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TO BE ARGUED BY:
MICHAEL P. PASQUALE, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: Second Department

GREGORY KLEIN, individually and derivatively as shareholder of GALLOWAY DENTAL, P.C.,
Plaintiff-Appellant,

-against-

EDWIN WILEY, D.M.D., individually and as a shareholder of GALLOWAY DENTAL, P.C., and SALLY WILEY,
Defendants-Respondents.

Appellate Division Docket No. 2023-01437

BRIEF FOR DEFENDANTS-RESPONDENTS

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I. COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did Plaintiff-Appellant's right of direct appeal of the trial court's December 9, 2021 Order terminate with the subsequent final disposition of the case by entry of Judgment?

Answer: Yes.

2. Did Plaintiff-Appellant's appeal omit controlling facts and law fatal to his Appeal?

Answer: Yes.

3. Did Plaintiff-Appellant fail to preserve and perfect the issue of attachment of the pleadings?

Answer: Yes.

II. PRELIMINARY STATEMENT

Plaintiff-Appellant's brief in support of reversal of the trial court's decision omits controlling facts and law, argues matters neither preserved nor perfected, and misplaces reliance on precedent which does not support its arguments for reversal. The trial court's decision should be left undisturbed because, after three years of litigation, the Supreme Court correctly adjudged the facts of the case and applied applicable and binding precedent of this Court to reach its decision.

As a threshold matter, and absent from the "full record" submitted on appeal, several months before Plaintiff-Appellant filed his brief appealing the trial court's December 9, 2021 Order, Defendants-Respondents moved for summary judgment on their counterclaims for breach of contract, and final disposition of the case below by the entry of judgment in favor of Defendants-Respondents was entered on September 27, 2023. The law provides that Plaintiff-Appellant's right of direct appeal from the earlier, interlocutory order terminates with the subsequent entry of the final judgment in the action. The appeal should be dismissed on this basis alone.

Even if the appeal were to be considered, it should be denied for its glaring omissions of adjudged facts and its continued assertion of refuted false accusations. As to the law argued on appeal, Plaintiff-Appellant simply ignores the main, Second Department decision relied upon by the trial court to reach its decision. Courts have cautioned, and even sanctioned, counsel on the affirmative obligation to advise the

court of adverse legal authorities, and Plaintiff-Appellant flouts that obligation to the extreme. Not only does the appeal fail to address the principle legal authority relied upon by the trial court in dismissing his Verified Complaint, the first two legal points of Plaintiff-Appellant's Brief are devoid of *any* legal authority at all: the first two points contain no citations to binding or even persuasive authority whatsoever, but merely excerpt portions of the statute at issue and opine on its meaning. The first two points of Plaintiff-Appellant's Brief in support of reversal of the trial court's decision consist solely of counsel's opinion as to how the Business Corporation Law should be interpreted.

This lack of citation to controlling authority in Plaintiff-Appellant's Brief, or any attempt to distinguish the precedent which bound the trial court to its decision, are fatal to his arguments for reversal. This appeal should be summarily rejected for this reason alone as it is not the function of this Court to do a party's legal research or to make legal arguments for a party out of general propositions or opinion of counsel that are not supported by sufficient legal authority.

After a complete lack of citation to legal authority in the first half of its argument, Plaintiff-Appellant begins its third legal point asserting that "[t]o reach this point it will have been necessary for the Court to have determined that the interpretation of BCL §623 argued in Point I and alternatively in Point II, are not correct…" Again, Points I and II of Plaintiff-Appellant's brief ignore and omit any

reference to the only binding interpretations—that of the New York courts— as well as the specific law relied upon by the trial court in reaching its decision. Point III then continues with misrepresentation of the decision below, arguing that the trial court dismissed the Verified Complaint for inartful pleading, when that was not a basis for the court's holding at all.

Just as Plaintiff-Appellant ignores and misrepresents the law, so does he ignore the undisputed facts adjudged below by the trial court. Despite Plaintiff-Appellant's false claims that Defendants-Respondents "looted" the company, it has been adjudged, to the contrary, that they engaged in no wrongful activity and that, instead, Plaintiff-Appellant broke his promises and breached the agreements he signed with Defendants-Respondents. He did so by, among other actions, his:

- refusal to provide documents necessary to the sale of the business;
- refusal to sell his shares for their reasonable value;
- disclosure of confidential business information;
- false, written and repeated attacks on the professional reputations of Defendants-Respondents (the company, Dr. Edwin and his wife, as well as their nonparty daughters); and
- illegal threats of making false reports of criminal activity to the IRS unless his exorbitant demand of nearly half the proceeds of the sale (despite only owning 15% of the outstanding shares) was met.

The above findings of fact by the trial court are part of the record and should not be disturbed absent a finding of abuse of discretion.

The final point of Plaintiff-Appellant's brief, Point IV, argues for reversal because, while the Verified Complaint and Answer were attached to the Motion to Dismiss the Verified Complaint, the Amended Answer and Counterclaims, and Answer to Counterclaims, were not. Plaintiff-Appellant does not include the missing pleadings in his "Record on Appeal," and failed to argue this before the trial court or include the issue in his Notice of Appeal. Finally, the precedent he relies upon for reversal on this basis do not so hold, but instead provide the court has discretion to overlook such a minor procedural defect.

For the foregoing reasons, and the others stated below, Defendants-Respondents respectfully request that the Court affirm the decision of the trial court.

III. COUNTERSTATEMENT OF FACTS[1]

Galloway Dental

1. Over forty years ago in 1981, Defendant-Respondent Dr. Edwin Wiley (hereinafter "Dr. Wiley") opened Galloway Dental, a local unincorporated family dental practice in Warwick, New York.

[1] Plaintiff-Respondent's "Record On Appeal" includes neither the September 26, 2023 Decision and Order nor the September 27, 2023 final judgment whereby the following undisputed facts were adopted and adjudged by the trial court as true. NYSCEF Doc. Nos. 131-133; *see also* NYSCEF Doc. Nos. 90-109.

2. For years he ran his dentist's office as a solo practitioner and, along with his wife, Defendant-Respondent Sally Wiley, and later their three daughters, built his practice and the number of patients he served.

3. As the local demand for his professional services and the number of patients grew, Dr. Wiley began to take on additional dentists to work with him at Galloway.

4. One of the dentists hired was Plaintiff-Appellant Dr. Gregory Klein (hereinafter "Dr. Klein" or "Plaintiff"), who became a dentist at Galloway in or about 2003.

The Proposed Sale to Dr. Klein & Executed Letter of Intent

5. In or about 2007, Dr. Klein expressed his interest in purchasing Galloway from Wiley.

6. Wiley and Klein are both learned professionals, both hold the title of Doctor of Medicine and Dentistry ("D.M.D."), and both were represented by attorneys at all times relevant hereto.

7. In furtherance of the proposed sale of Galloway to Klein, on April 10, 2007 Klein signed a Letter of Intent ("LOI") regarding a Stock Purchase Agreement.

8. The LOI provided that:

- Galloway Dental would be incorporated as a professional service corporation, Galloway Dental, P.C.;

- Wiley would be the sole officer, director and shareholder;
- 1,000 shares of Galloway would be issued to Wiley, and
- Klein would be granted the option shares each year.

9. Pursuant to the LOI, Klein could purchase up to 150 shares upon closing, and then up to 50 shares each year thereafter.

10. Klein was free to purchase as few or as many shares each year up to the annual maximum limits set forth in the LOI, and the LOI also set forth the amount of Klein's base salary and bonus terms.

11. Paragraph 4 of the LOI, entitled "Confidentiality," provided, in part, that Klein would agree "to maintain in strict confidence and not disclose to any person," the terms of the LOI, the legal structure of Galloway, as well as information concerning "employees, salaries, revenues, expenses. . . and "any other information that might be reasonably deemed proprietary or confidential."

12. Paragraph 13 of the LOI, entitled "Family", provides that Dr. Wiley's ". . . family members would continue to be employees" by Galloway, "as currently."

13. Klein agreed to the terms and signed the LOI on April 10, 2007.

14. Pursuant to the LOI, Galloway, the professional corporation, was thereafter formed by way of a Certificate of Incorporation ("COI") signed by Dr. Wiley on June 4, 2007.

15. The COI provides that the "aggregate number of shares which the Corporation shall have the authority to issue is 1000, each of which hall be common stock with no par value."

16. The COI expressly provided that Wiley was the sole officer, director and shareholder of Galloway.

17. Additionally, the COI insulated Dr.Wiley from liability to the full extent of the law, providing specifically that:

> No director of the corporation shall be personally liable to the corporation or its shareholders for damages for any breach of duty as a director, provided that nothing contained in this Article FIFTH shall eliminate or limit the liability of any director if a judgment or other final adjudication adverse to the director establishes that the director's acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that the director personally gained in fact a financial profit or other advantage to which the director was not legally entitled or that the director's acts violated Section 719 of the BCL. If the BC is amended after the date of the filing of this Certificate of Incorporation to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the BCL, as so amended.

18. In furtherance of the LOI, on or about August 3, 2007, Galloway adopted by-laws and issued 1,000 shares of stock to Dr. Wiley.

19. In furtherance of the LOI, attorneys for both Dr. Wiley and Klein prepared and vigorously negotiated the following documents:

- The Stock Option Plan Agreement;

- The Shareholders Agreement;
- The Employment Agreement for Klein; and
- The Lease.

20. Prior to the signing of these four agreements, Klein's then attorney, Michael Halkias, Esq., demanded several changes.

21. On or about December 11, 2007, counsel for Klein wrote to counsel for counterclaimants demanding that all accounts payable be paid prior to his client's purchase of Galloway shares, and that this should be done by Dr. Wiley using his own funds.

22. As a result of Klein's demands on accounts payable, the agreement reflects that Dr. Wiley was to transfer $50,000.00 to Galloway upon execution of the documents, which Dr. Wiley did.

23. Likewise, the Halkias letter set forth the complaint that the draft agreements limited the number of shares per year that Klein could purchase, and stated that Klein intended "to buy the initial 150 shares and then to purchase the balance of 350 shares, or as many as he can afford, at the first option date of May 1, 2008. Furthermore, the Halkias letter demanded that Klein's salary be increased by $20,000.00 a year because he would "now need to carry financing in order to buy into the practice."

24. It is undisputed that, Wiley relied upon Klein's statements and demands regarding buying the practice, as admitted to and set forth in the Halkias letter, and that Wiley hired counsel, incorporated his business, caused Galloway to issue shares and had counsel draft and negotiate the necessary agreements for the closing of the sale of shares.

25. It is also undisputed that, despite Wiley's efforts and great costs incurred to sell the business to Klein, Klein never purchased any additional shares after his first purchase in 2008.

26. Nevertheless, in 2007, Klein's attorney was making demands upon Wiley as if he would be the owner of Galloway tomorrow. *See id*. Klein demanded he be permitted to sign checks on behalf of Galloway, and also made demands regarding the Lease, including, but not limited to: (i) a right of first refusal during entire term of the Lease; (ii) an Option to Purchase the real estate from the landlord; (iii) demands regarding late fees, their amount and timing, (iv) Klein made demands regarding the security deposit amount and terms, (v) a demand that the parking lot be repaved every two years, (vi) demands regarding the landlord's reasonable consent; (vii) demands regarding days for the Tenant to cure defaults; (viii) demands regarding the definition of costs to be reimbursed; (ix) demands regarding the manner of notice by landlord to tenant for entry to the premises; and (x) demands

regarding the amount of rent, amount of rent of other tenants and the amounts of future rent increases.

27. Despite Klein's demands regarding Galloway's lease being misguided and misplaced for a minority shareholder with only 150 shares, these demands evinced a strong intent by Klein to be the owner of Galloway, which counterclaimants relied upon to their detriment as set forth below.

The Agreements for the Sale of Shares to Klein

28. After thorough negotiations with each party fully represented by counsel, Klein, Wiley and Galloway entered into and executed the following written agreements, effective as of January 1, 2008: the Stock Option Plan Agreement; the Shareholders Agreement; the Employment Agreement for Klein; and the Lease (collectively, the "2008 Agreements").

29. The Shareholder Agreement provided that Klein only had to put down a third of the purchase price for the 150 shares, with the remaining balance to be paid in monthly installments over 60 months.

30. As Klein had demanded that Galloway have no accounts payable at the time of signing, Wiley loaned Galloway $50,000.00 as memorialized in paragraph 2 the Shareholders Agreement, and in its Exhibit A, which was a Promissory Note for the $50,000 loan by Dr. Wiley.

31. The Shareholders Agreement also memorialized that, after the initial sale of shares to Klein, Dr. Wiley held 850 shares and Dr. Klein held 150 shares.

32. Paragraph 3 of the Stock Option Plan states:

> The ownership of any shares of stock of the Corporation acquired by Klein under this Stock Agreement shall also be subject to any other provisions of the Certificate of Incorporation, the By Laws, as the same may hereafter be amended or replaced from time to time, and the Minutes of the Corporation.

33. Both the COI and the Shareholders Agreement provide that Galloway will indemnify "officers and directors" (*i.e.*, Dr. Wiley) from and against any and all liabilities, costs, damages, expenses, and attorneys' fees resulting from, or attributable to, any and all of their actions, including "grossly negligent acts."

34. Paragraph 1(a) of the Shareholder Agreement provides that:

> Until such time, if any, as Klein shall own five hundred (500) shares, the Board of Directors shall consist solely of Wiley, and Wiley shall be the President and sole officer of the Corporation. From and after such time, if any, as Klein shall own five hundred (500) shares, the Board of Directors shall consist solely of Wiley and Klein, Wiley shall be Chairman of the Board, Wiley shall be President of the Corporation and Klein shall be Vice President of the Corporation.

35. Having never purchased any other shares after the first 150 in 2009, Klein never reached the 500-share threshold and Dr. Wiley remained the sole officer and director of Galloway at all times.

36. Paragraph 5 of the Stock Option Plan provides:

> Pre-Emptive Rights. Klein shall not have pre-emptive rights with respect to shares of stock in the Corporation. Wiley shall have the right to sell his shares at any time to one or more third parties, including other professional employees of the Corporation, without obligation to Klein. The Corporation shall have the right to sell authorized but unissued shares of stock at any time to one or more professional third parties, including professional employees of the Corporation, without obligation to Klein.

37. The Shareholders Agreement also provided in Section 3, entitled "Stock Restrictions," that in the event of a sale of Galloway by Dr. Wiley, Klein would also "sell all of his shares, free of any encumbrance", that he would "take all necessary action to cause the consummation of such transaction", and that Klein further agreed "to take all actions (including executing, acknowledging, and delivering documents) in connection with consummation of the proposed transaction as may reasonably be requested by Wiley, and (ii) hereby appoints Wiley as his attorney-in-fact to do the same on his behalf, such power being coupled with an interest and irrevocable."

38. Klein's Employment Agreement provided that Klein agreed to abide by all the rules, regulations, policies and procedures of Galloway, as set exclusively by Dr. Wiley, its sole officer and director; that Klein would be subject to the direction of Galloway for matters involving Galloway business; and that he would comply with all reasonable directives, policies, standards and regulations of the Galloway.

39. Klein also agreed to maintain business records as directed by Galloway; that Galloway was the owner of all business records generated by Klein; that Klein would fully cooperate with the Employer in all matters, both during his employment and after his employment with Galloway ended; and that he would deliver all such business records and other property of Galloway.

40. Under paragraph 15 of the Employment Agreement, entitled "Confidentiality," Klein agreed and acknowledged that, as a result of his employment, Klein would have access to certain confidential information, including, "without limitation, trade secrets, technical information, plans, lists of projects, data, records, fee schedules, computer programs, manuals, processes, methods, intangible rights, contracts, agreements, licenses, personnel information and the identity of vendors (collectively, the "Confidential Information")."

41. The Employment Agreement provided further that the Confidential Information was Galloway's exclusive property to be held by Klein in trust and solely for the Galloway's benefit, and that Klein would not use, receive, report, publish, copy, transcribe, transfer or otherwise disclose to any person, corporation or other entity, any of the Confidential Information…"

42. Paragraph 21 of the Shareholders Agreement, entitled "Injunctive Relief and Damages," was intended to protect, *inter alia*, the goodwill and reputation of Dr. Wiley and Galloway.

43. In paragraph 21 of the Shareholders Agreement, Klein agreed to preserve Dr. Wiley's reputation and to an award of liquidated damages in the event breaches of their agreement:

> The shareholders acknowledge and agree that **this Agreement**, and the covenants contained herein, are **intended to protect and preserve** the legitimate business interests, including, but not limited to, **the goodwill and proprietary interest of the Corporation and the shareholders**. It is further agreed that in the event of a breach of any of these covenants, it would be difficult to assess actual damages, but that any such breach would cause unquantifiable and irreparable harm and significant injury to the Corporation and the shareholders. It is agreed that the Corporation and the shareholders shall be entitled to apply to a Court of competent jurisdiction for an injunction to enjoin any violation of this covenant, threatened or actual. **In addition, the Corporation and the shareholders shall be entitled to recover liquidated damages in the amount of $50,000.00, the entry of a judgment enjoining further violations, and the recovery of costs and reasonable attorney's fees**.

44. Paragraph 37 of the Shareholders Agreement, paragraph 16 of the Stock Option Plan, and paragraph 26 of the Employment Agreement are all identical provisions which state:

> Attorneys' Fees. In the event that any dispute arises between the parties, and regardless of whether the dispute is litigated or arbitrated, the prevailing party shall be entitled to receive reasonable attorneys' fees and repayment for all costs incurred in connection with such dispute, including fees and costs of appeal or removal, if any. In an arbitration, the arbitrator shall apportion attorneys' fees and costs upon request of any party.

45. After his initial purchase of 150 shares, Klein never again exercised his rights under the Stock Option Plan to purchase additional shares.

46. Approximately a decade later, Klein expressed renewed interest in purchasing Galloway.

47. Once again, Dr. Wiley hired an attorney to represent him and draft the necessary agreement, and the parties entered into a new agreement, entitled "Asset Purchase Agreement" for the sale of Galloway's assets to Plaintiff-Counterclaim Defendant.

48. Wiley consented to Klein's multiple requests for extensions of the new agreement's loan commitment contingency date.

49. Klein falsely reported that his loan request to purchase Galloway remained under review by his lending institution when, in fact, it had already been denied.

50. Accordingly, on or about May 30, 2018, after once again committing and wasting time and money on Klein's purported purchase, after multiple extensions of the contingency period and no reasonable prospect of Klein obtaining the necessary financing commitment, notice cancelling the Asset Purchase Agreement pursuant to its terms.

The 2018 Sale of Galloway and Klein's Multiple Breaches of Contract

51. Galloway suffered during its final two years of operations and necessitated infusions of capital by Dr. Wiley totaling $105,000.00.

52. During this same period, Klein began submitting thousands of dollars in credit card bills for reimbursement by Galloway for alleged business expenses.

53. When demand was made by Galloway for the statement to show the charges were for business expenses, Klein refused to provide them.

54. To date, despite litigation and document production, Klein refuses to provide all of the statements and those that have been produced document charges that are patently not business related.

55. Shortly after the cancellation of Klein's second agreement, Dr. Wiley accepted an offer made by a dentist office franchise named Premiere Dental to buy Galloway for $800,000.

56. In June 2018, approximately 90 days prior to the closing of the asset sale to Premiere, Dr. Wiley's attorney provided Klein and his attorney notice of the intended sale to Premiere, the identity of the buyer, the purchase price and a copy of the Asset Purchase Agreement with Premiere.

57. Klein nor his attorney responded within the timeframe for dissenting shareholders pursuant to statute nor otherwise made application to assert any appraisal rights.

58. Instead, Klein approved the sale of Galloway's assets to Premiere, and the closing occurred on September 4, 2018.

59. Klein signed the Asset Purchase Agreement between Galloway and Premiere not just once, but two times: as a shareholder of Galloway and as a dentist of Premiere.

60. Klein also approved and initialed each page of the Asset Purchase Agreement from Galloway to Premiere.

61. It cannot be reasonably disputed that Klein consented to the sale of Galloway's assets to Premiere.

62. It cannot be disputed that Klein agreed to the terms of the Asset Purchase Agreement.

63. After the September 4, 2018 sale by Galloway to Premiere, Klein took employment with Premiere as a dentist based upon the recommendation of Dr. Wiley to Premiere.

64. It is admitted by Klein that he agreed under the Shareholders Agreement that upon the sale of the practice to a third party by Dr. Wiley, Klein would: (i) deliver necessary documents to Galloway; and (ii) sell all his shares less all costs associated with such transaction.

65. Klein has breached these promises by not delivering all needed documents and refusing to accept payment for or otherwise sell his shares as agreed.

66. It is also admitted and undisputed that, pursuant to the Shareholders Agreement, Klein promised and agreed to protect and preserve the goodwill and reputation of Dr. Wiley.

67. After the $800,000 in sales proceeds was transferred to Galloway's account by Premiere, Galloway began the process of paying expenses and taxes necessary before final distributions to shareholders.

68. Klein, despite his approval of the $800,000 asset sale to Premiere, his agreement to sell his shares, to cooperate with the sales process, to provide any documentation or other property of Galloway in his possession, instead made an outrageous post-sale threat and demand upon Dr. Wiley for a $300,000 payment.

69. The demand was accompanied by false claims that Dr. Wiley had "cheated" his former employee, that he had committed fraud, embezzlement and tax fraud.

70. Since Galloway's gross sales proceeds was only $800,000, and Klein held 15% of the outstanding shares, Klein's demand for $300,000 was outlandish, a breach of the promise to sell and cooperate with the sale and, accordingly, rejected by Counterclaimants.

71. When his inflated demand was rejected and his false claims refuted, Klein thereafter began a disinformation campaign directed at Galloway, Edwin and

Sally Wiley, and their daughters, falsely accusing them of committing tax fraud, business misfeasance and malfeasance.

72. Klein repeated these false accusations to multiple patients and staff of Galloway and Premiere, as well as throughout the local dentistry, business and social community.

73. These defamatory statements, put in writing and repeated orally multiple times by Klein, constitute breaches of his admitted promise to protect the reputation of Dr. Wiley as set forth in the Shareholders Agreement.

74. On or about December 26, 2018, Dr. Wiley's attorney sent Plaintiff-Plaintiff-Appellanta letter *via* certified mail demanding that he cease and desist all disparaging and defamatory remarks.

75. While attending a social event out of state in Florida, an attendee at the event told counterclaimants that Klein had been repeating the false claims of criminal activity, the same that were set forth in his $300,000 demand letter.

76. Klein did not cease and desist with his defamatory accusations and false claims of serious crimes committed by counterclaimants.

77. Klein's breaches of contract continued into 2019, and on or about January 4, 2019, Klein's counsel wrote counterclaimants, this time demanding $260,000, and again threatening counterclaimants and containing false, serious and offensive accusations that they were thieves and embezzlers.

78. Klein's January 9, 2019 letter also contained the specific and unethical threat of Klein reporting counterclaimants to the IRS unless his bloated and extortionist demands were met.

79. Specifically, Klein's counsel wrote in the January 2019 correspondence, in pertinent part, that:

> My understanding of corporate law is fair but my understanding of fiduciary duty, theft, tax fraud, embezzlement etc etc is far better. We can approach resolution in two ways: instead of involving the IRS at this stage … my client will accept $260,000.00 as full and final settlement and we can leave the IRS out of this.

80. Klein's claims of fraud, embezzlement and tax fraud were false, and directly contrary to the clear and express terms of the Asset Purchase Agreement he had just signed and initialed, in which Klein promised and agreed that the tax returns, its business records and reports of Galloway were ***all*** "true, correct and complete and all amounts shown as owing thereon have been paid."

81. Also in 2019, Counterclaimants wrote Klein on multiple occasions as Galloway was unable to complete its post-sale tax returns because Klein would not provide his American Express card statements for which he caused Galloway to reimburse him in the amount of $9,365.00 for alleged business expenses.

82. To date, Klein has not provided a complete copy of the American Express records requested in 2019 and throughout this litigation.

83. Klein's actions in refusing to sell his shares as agreed constitute breaches of the Shareholders Agreement he signed.

84. Klein's actions in writing false and defamatory statements about Dr. Wiley also constitute breaches of the Shareholders Agreement.

85. Klein's actions in refusing to deliver necessary documents to Galloway constitute breaches of the Shareholders Agreement.

86. Klein's breaches of contract and the damages he inflicts on counterclaimants are ongoing, substantial and permanent in nature.

87. It is undisputed that the Shareholders Agreement provides that, in the event of a breach of its terms, the prevailing party is entitled to entry of judgment for liquidated damages in a sum certain, injunctive relief to prevent ongoing breaches, and reimbursement of attorney fees and costs in any dispute between the parties, "including fees and costs of appeal."

IV. ARGUMENT

a. The Right of Direct Appeal Terminated with the Entry of Final Judgment

Plaintiff-Appellant's appeal from the intermediate order of December 9, 2021 must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action on September 27, 2023. *See Matter of Aho,* 39 N.Y.2d 241 (1976).

Despite not being include in his "Record on Appeal", there has been a final disposition of this case with the entry of judgment and specific findings by the trial court which subsume this appeal of an interlocutory order. Although the CPLR is generous in its allowance of intermediate appeals (*see* CPLR 5701(a)(2)), if a nonfinal order is appealable and has been appealed, the appeal, if not determined before final judgment is handed down in the action, will not survive the final judgment. *Brooker Engineering, PLLC v. SK Trust*, 96 N.Y.S.3d 512 (2nd Dept 2023); *Deutsche Bank National Trust Co. v. Bonal*, 166 N.Y.S. 3d 549 (2nd Dept. 2022).

The law is clear that the appeal does not survive the subsequent entry of final judgment and Plaintiff-Appellant's appeal should be denied on this basis alone.

b. Plaintiff-Appellant Disregards Controlling Facts And Law

The trial court relied primarily upon this Court's decision in *Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008). In *Kingston*, the Second

Department affirmed dismissal where it was undisputed that: (i) the corporation sold it assets; (ii) the plaintiff / minority (who held 15% of the shares) consented to the sale; (iii) did not file an action asserting his appraisal rights pursuant to § 623 (k); and (iv) subsequently filed a lawsuit asserting derivative claims on behalf of the corporation.

The present action is directly on point with *Kingston*, even down to the share percentage amount in dispute of 15%, and the trial court was bound to follow and apply this precedent's interpretation of the statute as it did. Plaintiff-Appellant never filed an appraisal action, nor did he file a claim for breach of contract under the controlling Shareholders Agreement. Instead, having failed to file an appraisal action as required, he attempted to dress-up derivative claims as his own, individual claims. Both *Kingston* and the trial court correctly conclude that BCL 623 mandate dismissal of derivative claims under these circumstances.

Plaintiff-Appellant seeks reversal of the trial court but his brief omits any reference to *Kingston*, let alone analysis as to why it is distinguished from or why its interpretation of the statute should not be applied to this case.

Indeed, Points I and II of the appeal brief offer no legal authority whatsoever—neither adverse to nor in support of their interpretation of the controlling statute. This Court should decline Plaintiff-Appellant's invitation to adopt his contrary interpretation of the controlling statute as a basis to reverse the

trial court and its reliance on actual, binding precedent. The absence of citation to legal authority is fatal to the arguments raised in Points I and II of the appeal brief.

The failure to raise legal arguments in an appellate brief is tantamount to abandonment of argument. *Town of Islip v. Cuomo*, 541 N.Y.S.2d 829 (2nd Dept 1989). Furthermore, it is not the function of this Court to do a party's legal research or to make legal arguments for a party based on undelineated, general propositions not supported by sufficient authority. While appellate judges surely do not "sit as automatons", they are "not freelance lawyers either." *Misicki v. Caradonna*, 12 N.Y.3d 511 (2009). Claims and arguments not supported by sufficient authority should not be allowed to survive. *See Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48 (S.D.N.Y. 2000).

As to the failure to alert to this Court to adverse and binding precedent, the Court of Appeal has held that counsel have "an affirmative obligation to advise the court of adverse authorities." *Cicio v. City of New York,* 469 N.Y.S.2d 467 (2nd Dept. 1983), *citing* ZEAL AND FRIVOLITY: THE ETHICAL DUTY OF THE APPELLATE ADVOCATE TO TELL THE TRUTH ABOUT THE LAW, Uviller, 6 Hof. L. Rev. 729. Plaintiff-Appellant has failed this obligation, has ignored the primary case relied upon below that is adverse to his position, as well as several other decisions argued below and relied upon by the trial court.

As argued below, the Court of Appeals of New York, the Second Department

and several other courts have all held that after the sale of a corporation's assets that is consented to by a minority shareholder such as Plaintiff-Appellant, the shareholder's *exclusive* remedy is a statutory appraisal action, and that the person may no longer sue derivatively on behalf of the company. *Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008); *Walter J. Schloss Assoc. v Arkwin Indus.*, 61 N.Y. 2d 700 (1984) (reversing Appellate Division, Second Department, for reasons stated in the dissenting Opinion of J. Mangano, *Walter J. Schloss Associates v. Arkwin Industries, Inc.*, 455 N.Y.S. 2d 844, 847 (1982).

After a corporation sells all or substantially all of its assets, the law dictates that the exclusive remedy of a minority shareholder is to file an action for an appraisal proceeding pursuant to NY Business Corporation Law § 623(a)-(k) ("BCL § 623"). *See also* BCL §909; *Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008); *Walter J. Schloss Assoc. v Arkwin Indus.*, 61 N.Y. 2d 700 (1984). The trial court held correctly, and recognized that several courts have also held, that a shareholder may not sue individually for the very claims brought by Plaintiff-Respondent, and that allegations of mismanagement or diversion of assets by officers or directors pleads a wrong to the corporation alone, for which a shareholder may only sue derivatively. *Jacobs v. Cartalemi*, 27 N.Y. 3d 817 (2nd Dept. 2016); *Abrams v Donati*, 66 N.Y. 2d 951, 953 (1985); *Feiliks International Logistics Hong Kong Ltd. v. Feiliks Global Logistiscs Corp.*, 2016 WL 1069069 (E.D.N.Y. 2016);

Seretis v Fashion Vault Corp., 110 A.D.3d 547 (1st Dept. 2013).

As pronounced by the Court of Appeals, "[a] complaint the allegations of which confuse a shareholder's derivative and individual rights will, therefore, be dismissed." *Abrams v Donati*, 66 N.Y. 2d 951, 953 (1985). As correctly found by the trial court, Counts One through Seven of Plaintiff-Appellant's Verified Complaint were derivative claims that belonged to the company Galloway, and that could not be brought by Plaintiff-Appellant in his individual capacity-- no matter how he described them in his pleading. As further provided in *Kingston*, since he consented to the sale of Galloway's assets, the law dictates that such derivative claims are no longer an option, and that Plaintiff's exclusive remedy was a statutory appraisal action, which he never brought. *Kingston v. Breslin*, 866 N.Y.S. 2d 778, 780 (2d Dept. 2008).

In sum, it has also long been the law, as set forth in another case relied upon below but omitted from Plaintiff-Appellant's brief, that a shareholder who accedes to or who expressly or impliedly approves or consents to an asset sale, no longer has standing to complain of it, and cannot attack it or maintain a derivative action on the ground of waste or mismanagement. *Beloff v. Consolidated Edison Co. of N.Y.,* 81 N.Y.S. 2d 440 (N.Y. Sup. Ct.), *aff'd*, 85 N.Y.S.2d 303 (App. Div. 1948); *see also Cortes v. 3A North Park Ave Rest Corp.,* 998 N.Y.S. 2d 797, 816-17 (2014) (dismissing claims for breach of fiduciary duty and diversion of assets as wholly

derivative, stating they "plead a wrong to the corporation only", for which a shareholder may not sue individually)..

Under these facts, the ample precedent cited above and ignored by Plaintiff-Appellant makes clear that this Court was compelled to dismiss the Verified Complaint.

c. Plaintiff-Appellant Failed to Preserve or Perfect His Argument Regarding Attachment of Pleadings

Point IV of Plaintiff-Appellant's appeal brief argues that summary judgment should have been denied for failure to attach all the pleadings to the motion, yet Plaintiff-Appellant himself fails to include the missing pleadings in his "full" Record on Appeal.

Further, Plaintiff-Appellant failed to make this argument below. Accordingly, he failed to preserve this issue for appellate review. *Surjnarine v. Brathwaite*, 738 N.Y.S. 2d 579 (2nd Dept. 2002); CPLR 4017; CPLR 5501. New York law is also crystal clear that failure to name an issue in the notice of appeal means that the party has not preserved that issue. *Time Warner City Cable v Adelphi Univ.*, 813 N.Y.S.2d 114 (2nd Dept. 2006). Plaintiff-Appellant did not include this issue in his Notice of Appeal.

Additionally, Plaintiff-Appellant relies primarily on the First Department case of *Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675 (1st Dept

2013) for his argument for reversal for failure to attach the pleadings to the motion below. In *Washington*, however, it was noted that although CPLR 3212 (b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is "sufficiently complete," such as the case when the pleadings are filed electronically. There should be no reversal based upon Point IV of Plaintiff-Appellant's brief.

V. CONCLUSION

For the reasons stated above, Defendants-Respondents respectfully request that the Court deny Plaintiff-Appellant's appeal in its entirety.

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