (NYCHRL), (7) hostile work environment under the NYSHRL, (8) slander/slander *per se*, and (9) defamation/defamation *per se*.

DISCUSSION

I. JBD's Motion To Dismiss or Stay and Compel Arbitration

CPLR 7503

Generally, "[t]he CPLR arbitration provisions (CPLR 7501 *et seq*) evidence a legislative intent to encourage arbitration" (*Weinrott v. Carp*, 32 NY2d 190, 199 [1973]). CPLR 7503 (a), entitled "Application to compel arbitration; stay of action," provides "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration .... If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration." A threshold question on motions to compel arbitration is "whether the parties made a valid agreement to arbitrate" (*Matter of County of Rockland [Primiano Constr. Co.*], 51 NY2d 1, 6 [1980]) and whether the dispute that the moving party seeks to compel to arbitration falls within the scope of that agreement (*Rockland County v Primiano Constr Co.*, Inc., 51 NY2d 1, 8 [1980]).

Initially, the court rejects JDB's argument that it must defer to the arbitrator on the question of arbitrability. The First Department recently held that "[i]t is for a court, not an arbitrator" to decide threshold issues of arbitrability where the subject arbitration clause lacks a provision specifically delegating that authority to the arbitrator (*Matter of Progressive Ins. Co. v Bartner*, 171 AD3d 598 [1st Dept 2019]).

JBD argues that, as Ferrantino is a signatory to the Operating Agreement, and that agreement names him as the manager of DNY, he is bound by the broad arbitration clause contained therein. In support, JBD cites, among others, to *Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489 [1st Dept 2011]). *Matter of Rural Media* held that the signatories to an agreement containing an arbitration agreement were bound by an arbitration clause in that

agreement (137 AD3d at 190). The individual bound by this agreement signed in his individual capacity rather than on behalf of a business entity (*id.*).

Ferrantino argues that he signed the Operating Agreement on behalf of Elements, in his capacity as president of Elements, and is thus not bound, as an individual, by the arbitration clause. Ferrantino cites, among others, to *L'Aquila Realty, LLC v Jalyng Food Corp.* (148 AD3d 1004 [2d Dept 2017]), which held that an agent signatory for a disclosed principal may not be personally bound by a contract unless there is "clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal" (*id.* at 1006). Ferrantino argues that "where individual responsibility is demanded the nearly universal practice is that the officer signs twice – once as an officer and again as an individual" (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67 [1961]).

Even if he were bound by the arbitration clause of the Operating Agreement, Ferrantino argues that defendants have waived any right to arbitrate against him. Generally, a party may impliedly waive its right to arbitration by "actively participat[ing] in a lawsuit or tak[ing] other action inconsistent with that right that prejudices the opposing party" (*Doctor's Assoc., Inc. v. Distajo*, 66 F3d 438, 455 [2d Cir 1995] [internal quotation marks and citation omitted]). Ferrantino argues that defendants waived their right to arbitrate against Ferrantino when their affiliate, Gil, brought claims in federal court related to the instant dispute and arising out of the same deterioration in the relationship between Ferrantino and Brambilla and their related affiliates.

Here, the Operating Agreement is plainly signed by Ferrantino on behalf of Elements. There is no clear and explicit evidence that Ferrantino's intended to be personally bound by the

Operation Agreement and its arbitration clause. Accordingly, Ferrantino's claims in this action are not within the scope of the arbitration clause.

Moreover, even if that were not the case, the court is persuaded by Ferrantino's waiver argument. Brambilla and his affiliated entities are not free to litigate the Federal Action, on one hand, against Ferrantino outside of the Arbitration, and then, on the other, preclude Ferrantino from litigating against them outside of the Arbitration. Accordingly, the branch of JDB's motion seeking an order dismissing or staying this action pursuant to CPLR 7503 must be denied.

LLC Law § 703 (b)

LLC Law § 703 (b) provides:

> "Upon dissolution of a limited liability company, the persons winding up the limited liability company's affairs may, in the name of and for and on behalf of the limited liability company, prosecute and defend suits, whether civil, criminal or administrative, settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge the limited liability company's liabilities and distribute to the members any remaining assets of the limited liability company, all without affecting the liability of members including members participating in the winding up of the limited liability company's affairs"

While JDB nominally argues that this provision somehow militates in favor of an order staying or dismissing the action, it fails, in its papers, as well as at conference before the court, to flesh out an argument under this statutory provision. Accordingly, as JDB fails to a establish a basis under which the court could grant the relief it seeks under this statutory provision, the branch of JDB's motion that seeks relief pursuant to LLC Law § 703 (b) is denied.

Injunctive Relief

JDB argues that the Court should issue an injunction preventing Ferrantino from bringing claims against DNY outside of the Arbitration. The threshold for obtaining an injunction pursuant to CPLR 7503 (c) is high. "In addition to showing that the arbitration award could be

rendered ineffectual, a party seeking an injunction in aid of arbitration must demonstrate the traditional factors for injunctive relief under CPLR article 63" (*Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403 [1st Dept 2009]). Here, the prosecution of the present action will not render the Arbitration ineffectual, as this action does not impinge on the central issue before the arbitrator: the dissolution of DNY. Moreover, JDB has made no showing as to the traditional factors for establishing entitlement to injunctive relief. As such, JDB's alternative application for injunctive relief is denied.

Collateral Estoppel and *Res Judicata*

Collateral estoppel "is but a component of the broader doctrine of res judicata which holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action" (*Gramatan Home Invs. Corp. v Lopez* (46 NY2d 481 [1979]). Courts apply collateral estoppel "where the issue in the current litigation is identical to a material issue decided in a prior proceeding, and the party to be precluded had a full and fair opportunity to litigate the issue in that proceeding" (*Auqui v Seven Thirty Ltd. Partnership*, 83 AD3d 407, 410 [1st Dept 2011]).

Here, the court denied an application for an interim stay of pending arbitration in Farrantino's disposed petition under index No. 650769/19. JDB does not submit the "So-ordered" transcript upon which that disposition was based, let alone point to a portion of it which could serve as a basis for issue or claim preclusion. Moreover, the stipulation of discontinuance does not, on its face, provide such a basis. Thus, JDB's application for dismissal based on collateral estoppel or *res judicata* must be denied.

II. Brambilla's Motion

Brambilla argues that the Ferrantino's complaint should be dismissed, as against him, for: lack of jurisdiction, lack of standing, failure to state a cause of action, failure to serve, and *forum non conveniens*. Alternatively, Brambilla seeks a stay of this action pending arbitration.

Jurisdiction

Brambilla, an Italian citizen, argues that the court does not have jurisdiction over him.

Courts use a two-part analysis to determine whether a non-domiciliary may be subjected to suit in New York: first, a determination must be made as to whether New York's long-arm statute, CPLR 302, confers jurisdiction in light of the non-domiciliary's contacts with this State; second, if the defendant's relationship with New York falls within the terms of CPLR 302, courts must determine whether the exercise of jurisdiction comports with due process (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

Under CPLR 302 (a) (1), a court may exercise jurisdiction over a non-domiciliary who, in person, or through an agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR 302 (a) (1) is a single transaction statute, meaning "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]).

Purposeful activities in this context are "volitional acts" with which a defendant "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]). While not all purposeful activity constitutes a transaction of business, and it is impossible to

precisely fix those acts which do so, the Court of Appeals has held that "it is the quality of the defendants' New York contacts that is the primary consideration" (*Fischbarg v Doucet*, 9 N.Y.3d 375, 380 [2007] [finding purposeful activity constituting a transaction of business where defendants' attempted to establish an attorney-client relationship in New York, and directly participated in that relationship through calls, faxes and e-mails that they projected into the state over an extended period]).

As for due process, the U.S. Constitution is not satisfied in this context unless a non-domiciliary has "minimum contacts" with the forum state (*see International Shoe Co. v State of Wash.*, 326 US 310, 316 [1945]). The test for minimum contacts rests on whether the defendant's "conduct and connection with the forum state" are such that the defendant "should reasonably anticipate being haled into court there" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]). A defendant can reasonably expect such when it "purposefully avails itself of the privilege of conducting activities within the forum state" (*id.* [internal quotation marks and citations omitted]). If minimum contacts are found, the court must determine if the prospect of defending the suit in the forum state comports with traditional notions of "fair play and substantial justice" (*Burger King v Rudzewicz*, 471 US 462, 477 [1985] [quoting *International Shoe Co.*, 326 US at 320 [1945]).

Brambilla, without using the term, essentially argues that he is shielded from New York's jurisdiction by the fiduciary shield doctrine, which provides that an individual is not subject to a state's jurisdiction where her dealings in that state were only in her corporate capacity. Brambilla's argues that his affiliation with DNY, a New York entity, does not confer jurisdiction over him as an individual. In support, Brambilla cites *to Excess Line Assn. of N.Y. (ELANY) v Waldorf & Assoc.* (40 Misc3d 750 [Suffolk Cty 2013]), which involved the question of whether

New York had jurisdiction over a non-domiciliary individual member of a New York business entity. The Court in *Excess Line* wrote:

> "The general rule is that jurisdiction over individual officers of a corporation may not be based merely on jurisdiction over the corporation. Although a corporation can act only through an employee or agent, the employee or agent being a live rather than a fictional being can act on behalf of himself or his employer or principal. He does not subject himself, individually, to the CPLR 301 personal jurisdiction, however, unless he is doing business in the State individually"

(*id.* at 774-775 [internal quotation marks and citation omitted]).

Brambilla also cites to *Seneca Ins. Co. v Boss* (256 AD2d 175 [1st Dept 1998]) and *American Barrick Resources Corp. v Canarim Inv. Corp.* (153 AD2d 546 [1st Dept 1989]). *Seneca* held that the defendant non-domiciliary, a former employee of the plaintiff, was not subject to New York's jurisdiction where the defendant was only present in New York on two occasions, for meetings pursuant to her job requirements (256 AD2d 175). *American Barrick* held that the defendant non-domiciliary was not subject to long-arm jurisdiction, as "the stock ownership and corporate control exercised by [individual defendant] without more, does not provide a sufficient basis to constitute [the individual defendant] an agent … for jurisdictional purposes" (153 AD2d 546).

In opposition, Ferrantino argues that where a corporate officer stands to gain personally from acting on a corporation's behalf, or where the officer was the primary actor or agent of a corporate entity, that corporate officer is subject to jurisdiction in New York. In support, Ferrantino cites to *Kreutter v McFadden Oil Corp.* (71 NY2d 460 [1988]), where the Court of Appeals held that "the fiduciary shield rule is not available to defeat jurisdiction under the New York long-arm stature" (*id.* at 472).

In the complaint, Ferrantino alleges that Brambilla travelled to New York to negotiate the creation of DNY (NYSCEF doc No. 6, ¶ 23). Moreover, Ferrantino alleges that Brambilla organized a New York corporation, JBD, which he is the president of and which operates a showroom in New York. Moreover, Ferrantino submits an affidavit in which he states: "Brambilla routinely made phone calls and sent emails to DNY's employees based in New York as well as held in person and telephonic messages in New York. Brambilla visited New York to conduct such business on numerous occasions, including, most recently, in January 2019, when he went to DNY's Showroom and offices, gave directions and orders to DNY employees" (NYSCDF doc No. 36, ¶¶ 19-20).

Brambilla does not contest these allegations, but instead argues that New York's long-arm jurisdiction does not reach him, as all these actions were taken to further DNY's interest on behalf of JBD. In reply, Brambilla cites to *Brax Capital Group, LLC v WinWin Gaming, Inc.*, (83 AD3d 591 [1st Dept 2011]) which actually militates in favor of Ferrantino's position. In *Brax*, the First Department held that long-arm jurisdiction CPLR 302 (a) (1) was established where the defendant "made numerous telephone calls to an individual in New York to procure investors for a corporation that defendant chaired and in which he had substantial holdings" and where "he had sent others to New York who acted on his behalf in dealing with investment bankers involved with obtaining financing for the corporation" (*id.* at 591).

Here, Brambilla himself has made several trips to New York to further the interests of a corporation and a joint venture in which he has significant holdings. Moreover, those trips, as well as a multitude of communications that Brambilla sent into New York, are related to Ferrantino's claims against him. As a result, New York has long-arm jurisdiction over Brambilla

pursuant to CPLR 302 (a) (1). Accordingly, the branch of Brambilla's motion that seeks dismissal based on lack of jurisdiction is denied.

Brambilla also argues that the court does not have jurisdiction over Ferrantino, as he is a resident of Connecticut. However, the court plainly has jurisdiction over Ferrantino as he works in New York, and his work in New York is the subject of this action.

Standing

Brambilla argues briefly that the complaint should be dismissed for lack of standing pursuant to CPLR 3211 (a) (3), as Ferrantino lives in Connecticut.

"Standing is … a threshold determination that allows a litigant access to the courts to adjudicate the merits of a particular dispute that otherwise satisfies the other justiciability criteria" (*Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 [1st Dept 2011]). "The general requirements for establishing standing are that the party must show injury in fact, that is, an actual stake in the matter to be adjudicated, so as to ensure that the party has some concrete interest in prosecuting the action, and the court must have before it a justiciable controversy" (*Lucker v Bayside Cemetery*, 114 AD3d 162, 169 [1st Dept 2013]). "On a defendant's motion pursuant to CPLR 3211 (a) (3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" (*U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [2d Dept 2015]). "To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing" (*id.*).

Here, Brambilla has failed to make a *prima facie* showing as to standing, as Ferrantino's residence in Connecticut does not touch the issue of standing. Accordingly, the branch of Brambilla's motion that seeks dismissal based on lack of standing must be denied.

CPLR 3211 (a) (7)

Brambilla dedicates one page in his memorandum of law to the argument that the complaint should be dismissed as against him pursuant to CPLR 3211 (a) (7). Although styled as a motion pursuant to CPLR 3211 (a) (7), it resembles a motion brought pursuant to CPLR 3211 (a) (1). That is, while Brambilla states, in a conclusory fashion, that Ferrantino fails to state a cause of action, he does not discuss the various causes of action individually. Thus, he fails to make a showing pursuant to CPLR 3211 (a) (7). Brambilla instead argues that all the causes of action asserted against him arise out of the Operating Agreement, and that these causes of action should, therefore, be dismissed by this court to be heard in the Arbitration. As discussed above, the Operating Agreement is not documentary evidence which may serve as a basis for dismissal of this action. Accordingly, the branch of Brambilla's motion asserted under CPLR 3211 (a) (7) must be denied.

Forum Non Conveniens

CPLR 327 (a) provides: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

Brambilla dedicates a half page in his memorandum of law to his argument that this action should be dismissed for *forum non conveniens*. While Brambilla lists factors for evaluating an application for dismissal based on *forum non conveniens* from the Court of Appeals decision in *Islamic Republic of Iran v Pahlavi* (62 NY2d 474 [1984]) (alternate forum, situs of underlying claims, residency of parties, potential hardship of defendant, location of

evidence, burden to New York courts), he does not discuss how these factors may apply here. Thus, Brambilla fails to make a showing that he is entitled to dismissal based on *forum non conveniens*, and the branch of his motion seeking this relief must be denied.

Service

Ferrantino submits proof that he served Brambilla in Italy pursuant to the Hague Convention (NYSCEF doc No. 92, 93). Accordingly, the branch of Brambilla's motion seeking to dismiss for lack of service must be denied.

Stay

As discussed above, Brambilla is not entitled to a stay of this action pending the resolution of the Arbitration.

CONCLUSION

Accordingly, it is

ORDERED that defendant Jumbo Design Brand's Inc. motion, on its own behalf, and derivatively on behalf of DzineNY LLC, to dismiss, compel, stay, or preclude (motion seq. No. 001) is denied; and it is further

ORDERED that defendant Moreno Brambilla (Brambilla) motion to dismiss or stay (motion seq. No. 002) is denied;

ORDERED that counsel for Plaintiff is to serve a copy of this order, along with notice of entry, on all parties within 15 day of entry.

Dated: July 1, 2019

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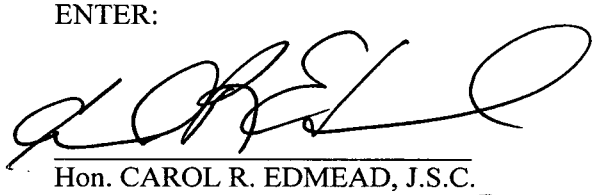

Hon. CAROL R. EDMEAD, J.S.C.

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HON. CAROL R. EDMEAD
J.S.C.