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To be Argued by:
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New York Supreme Court

Appellate Division—First Department

NW MEDIA HOLDINGS CORP., NEWSWEEK LLC, NEWSWEEK DIGITAL LLC, NEWSWEEK MAGAZINE LLC, NEWSWEEK PUBLISHING LLC, NW DIGITAL LLC and NW MAGAZINE LLC,

Plaintiffs-Appellants,

– against –

IBT MEDIA INC.,

Defendant-Respondent,

– and –

OLIVET UNIVERSITY, WORLD OLIVET ASSEMBLY, INC., ETIENNE UZAC, DAVID JANG and YOUNSEOK CHOI,

Defendants.

Appellate Case No.: 2023-00535

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TABLE OF CONTENTS

Page(s)

PRELIMINARY STATEMENT 1

ARGUMENT.....4

I. IBT Cannot Challenge Newsweek Plaintiffs' Authority To Sue.....4

II. Newsweek May Enforce Its Legal Rights Against IBT 9

A. Pragad, As President, Has Implied Authority To Authorize The Filing Of This Lawsuit.....9

B. Plaintiffs Had Authority To Bring This Suit Under The Purchase Agreement.....15

III. Johnathan Davis Cannot Void Newsweek's Right To Sue IBT 18

A. As An Interested Director, Davis Is Disqualified From Voting Against This Lawsuit 18

B. Plaintiffs Did Not Waive The Argument About Davis's Disqualification 20

CONCLUSION.....22

TABLE OF AUTHORITIES

Page(s)

Cases

328 E. 56 St. Rest. v. Polldon Rest.,
39 A.D.2d 689 (1st Dep't 1972) 11

A.B.C. Publ'ns v. N.Y. Times Co.,
103 N.Y.S.2d 693 (Sup. Ct. N.Y. Cnty. 1951) 2, 4, 5, 7

Berma Mgmt. Corp. v. 140 W. 42nd St. Realty, Inc.,
21 Misc. 2d 571 (Sup. Ct. N.Y. Cnty. 1960) 11, 13

Carr v. Kimball,
153 A.D. 825 (1st Dep't 1912) 19

Cicero Ind. Dev. Corp. v. Robert,
63 Misc. 2d 565 (Sup. Ct. Onondaga Cnty. 1970).....11

Citimortgage, Inc. v. Bunger,
58 Misc.3d 333 (Sup. Ct. Suffolk Cnty. 2017) 21

City of Batavia v. Howland,
43 A.D.2d 787 (4th Dep't 1973).....5, 6

Crane, A.G. v. 206 West 41st Street Hotel Associates, L.P.,
87 A.D.3d 174 (1st Dep't 2011) 12, 17

Crouse-Hinds Co. v. InterNorth, Inc.,
634 F.2d 690 (2d Cir. 1980) 8

Emigrant Mtge. Co., Inc. v. Lifshitz,
143 A.D.3d 755 (2d Dep't 2016).....21

Family M. Found., Ltd. v. Manus,
71 A.D.3d 598 (1st Dep't 2010) 9, 13

Farmers Union Oil Co. of New England v. Maixner,
376 N.W.2d 43 (N.D. 1985) 8, 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Grand Allen Holding Corp. v. M. & S. Circuit, Inc.,
236 A.D. 2 (1st Dep't 1932) 5, 6

Hellman v. Hellman,
31 Misc. 3d 265 (Sup. Ct. Monroe Cnty.) 12

Hutterville v. Sveen,
776 F.3d 547 (8th Cir. 2015) 8

Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.,
296 A.D.2d 103 (1st Dep't 2002) 6

Kenneth Cole Prods., Inc. v. Blitzer,
27 N.Y.3d 268 (2016).....19

Marx v. Akers,
88 N.Y.2d 189 (1996).....19

Matter of Morris v. N.Y. State Dept. of Tax. & Fin.,
82 N.Y.2d 135 (1993).....6

Oliver 889 LLC v. 889 Realty Inc.,
212 A.D.3d 531 (1st Dep't 2023) 21

Paloma Frocks, Inc. v. Shamokin Sportswear Corp.,
3 N.Y.2d 572 (1958).....9, 10, 12, 13

Park River Owners Corp. v. Bangser Klein Rocca & Blum,
269 A.D.2d 313 (1st Dep't 2000) 19, 20

Perez v. N.Y.C. Hous. Auth.,
47 A.D.3d 505 (1st Dep't 2008) 21

Polish-American Media, Inc. v. Jozwiak,
29 A.D.3d 663 (2d Dep't 2006).....9

Rothman & Schneider, Inc. v. Beckerman,
2 N.Y.2d 493 (1957).....5, 6, 7, 9, 10, 11

Simon v. Becherer,
7 A.D.3d 66 (1st Dep't 2004) 18

Sterling Industries, Inc. v. Ball Bearing Pen Corp.,
298 N.Y. 483 (1949).....2, 12

Tidy-House Paper Corp. of N.Y. v. Adlman,
4 A.D.2d 619 (1st Dep't 1957) 7

Vill. Of Brown Deer v. City of Milwaukee,
114 N.W.2d 493 (Wis. 1962).....8, 9

West View Hills, Inc. v. Lizau Realty Corp.,
6 N.Y.2d 344 (1959).....9, 11, 12, 13

Statutes

CPLR 3211 1

Other Authorities

Roger J. Goebel, *The Authority of the President Over Corporate Litigation: A Study in Inherent Authority*, 37 St. John's L. Rev. 29, 80 (1962).....12, 14

Treatises

14 N.Y. Jur. 2d Business Relationships.....3, 5

Plaintiffs-Appellants NW Media Holdings Corp. ("NW Media"), Newsweek LLC, Newsweek Digital LLC, Newsweek Magazine LLC, Newsweek Publishing LLC, NW Digital LLC, and NW Magazine LLC (collectively, "Plaintiffs") respectfully submit this reply brief in further support of their appeal of the Decision and Order granting Defendant IBT Media Inc.'s ("Defendant" or "IBT") motion to dismiss the complaint pursuant to CPLR 3211(a)(3).

PRELIMINARY STATEMENT

IBT does not—and cannot—dispute that it has a contractual obligation to indemnify NW Media for IBT's mismanagement of storied publication Newsweek during the years it controlled the company. Nor does IBT dispute that NW Media has incurred millions in damages and losses, including for rent payments that it was forced to make on IBT's behalf, payments to the Internal Revenue Service ("IRS") that IBT failed to make, and various payroll and vendor costs, among others. In short, IBT cannot challenge the merits of NW Media's claims, and its attempt to evade accountability through meritless arguments about NW Media's capacity to sue should not be countenanced.

As part of his effort to turn Newsweek's finances around following its acquisition by NW Media, Dev Pragad, the President and co-owner of NW Media, authorized the initiation of this suit to enforce the explicit terms of the Membership Interest Purchase Agreement (the "Purchase Agreement") that IBT and NW Media

entered into with the express approval of NW Media's shareholders and board of directors. The suit seeks to recover millions of dollars of losses, damages, and liabilities owed pursuant to IBT's contractual obligation to indemnify NW Media for the financial harm IBT's management caused.

IBT moved to dismiss, arguing that Pragad lacked authority to initiate a lawsuit on behalf of NW Media—despite Pragad's undisputed role as the CEO of the company, and despite the parties' purchase agreement expressly conferring on NW Media the right to recover for any harm attributable to IBT's mismanagement of Newsweek. IBT's argument is squarely at odds with New York law and long-standing principles of corporate governance.

As a preliminary matter, IBT may not challenge Plaintiffs' authority to sue. IBT is a stranger to NW Media, and only stockholders, officers, or directors may challenge the validity of corporate acts. *See A.B.C. Publ'ns v. N.Y. Times Co.*, 103 N.Y.S.2d 693 (Sup. Ct. N.Y. Cnty. 1951). IBT tries to sidestep this simple legal principle by characterizing it as "unsupported *dicta*" and decreeing that it "is inconsistent with the Court of Appeals decision in *Sterling* [*Industries, Inc. v. Ball Bearing Pen Corp.*, 298 N.Y. 483 (1949)], decided two years earlier." Br. for Defendant-Respondent ("Opp.") at 15. But the decision in *A.B.C. Publications* is no aberration; it sits in a line of cases spanning decades that have reaffirmed the same principle—a principle that a major treatise on New York law called a "general rule."

See 14A N.Y. Jur. 2d Business Relationships § 658. Because IBT is not and cannot claim to be a stockholder, officer, or director of NW Media, it has no standing to challenge the initiation of this lawsuit.

Even if this Court were to ignore IBT's lack of standing, its challenge to this lawsuit fails on the merits. Pragad has both implied and contractual authority to authorize the filing of this case. The implied authority of a corporate president to initiate legal action can only be withdrawn by vote of the board of directors. Try as it might, IBT fails to point to any caselaw supporting the notion that a letter from NW Media board member Jonathan Davis can substitute for formal action by the board of directors. Moreover, beyond his implied authority based on his role as President, Pragad also has authority to bring suit pursuant to the Purchase Agreement between NW Media and IBT, which was signed by both Pragad and Davis and expressly creates a contractual right to bring indemnification claims against IBT.

Finally, even if Jonathan Davis's letters were somehow treated as tantamount to formal board action, Davis's status as an interested director would void any vote in opposition to litigation. IBT seeks to distinguish a long line of New York cases on the basis that "they do not involve a deadlock between 50/50 owners of a closely held corporation over the decision to initiate litigation." Opp. at 33. To be sure, the corporate acts at issue in those cases were different, but IBT offers no theoretical justification for treating a decision to authorize litigation differently than any other

corporate act. Lastly, IBT's waiver argument is meritless. This purely legal issue was raised—and responded to by IBT—before the lower court and was, of course, raised in Plaintiffs' opening brief. The notion that IBT lacked notice or would be prejudiced by this Court reaching the issue is nonsensical.

Plaintiffs have the right under New York law to bring this lawsuit to try to recover against IBT. The lower court's decision granting IBT's motion to dismiss should be reversed and the case permitted to proceed so NW Media's claims can be decided on the merits.

ARGUMENT

I. IBT Cannot Challenge Newsweek Plaintiffs' Authority To Sue

IBT lacks standing to question Plaintiffs' capacity to sue because "[o]nly a stockholder, officer or director of the corporate plaintiff may question the validity of the action of its directors or officers." *A.B.C. Publ'ns,* 103 N.Y.S.2d at 694. IBT is none of these.

IBT attempts to evade the consequences of this unequivocal statement of law, arguing that it is "unsupported," "inconsistent with the Court of Appeals decision in *Sterling*, decided two years earlier," and "not" the "rule in New York." Opp. at 15.[1] Not so. A clear line of precedent, both before and after *Sterling*, makes clear that

[1] IBT also arbitrarily attempts to cabin *A.B.C.* to decisions about "ratified" corporate acts. Opp. at 16. That limitation finds no support in *A.B.C.*, nor in any other case.

A.B.C. is far from an outlier and firmly establishes that only officers or shareholders, not strangers to a corporation, may challenge the corporation's acts. *See Grand Allen Holding Corp. v. M. & S. Circuit, Inc.*, 236 A.D. 2 (1st Dep't 1932), *aff'd*, 261 N.Y. 516 (1933) ("[T]he defendant, being a stranger to the assignment and having notice thereof . . . cannot question or attack the authority of the person making the assignment."); *City of Batavia v. Howland*, 43 A.D.2d 787, 788 (4th Dep't 1973) ("Being neither officers nor shareholders of the corporation, the town board had no authority to . . . examine the internal organization of the corporation and challenge its action."); *Rothman & Schneider, Inc. v. Beckerman*, 2 N.Y.2d 493, 499 (1957) (describing the defendants, one of whom was formerly an employee of the plaintiff corporation and a relative of its president, as "complete strangers to the corporation" who "should not be permitted to question [the president's] authority and thereby frustrate the action."). Indeed, it is hornbook law that the "general rule" in New York is that "a defendant in an action brought by a corporation, who is neither a stockholder, an officer, nor a director of the corporation, has no right to question the validity of the action of the officers of a corporation in authorizing maintenance of the action." *See* 14A N.Y. Jur. 2d Business Relationships § 658; *see id.* § 594 (third parties have "no standing to question the validity of the acts and conduct of the corporation's executive committee with respect to its authority to act").

Tellingly, IBT's opposition brief does not even acknowledge *Grand Allen Holding* or *City of Batavia*, relied upon in Plaintiffs' opening brief. Br. for Plaintiffs-Appellants ("App. Br.") at 15-16. And IBT's attempt to distinguish *Rothman* fails in multiple respects. First, IBT argues that *Rothman* did not frame its decision as "dismissing . . . for lack of standing." Opp. at 16 n.6. That is true only to the extent the procedural posture was slightly different: *Rothman* denied a motion to vacate and set aside the service of a summons and complaint. *See Rothman*, 2 N.Y.2d at 496. But the holding of *Rothman*—that "strangers" to a corporation may not challenge the corporation's decision to litigate—applies with equal force to challenges to service of a complaint as to standing challenges. Second, IBT argues that the defendant in Rothman's status as a former employee is "starkly different" from IBT's status because of "Davis's common ownership" of IBT and NW Media. Opp. at 16 n.6. But IBT cannot escape this action by conflating its own corporate identity with Jonathan Davis. *See generally Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103 (1st Dep't 2002) ("[A] corporation exists independently of its owners, as a separate legal entity.") (quoting *Matter of Morris v. N.Y. State Dept. of Tax. & Fin.*, 82 N.Y.2d 135 (1993)). Whatever Davis's relationship to both IBT and NW Media, IBT has no present-day affiliation with NW Media and is, like the former employee in *Rothman*, a stranger to the corporation.

Additionally, IBT fails to engage with the decision in *Tidy-House Paper Corp. of N.Y. v. Adlman*, which notably points to *Rothman* for the proposition that defendants who are "purported wrongdoers" and "*complete strangers to the corporation* and actually charged with converting a portion of its assets, should not be permitted to question his authority and thereby frustrate the action." 4 A.D.2d 619 (1st Dep't 1957) (citing *Rothman*, 1 A.D.2d 154 (1st Dep't 1956), *aff'd*, 2 N.Y.2d 493 (1957)) (emphasis in original). So, too, here, IBT has wronged NW Media to the tune of millions of dollars of losses and debts incurred through IBT's mismanagement of Newsweek. As a stranger to the corporation, IBT should not be permitted to question Pragad's authority to bring this suit.[2]

The authorities IBT *does* cite provide no support for its position. IBT leans heavily on *Sterling*—even though it admits that the Court of Appeals in *Sterling* "did not discuss the issue" of whether a non-shareholder, director, or officer has capacity to question a president's authority to bring suit. Opp. at 14. And yet, IBT claims that *A.B.C.*'s discussion of this precise issue—from just two years after *Sterling* and presumably with *Sterling* in mind—should be set aside as dicta. IBT's attempt to manufacture inconsistency between *A.B.C.* and *Sterling* fails.

The other authorities IBT cites are a treatise on corporate law, not specific to New York, case law from North Dakota and Wisconsin, and an Eighth Circuit case

[2] See *infra* Section II.A.

out of South Dakota, all apparently stating that "if a corporation does not object to an officer's lack of authority to initiate a lawsuit, a third person may not object." Opp. at 12 (citing 9 Fletcher Cyc. Corp. § 4216; *Hutterville v. Sveen*, 776 F.3d 547, 555 n.5 (8th Cir. 2015); *Farmers Union Oil Co. of New England v. Maixner*, 376 N.W.2d 43, 46 (N.D. 1985); *Vill. Of Brown Deer v. City of Milwaukee*, 114 N.W.2d 493, 497 (Wis. 1962)). First and most importantly, in this case, NW Media *has not objected* to the initiation of this lawsuit. *See infra* Section II.

Second, even if NW Media *had* objected, IBT offers no authority to suggest a third party may then object. As a logical matter, the proposition that a third party may not object if a corporation does not object does not mean that a third party necessarily may object to the CEO's authority to enforce a contractual right if the corporation also does. *See, e.g.*, *Crouse-Hinds Co. v. InterNorth, Inc*., 634 F.2d 690, 702 n.20 (2d Cir. 1980) ("The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. The process of inferring one from the other is known as the 'fallacy of denying the antecedent.'") (citation omitted).

Third, IBT's own cases establish their own irrelevance to IBT's argument. *Hutterville* states that "capacity to sue depends on state law." *Hutterville*, 776 F.3d at 554. Whatever South Dakota law may be, New York law provides that strangers to a company lack capacity to sue. *Village of Brown Deer* distinguished between

"political act[s]" of a corporation, as to which third-party challenges are warranted, and "business act[s]," as to which they impliedly are not. 114 N.W.2d at 497. This instant dispute is a simple "business act." And *Farmers Union* held that the third party in question could *not* object to any alleged lack of authority to initiate the lawsuit: "Whether or not [the chairman of the plaintiff's board of directors] had actual authority to initiate a lawsuit is unimportant as [defendant] cannot object to [his] alleged lack of authority." *Farmers Union*, 376 N.W.2d at 46. Thus, as even IBT's own case suggests, because IBT is not a shareholder, director, or officer of NW Media, it may not challenge Plaintiffs' lawsuit.

II. Newsweek May Enforce Its Legal Rights Against IBT

A. Pragad, As President, Has Implied Authority To Authorize The Filing Of This Lawsuit

Even if the Court were to find that IBT has standing to challenge the NW Media CEO's authority to bring this lawsuit, that challenge fails on the merits. Pragad, as president of NW Media, presumptively holds the power to institute a lawsuit in the name of the corporation absent a "provision in the by-laws or action by the board." *West View Hills, Inc. v. Lizau Realty Corp.*, 6 N.Y.2d 344, 348 (1959); *accord, e.g.*, *Family M. Found., Ltd. v. Manus*, 71 A.D.3d 598, 599 (1st Dep't 2010); *Polish-American Media, Inc. v. Jozwiak*, 29 A.D.3d 663, 664 (2d Dep't 2006). In order to strip the president of this presumptive power, the board must act "directly." *Rothman*, 2 N.Y.2d at 497; *accord Paloma Frocks, Inc. v. Shamokin*

Sportswear Corp., 3 N.Y.2d 572, 575-76 (1958). No board vote occurred here to strip Pragad of his power. Accordingly, the initiation of this lawsuit was fully within Pragad's authority as NW Media President.

IBT offers several responses, none of which is availing.

First, IBT contends that, notwithstanding his presumptive authority, Pragad's authority was divested by Davis's letters to Plaintiffs' counsel "emphatically objecting to the filing of the draft complaint."[3] Opp. at 20. But IBT mistakes an act by Davis, a board *member*, with an act of the board *itself*. Under well-established New York law, only a direct action by a majority of the board—not informal opposition or even a deadlock—can displace Pragad's authority.

For example, in *Paloma Frocks, Inc. v. Shamokin Sportswear Corp.*, the court refused to strip the president of his presumptive power to sue his co-equal corporate partner because there was no direct action by the board. 3 N.Y.2d at 575 (citing *Rothman*, 2 N.Y.2d at 497). There, even though a board meeting would have been an "idle gesture," given the clear opposition by the other board members, the court nevertheless upheld the president's action because the board vote to strip authority

[3] Gibson Dunn, counsel for Plaintiffs in this suit, has no record of receiving one of two letters that were sent by Mr. Davis. Notably, Mr. Davis's litigation counsel sent a separate letter to NW Media that simply claimed that NW Media lacked authority to initiate litigation against *Mr. Davis*. Index No. 652344/2022, NYSCEF 75 ("NW Media, Newsweek and Mr. Pragad do not have authority or power to authorize the filing or to bring the claims asserted against Mr. Davis.").

did not take place. *Paloma*, 3 N.Y.2d at 575. *Rothman* takes a similar position, upholding the president's power to sue despite opposition from the other 50% shareholder and board member. 2 N.Y.2d at 497-98; *see also W. View Hills*, 6 N.Y.2d at 346-47 (preserving presumptive power despite actual knowledge of board members' opposition).

While IBT fails to meaningfully respond to the Court of Appeals' decisions in *Paloma*, *Rothman*, and *West View Hills*, it fails to even address several other cited cases—including binding First Department authority—in which courts similarly upheld the president's authority, despite known opposition by controlling officers, directors, and shareholders of the corporation. *See, e.g.*, *328 E. 56 St. Rest. v. Polldon Rest.*, 39 A.D.2d 689, 690 (1st Dep't 1972) (preserving president's presumptive authority to initiate a lawsuit even where a motion to dismiss was "supported by a joint affidavit" of two individuals "who allege[d] they [we]re sole officers and directors of plaintiff and did not authorize the instant action or application"); *Cicero Ind. Dev. Corp. v. Robert*, 63 Misc. 2d 565, 568-70 (Sup. Ct. Onondaga Cnty. 1970) (preserving president's presumptive authority even where the controlling stockholders had sought to meet to dissolve the corporation). As these cases make clear, actions short of a formal board vote are insufficient. *See 328 E. 56 St. Rest.*, 39 A.D.2d at 691; *Cicero Ind. Dev. Corp.*, 63 Misc. 2d at 568-70.

That is true even when the president deliberately opts not to call a board meeting for the express purpose of preserving his power to act. *See Berma Mgmt. Corp. v. 140 W. 42nd St. Realty, Inc.*, 21 Misc. 2d 571, 572-73 (Sup. Ct. N.Y. Cnty. 1960) (president "deliberately failed to call a meeting to pass upon the question") (citing *West View Hills*, 6 N.Y.2d at 349 and *Paloma*, 3 N.Y.2d at 575); *see also Hellman v. Hellman*, 31 Misc. 3d 265, 269-70 (Sup. Ct. Monroe Cnty.), *aff'd* 79 A.D.3d 1813 (4th Dep't 2010) (that the director opposing corporate action was "unable to convene a board meeting" was insufficient, as "formal refusal" by the board was required).

Sterling and *Crane* are not to the contrary. In both, a formal vote of the board (or the shareholders) took place. *Sterling*, 298 N.Y. at 489; *Crane, A.G. v. 206 West 41st Street Hotel Associates, L.P.*, 87 A.D.3d 174, 177, 181 (1st Dep't 2011). No such meeting or vote of the board took place here. Without a formal vote, Davis's professed opposition cannot strip Pragad of his authority. IBT fails to cite even a single case in which a court found the president's presumptive power was overcome outside of a formal board meeting and board vote. In short, "[p]rohibition . . . equals an actual majority vote against action, and that alone." Roger J. Goebel, *The Authority of the President Over Corporate Litigation: A Study in Inherent Authority*, 37 St. John's L. Rev. 29, 80 (1962).

Second, recognizing that its "deadlock" argument runs headlong into cases like *West View Hills*, which "make it clear in New York that a president may sue in a tacit deadlock under any circumstances—crisis or not, prior suit or none, insider or outsider suit," *id.* at 76, IBT feebly attempts to distinguish those cases on the basis that Pragad not only "must have known" that "Davis would oppose the lawsuit," but "knew that for sure." Opp. at 23. That wafer-thin known vs. must have known distinction finds no support in the case law. Indeed, IBT admits on the very same page of its brief that the president in *Berma Management* "*knew* that two of the four [board] members opposed [the] lawsuit." *Id.* (citing *Berma Mgmt. Corp*, 21 Misc.2d at 572-73) (emphasis added). Despite that knowledge, the *Berma Management* court refused to dismiss the claim. 21 Misc.2d at 573.

Third, IBT attempts to expand the "50/50 Shareholder Rule" beyond all recognition. Opp. at 24. That rule, as IBT notes, provides that "one 50% shareholder in a close corporation cannot weaponize the assets of the corporation against the other 50% shareholder." *Id.* But NW Media is suing IBT, *not* Johnathan Davis. As *Paloma* makes clear, a corporate president is permitted to sue another corporation owned by his co-equal director. 3 N.Y.2d at 574-75. The First Department has repeatedly recognized that the 50/50 shareholder rule does not apply to suits against another corporation. *See, e.g.*, *Family M. Found.*, 71 A.D.3d at 599 ("This is not a

case where one 50% shareholder seeks to assert a claim on behalf of the corporation against another 50% shareholder who possesses an equal degree of control. . . .").

Finally, IBT invites this Court to ignore the relevant case law in favor of its policy argument that a ruling in Plaintiffs' favor would create an "obvious loophole" for corporate presidents to initiate litigation without the consent of their boards and would encourage them to "race to the courthouse." Opp. at 22. But New York courts have repeatedly weighed in in favor of permitting corporate presidents to initiate legal action on behalf of the corporation. This rule makes sense for several reasons. It promotes efficiency by permitting a corporation to act efficaciously. *See Goebel*, *supra*, at 79. The president, as "the functional head of the corporation, supervising its general administration, and burdened with a fiduciary obligation toward its over-all welfare . . . may have a greater grasp of the urgency of suit than any individual director." *Id*. Second, a cause of action that can yield "a judgment beneficial" to the corporation may be understood as "an intangible corporate asset." *Id.* at 78. The president should be permitted to "realiz[e] this asset on behalf of the corporation," even in the face of "the unformalized opposition of a majority of individual directors." *Id.* Third, "a director, opposed to suit for his own personal reasons, might find it a little hazardous to go on record in opposition in a formal board vote when his act can be objectively measured later in terms of his fiduciary responsibilities." *Id.* at 82. Requiring a formal vote ensures that the director will act in the company's

best interest despite any personal desire to act to the contrary. "[A] record vote prior to suit" is therefore appropriately "the only means of legally ascertaining the opposition of the board." *Id.* Because no such vote took place here, Pragad's implied authority remains intact.

B. Plaintiffs Had Authority To Bring This Suit Under The Purchase Agreement

In addition to his implied authority as President of NW Media, Pragad also had authority to bring suit pursuant to the Purchase Agreement between NW Media and IBT. In *Paloma*, the court distinguished *Sterling* by pointing out that the president initiating legal action was "carrying out an existing agreement"; the directors had "agreed in advance" to certain terms, and the initiation of legal action "was a routine step in the performance of an authorized contract." *Paloma*, 3 N.Y.3d at 575.

So, too, here: In September 2018, IBT and NW Media entered into a written Purchase Agreement, unanimously approved by the boards of both IBT and NW Media. *See* R. 52 ¶ 108. That Purchase Agreement contained a broad indemnification provision that covered "any and all" losses and damages arising out of IBT's "management of the Company prior to the Closing." R. 122; *see also* R. 55 ¶¶ 119-20. The indemnification provision anticipated litigation, specifically providing that IBT would indemnify NW Media for "reasonable attorneys' fees and costs and expenses incurred in . . . preparing . . . or prosecuting any litigation, claim,

proceeding or demand," R. 122, and that "the state and federal courts located in New York County or the Southern District of New York . . . shall have exclusive jurisdiction," R. 123. In connection with that Purchase Agreement, Davis and Pragad signed a Unanimous Written Consent, whereby Davis "authorized" Pragad "to execute the [Purchase Agreement]." R. 16. Thus, Jonathan Davis "agreed in advance," *Paloma*, 3 N.Y.3d at 575, by approving a contract authorizing NW Media to engage in litigation against IBT over its mismanagement of Newsweek.

IBT argues that the Purchase Agreement and Unanimous Written Consent "cannot possibly be read to provide Pragad with a blank check to use company funds years later to institute any litigation he pleases," trying to distinguish *Paloma* on the basis that the contract in that case "concerned a long-term agreement to provide services over time." Opp. at 26, 28. But the indemnification on its face *does* carry forward, potentially "years later," until the statute of limitations for the indemnified "claims" runs out. R. 122. Given its forward-looking nature, the indemnification provision would have no meaning if, as IBT suggests, it were "fully performed on the day it was executed." Opp. at 28. NW Media was forced to pay out money after the Purchase Agreement was signed to resolve claims brought because IBT did not pay creditors such as its landlord and the IRS. Those post-Purchase Agreement payments are the heart of Plaintiffs' indemnification claims. This is not "any litigation [Pragad] pleases"; it is litigation over IBT's "management of the Company

prior to the Closing," which is explicitly covered by the indemnification provision of the Purchase Agreement expressly approved by NW Media's directors. R. 122. IBT's attempt to distinguish *Paloma* fails out of the gate.

Next, IBT argues that the Purchase Agreement cannot "override the contemporaneously-executed bylaws of NW Media." Opp. at 26; *see id.* at 27, 28. But Plaintiffs have said nothing about "overrid[ing] the bylaws." In fact, the bylaws support Plaintiffs' contention that Pragad has "all powers which are commonly incident to the office of chief executive," R. 206 Art. IV ¶ 3, which powers include the power to initiate lawsuits. *See supra* Section I. The bylaw provisions to which IBT points govern meetings and votes of the Board of Directors. *See* Opp. at 7-8 (citing R. 203-04, Art. III). But as noted above, there was no meeting or vote of the Board of Directors regarding whether to initiate this lawsuit. Nor, given the authority the bylaws confirm Pragad held as CEO, was any such vote necessary, especially in light of the fact that initiating this lawsuit was clearly in the interest of NW Media. IBT offers no explanation as to why NW Media should not seek to enforce its contractual rights under the Purchase Agreement, and IBT's argument that the bylaws compel director consent for all corporate actions is both wrong and irrelevant given that Davis "agreed in advance" to the Unanimous Written Consent discussed above. *See Paloma*, 3 N.Y.3d at 575.

If anything, the NW Media bylaws only illustrate the stark contrast between this case and *Crane*, upon which IBT relies. *See Crane,* 87 A.D.3d at 178. In *Crane*, the stockholder agreement required "unanimous approval of the Stockholders" for "[a]ll action by the Stockholders," a meeting of the stockholders occurred, and "the stockholders refused unanimously to sanction" the president's authority to defend the foreclosure action, thus terminating his authority. *Id.* at 176. Here, there was no action by the stockholders, nor do NW Media's bylaws contain a comparable "unanimous approval" for "all action" requirement.

In short, NW Media's corporate governance regime follows the New York default rule: the President, Dev Pragad, is empowered to initiate lawsuits or take other action absent a formal vote of the Board of Directors prohibiting him from doing so.

III. Johnathan Davis Cannot Void Newsweek's Right To Sue IBT

A. As An Interested Director, Davis Is Disqualified From Voting Against This Lawsuit

Finally, even if there had been a formal vote of the Board of Directors, a vote by Johnathan Davis against litigation would be voided by his conflict as an interested director.

As CEO and 50% shareholder of IBT at the time the suit was filed, Davis has an obvious financial interest in NW Media's decision whether to sue IBT for millions of dollars in damages. *See Simon v. Becherer*, 7 A.D.3d 66, 72 (1st Dep't

2004) (finding director interest where a decision will have "a materially detrimental impact on a director.").[4] Under hornbook New York law, "a director cannot . . . vote . . . upon a matter affecting his own private interest any more than a judge can sit in his own case." *Carr v. Kimball*, 153 A.D. 825, 837 (1st Dep't 1912); *see also Park River Owners Corp. v. Bangser Klein Rocca & Blum*, 269 A.D.2d 313 (1st Dep't 2000) (holding that "[d]irector interest . . . invalidated the vote of at least two, if not all three, of the directors who voted to terminate defendant's retainer."). Thus, had a board meeting taken place, Davis would have been precluded from voting on the issue.

IBT attempts to distinguish the ample authority on this point on the basis that Plaintiffs' cited cases "do not involve a deadlock between 50/50 owners of a closely held corporation over the decision to initiate litigation." Opp. at 33. But IBT concedes, as it must, that the rule that conflicted directors are precluded from participation in corporate governance decisions implicating that conflict applies to a broad range of corporate actions. *See Kenneth Cole Prods., Inc. v. Blitzer*, 27 N.Y.3d 268 (2016) (applying the rule to action challenging merger); *Marx v. Akers*, 88 N.Y.2d 189 (1996) (applying the rule to action challenging director compensation). And IBT offers no reasoned basis to treat the initiation of litigation any differently

[4] IBT's attempt to paint Pragad as similarly interested, *see* Opp. at 34, is without basis; Pragad holds no financial stake in IBT, nor any interests at stake separate and apart from those of NW Media as a corporate entity.

from any other form of corporate decision-making. For example, IBT claims *Park River Owners Corp.* "provides no guidance" because "the question posed" in that case was whether to terminate litigation rather than initiate it. Opp. at 33 (citing *Park River Owners*, 269 A.D.2d 313). That is a distinction without a difference.[5]

In short, New York law provides that director interest invalidates the vote of the conflicted director, such that a vote by Davis not to litigate would be void in any event.

B. Plaintiffs Did Not Waive The Argument About Davis's Disqualification

IBT's waiver argument is meritless. In this case, during the December 15, 2022 hearing on IBT's motion to dismiss, Justice Crane focused on Pragad's authority to bring this suit—just one of the many issues briefed in Plaintiffs' omnibus opposition to Defendants' motions to dismiss, *see generally* R. 230—and indicated that the issue was complex and would likely require clarification by the appellate courts. To assist Justice Crane in resolving the question, Plaintiffs

[5] IBT's reliance on *Sterling*, which it calls "the only case directly on point," is unavailing. Opp. at 34. As set forth in Plaintiffs' opening brief: 1) unlike in *Sterling*, Pragad has never treated Davis as a "qualified" director, 2) whereas the corporate charter in *Sterling* effectively waived conflicts, there is no comparable provision in NW Media's bylaws or elsewhere, and 3) the *Sterling* decision relied on a presumption that the directors "acted properly and in the interest of the plaintiff" as there were no facts alleged to the contrary, whereas here, the facts alleged, which must be accepted as true, show that Davis acted contrary to NW Media's best interests. App. Br. at 30-31. IBT fails to rebut any of these critical distinctions.

immediately submitted a supplemental letter on December 16, 2022, which, in part, raised the interested director issue. *See* Index No. 652344/2022, NYSCEF Doc. No. 124. IBT responded to Plaintiffs' letter in short order, filing additional letters addressing the issue before Justice Crane made her order. *See* Index No. 652344/2022, NYSCEF Doc. No. 125, 126.[6] Defendants cannot feign surprise or prejudice when they had an opportunity to respond to the argument in the lower court as well as, of course, in this Court. *See Emigrant Mtge. Co., Inc. v. Lifshitz*, 143 A.D.3d 755, 756 (2d Dep't 2016) (proper to consider "belated[]" submission where the other party had "a full opportunity to respond"); *see also, e.g.*, *Citimortgage, Inc. v. Bunger*, 58 Misc.3d 333, 337 (Sup. Ct. Suffolk Cnty. 2017) (waiver doctrine is about preventing "surprise" and "giv[ing] the parties fair opportunity to address the[] issues").

In any event, purely legal arguments may be raised for the first time on appeal, so long as the record on appeal permits review. *See, e.g.*, *Oliver 889 LLC v. 889 Realty Inc.*, 212 A.D.3d 531, 532 (1st Dep't 2023). The sole fact relevant here is Davis's status as CEO and co-owner of IBT at the time the suit was filed, which the record reflects. R. 22 ¶ 2, R. 62 ¶ 145, R. 72 ¶ 201, R. 76 ¶ 220. This Court should

[6] This Court may take judicial notice of documents filed electronically on NYSCEF. *See, e.g.*, *Perez v. N.Y.C. Hous. Auth.*, 47 A.D.3d 505, 505 (1st Dep't 2008).

not hesitate to reach the merits of the argument as to Davis's disqualification from objecting to this lawsuit.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening brief, this Court should reverse the decision of the IAS court granting IBT's motion to dismiss and remand for further proceedings.

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April 28, 2023

Respectfully submitted,

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