FILED: NEW YORK COUNTY CLERK 04/08/2013
NYSCEF DOC. NO. 42

INDEX NO. 650417/2013
RECEIVED NYSCEF: 04/08/2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JEAN BARMASH, an individual, for himself and derivatively on behalf of nominal defendant ENERGYSCORECARDS, INC.,	Index No. 650417/2013 (Schweitzer, J.)
Plaintiff,	Oral Argument Requested
- against -	Motion Sequence #2
JEFFREY PERLMAN and BRIGHT POWER, INC.	
Defendants.	
-and-	
ENERGY SCORECARDS, INC.,	
Nominal Defendant.	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Jean Barmash, by his undersigned attorneys, respectfully submits this Memorandum of Law in opposition to Defendants' motion to dismiss the Complaint.

PRELIMINARY STATEMENT

Plaintiff Jean Barmash, a talented software developer, created a software program for nominal defendant EnergyScoreCards, Inc. ("ESC") that is now the market leader in New York for the measurement and benchmarking of energy and water usage. (¶ 76).[1] Hundreds of buildings and major property owners use it now (¶ 105) to comply with New York's Local Law 85, that requires such measurement for buildings of over 5,000 square feet in size (¶ 35). The software is an outright success: Barmash and ESC should be thrilled.

The contrary is true. ESC's overwhelmingly dominant controlling shareholder, Bright Power, Inc. ("Bright Power") has taken ESC's key asset – the software – and licensed it under Bright Power's name, for Bright Power's benefit (¶¶ 98-107). Bright Power has drained ESC of its talent, its intellectual property, and left the company an empty shell. ESC permitted this to occur because its President and Director, Jeffrey Perlman, is also the head and founder of Bright Power. ¶ 27. Barmash now comes to this Court for redress for Perlman's and Bright Power's severe misconduct.

Unable to address these allegations, Defendants concoct a new story in their motion to dismiss, which they support with an Affidavit from Perlman, who testifies at length as to Plaintiff's supposedly deficient software quality (Perlman Aff. ¶¶ 13-15) and to Plaintiff's supposedly ornery character (*id.* ¶¶ 16-23). However, Defendants do not get to rewrite the Complaint on a motion to dismiss with a self-serving affidavit of this type. Case law is clear such evidence may not be used on a CPLR Rule 3211(a)(7) motion such as the motion at bar.

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[1] Unless otherwise stated, all references ("¶ __") are to the Complaint. *See* March 18, 2013 Perlman Aff. Ex. A.

Defendants' arguments on the mertis are even flimsier. They claim Plaintiff is inadequate to the task of bringing derivative claims against Perlman on ESC's because he once threatened to sue ESC directly. Plaintiff's Memorandum of Law ("Def. Mem.") at 11. But the mere threat of such a lawsuit, without more, creates no such inadequacy under governing Delaware law. *Youngman v. Tahmoush*, 457 A.2d 376, 380 (Del. Ch. 1983) ("purely hypothetical, potential or remote conflicts of interests never disable the individual plaintiff"). Nor does Plaintiff's request for relief to enjoin Bright Power from further sucking the life out of ESC make Plaintiff an inadequate representative of ESC. Defendants' argument that a dominant shareholder should be permitted to continue draining ESC of its assets (Def. Mem. at 13-14) lacks a single supporting citation to a case or law – and for good reason, as it is meritless.

Defendants next argue that because Bright Power owns over 81% of ESC, Plaintiff's derivative case should be dismissed because "substantially all of the benefit afforded to ESC will inure to the benefit of B[right] P[ower]." Def. Mem. at 14. This is a shocking claim. In other words, a very dominant shareholder can damage a minority shareholder at will, with no consequences, because the derivative action that will follow will simply end up benefiting the very dominant shareholder. This remarkable assertion – again unsupported by authority – is all the more astounding given that it is well settled that rapacious majority shareholders such as Bright Power owe direct fiduciary duties to minority shareholders such as Plaintiff. *Kahn v. Lynch Communication Sys.*, 638 A.2d 1110, 1113-14 (Del. 1994) (so holding).

Next, Defendants claim that Plaintiff cannot enforce its rights against Bright Power because that direct claim cannot be mixed with the derivative claims Plaintiff brings against Perlman (Def. Mem. at 16-17). Not so. As Plaintiff demonstrates below, a plaintiff cannot bring conflicting direct and derivative claims, i.e., where plaintiff both sues a company and brings suit

in its name. That is not the case here and this principle is irrelevant in this action. Moreover, any such holding would serve to insulate the dominant shareholder's depredations of the minority, which no case permits.

Finally, Defendants claim that Plaintiff knew how Bright Power actually raided ESC and stole its assets for no consideration, and that this immunizes Defendants from suit under an estoppel theory. Def. Mem. at 18-19. This contention is meritless because Defendants point to no affirmative act, vote or conduct by Plaintiff that approved of Bright Power's looting. Defendant only supports this claim with Perlman's affidavit, which is both insufficient on its face to raise this contention and further cannot be reviewed on this motion to dismiss.

Defendants' motion should be denied.

ALLEGATIONS OF FACT

Plaintiff Jean Barmash is a talented software developer. (¶ 2). At the behest of Defendant Jeffrey Perlman, who is the President of Defendant Bright Power, Inc., Barmash created software that enables large buildings to monitor their energy usage and water consumption. (¶¶ 2, 4, 27-29). To induce Barmash to create the software, Perlman founded a company, EnergyScoreCards, Inc. ("ESC"), for the purpose of commercially exploiting the software's capabilities. (¶¶ 5, 50-53). Barmash received no payment in 2009 and 2010 for his work in creating the software, receiving founder's stock instead. (¶¶ 48-51, 60-61).

ESC has two shareholders, Bright Power and Barmash. *See* Defendants' March 18, 2013 Mem. of Law ("Def. Mem.) at 16 ("Plaintiff is one of ESC's two shareholders, with BP being the other"). Barmash owns roughly 25% of ESC's shares. (¶¶ 58-60).[2] Defendant Perlman, Bright

[2] Although not material to this motion, while Defendants contend that Barmash owns only 19% of the Company, Defendants have offered no proof of this claim. Plaintiff disputes this erroneous factual claim. As Plaintiff will show at an appropriate time, though Defendants purport to have exercised a contractual option to

Power's President, is also is President, Secretary, Treasurer and Director of ESC. (¶¶ 6-7).

Bright Power and Perlman utterly dominate ESC. Not only is Perlman is President, Secretary, Treasurer and Director of ESC, but every person who now performs services for ESC in any capacity is a Bright Power employee. (¶ 98). Bright Power employees run ESC's Twitter account, monitor its email and answer its phones. (¶ 96). To contact ESC, one has to contact a Bright Power employee, Phil Vos, at a Bright Power email address. (¶ 99). Bright Power posts updates and events relating to ESC's software on its own website, not ESC's; by contrast, ESC's website is bereft of news about ESC, markets Bright Power's services and accomplishments, and directs visitors to its website to contact Bright Power personnel. (¶¶ 96-97).

ESC thus has not one employee whose loyalty resides with ESC, being operated entirely by personnel who are loyal to Bright Power. The same is true of ESC's Board. Director Perlman is Bright Power's founder and president. (¶ 139). Perlman has purported to appoint three other directors – all in violation of the very specific procedures set forth in ESC's bylaws (¶¶ 143-56, 166-81) – who are also beholden to Bright Power: Connor Laver, who works for Bright Power; Mitchell Hauser, who represented Bright Power in negotiations with Barmash; and Charles Komanoff, a consultant to Bright Power. (¶¶ 157-58, 188-92).

Plaintiff alleges serious breaches of fiduciary duty by both Bright Power and Perlman, of two kinds. *First*, Perlman and Bright Power have treated and ESC's software as if it were their own, and as if they were free to do with it as they pleased. Bright Power holds itself out as having control over ESC's software. Perlman and Bright Power have used that control to enter into licensing contracts for use of ESC's software in its own name with multiple large property owners, the revenues of which flow to Bright Power, not ESC. (¶¶ 91-92, 105, 207).

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repurchase some of Barmash's shares, the exercise was ineffective because Barmash was, at minimum, a member of the Board of Directors and therefore his employment by ESC had not then terminated.

Second, Defendants usurped a corporate opportunity belonging to ESC by establishing a Portfolio Analysis program that is built upon the use of ESC's software and building. These revenues, too, flow to Bright Power, not ESC. (¶¶ 109-118, 207, 219).

These allegations plainly state claims for fiduciary breach under Delaware law (which governs Plaintiff's claims, as discussed below), and Defendants do not argue otherwise. *Lama Holding v. Smith Barney Inc.*, 88 N.Y.2d 413, 423, 646 N.Y.S.2d 1370, 1374 (1996) ("Under Delaware law, corporate officers, directors and controlling shareholders owe their corporation and its minority shareholders a fiduciary obligation of honesty, loyalty, good faith and fairness"); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder"). Such allegations amply withstand a motion to dismiss under CPLR 3211(a)(7), particularly one that is not even addressed to the face of the pleading.

ARGUMENT

I. DEFENDANTS' MOTION IS DOOMED TO FAILURE UNDER THE STANDARD GOVERNING MOTIONS MADE UNDER CPLR 3211(a)(7)

"It is settled that on a pre-answer motion to dismiss brought pursuant to CPLR 3211(a)(7), the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor." *Gorelik v. Mount Sinai Hosp. Ctr.*, 19 A.D.3d 319, 319, 797 N.Y.S.2d 497, 498 (1st Dep't 2006) (citations omitted). The motion "must be denied if from the pleading's four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Id.* (citations omitted). *Accord Sand Canyon Corp. v. Homeward Residential, Inc.*, 650504/2012, 2012 N.Y. Misc.

LEXIS 3891, at *8 (N.Y. Sup. Ct. July 25, 2012) (Schweitzer, J.) (citing cases).[3]

Under equally settled law, Defendants cannot obtain dismissal under CPLR 3211(a)(7) based upon Defendants' own affidavit testimony. As the Court of Appeals has held: "affidavits received on a[] ... motion to dismiss for failure to state a cause of action *are not to be examined for the purpose of determining whether there is evidentiary support for the pleading*." *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 316 (1977).

Moreover, under *Rovello*, when a defendant improperly submits such an affidavit, plaintiff has no obligation to respond in kind: "Of course, CPLR 3211 allows plaintiff to submit affidavits, but it does not oblige him to do so on penalty of dismissal.... [U]nless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint." *Rovello*, 40 N.Y.2d at 635, 389 N.Y.S.2d at 316 (1977). *Accord German v. Bruins Transp. Inc.*, 272 A.D.2d 438, 439, 708 N.Y.S.2d 331, 332 (2d Dep't 2000) ("the plaintiffs may not be penalized for failing to interpose evidentiary submissions"). Thus, though Plaintiff disputes all of the allegations in the Perlman Affidavit, which are unsubstantiated by any independent evidence, Plaintiff has not burdened the Court with an extraneous affidavit here.[4]

Under the above precedent, if the "factual allegations discernable from the four corners of the pleadings, taken together, manifest causes of action cognizable at law," the Court's work

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[3] Copies of all unreported cases cited herein are annexed to the accompanying Affirmation of Stuart Kagen.

[4] Two egregious examples of obviously disputed "facts" will suffice. *First*, Perlman discusses at length the parties' supposed "agreement." The "agreement" cited, however, is an April 6, 2009 non-binding letter of intent which states: "the provisions of this Letter of Intent are not legally binding on any Party and the rights and obligations of the Parties shall only be established pursuant to a definitive agreement between the parties." Such a letter creates no obligations of any kind. *UrbanAmerica, L.P. II v. Carl Williams Group, LLC*, 95 A.D.3d 642, 644, 945 N.Y.S.2d 233, 236 (1st Dep't 2012). *Second*, Perlman makes self-serving claims about fees supposedly paid by Bright Power and about Barmash's state of knowledge, but puts forward no independent proof concerning (1) the details of these transactions, (2) the fairness of the terms, (3) presentation to Barmash of the specific terms of each transaction, or (4) any participation by Barmash in such transactions. Perlman's self-serving claims are obviously controvertible, particularly in the absence of any such actual proof, and Barmash disputes them.

is done, and the motion must be denied. *Health-Loom Corp. v. Soho Corp. v. Soho Plaza Corp.*, 209 A.D.2d 198-99, 618 N.Y.S.2d 287, 288 (1st Dep't 1994). The court may not examine "contrary factual allegations in the defendants['] affidavits" to decide the motion, because such extrinsic evidentiary submissions simply have nothing to do with whether a cause of action is well-pled. *Id.*, 209 A.D.2d at 199, 618 N.Y.S.2d at 288 (citing *Rovello*).

Rovello thus dooms Defendants' motion. Defendants do not contend that, on its face, the Complaint fails to allege causes of action for fiduciary breach and related causes of action. Defendants therefore have waived any such argument. To the extent Defendants rely on Perlman's affidavit to contravene the allegations in the Complaint, the motion is destined to fail, because *Rovello* and *Health Loom* foreclose any such argument.

Nor does the single, narrow exception under *Rovello* to the no-affidavit rule rescue Defendants' motion. *Rovello* created a narrow exception where "the affidavits establish conclusively that plaintiff has no cause of action." *Rovello*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314, 316 (1977).[5] In so holding, the Court of Appeals made clear that only the rare case warrants dismissal on this ground: "[A]ffidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action." *Id. See also Lawrence v. Miller*, 11 N.Y.3d 588, 595, 873 N.Y.S.2d 517 ("Affidavits submitted by a [defendant] will almost never warrant dismissal under CPLR 3211.").

Only the rare case meets this standard because the bar is set very high: dismissal is prohibited unless Defendant shows (1) "that a material fact as claimed by the pleader ... is not a fact at all, and (2) no significant dispute exists" regarding that fact." *Guggenheim v. Ginzburg*,

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[5] Defendants concur. *See Taylor v. Pulvers, Pulvers, Thompson & Kuttner, P.C.*, 1 A.D.3d 128, 766 N.Y.S.2d 430 (1st Dep't 2003) (movant must "conclusively demonstrate[] that plaintiff had no cause of action"), *cited in* Def. Mem. at 8; *Fields v. Leeponis*, 95 A.D.2d 822, 823 (2d Dep't 1983) ("a dismissal will be warranted only in those situations where the affidavits conclusively establish that there is no cause of action"), *cited in* Def. Mem. at 8.

43 N.Y.2d, 268, 275, 401 N.Y.S.2d 182, 185 (1977). *Accord County of Suffolk v. MHC Greenwood Vil., LLC*, 91 A.D.3d 587, 589-90, 937 N.Y.S.2d 89, 91 (2d Dep't 2012).

To satisfy this stringent two-part test, Defendants must offer incontrovertible proof from an unimpeachable source,[6] not Defendants' own say-so, as shown by the very authority cited in Defendants' own brief. *See Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250, 767 N.Y.S.2d 418, 421 (1st Dep't 2003), *cited in* Def. Mem. at 7. There, the First Department held:

> Contrary to defendant's contention, the affidavits submitted in support of defendant's CPLR 3211(a)(7) motion do not "conclusively establish that [plaintiff] has no cause of action" .... *[T]hey merely dispute some of the factual allegations of the complaint.*

(Emphasis added; citing *Rovello*). Similarly, in *Tsimerman v. Janoff*, 40 A.D.3d 242, 242, 835 N.Y.S.2d 146, 147 (1st Dep't 2007), the First Department held:

> *These affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss*, for the purpose of determining whether there is evidentiary support for the complaint .... and do not otherwise conclusively establish a defense to the asserted claims as a matter of law.

(Emphasis added; citing *Rovello*).

Defendants' affidavit may not be considered under CPLR 3211(a)(7) for exactly the same reason that such affidavits are not "documentary evidence" under CPLR 3211(a)(1). In both cases, dismissal is reserved for cases where the defendant's proof conclusively disposes of all factual issues because it is "essentially undeniable." *See Fontanetta v. John Doe 1*, 73 A.D.3d 78, 85, 898 N.Y.S.2d 569, 574 (2nd Dep't 2010); *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 347, 756 N.Y.S.2d 94, 96 (2d Dep't 2010).

Defendants' affidavit testimony does not satisfy that standard because, by its nature, such

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[6] As Defendants' own case shows. *See Biondi v. Beekman Hill Apt.*, 257 A.D.2d 76, 692 N.Y.S.2d 304 (1st Dep't 1999), *cited in* Def. Mem. at 9 (dismissing plaintiff's claim for indemnification of liability under a settlement agreement, where the agreement recited on its face that it covered only non-indemnifiable punitive damages).

one-sided testimony is essentially *deniable*. *Fontanetta, supra*; *Berger, supra*; *Innovative MR Imaging, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2013 N.Y. Misc. LEXIS 955 (N.Y. App. Term Mar. 12, 2013) ("Nor was the affidavit of defendant's no-fault litigation examiner so "essentially undeniable" as to qualify as documentary evidence that conclusively refutes any claim that plaintiff might have"). As a sister court has explained:

> *The mere fact that [Defendant's] affidavit disputes the fact that Ms. Green was discriminated against and quit after only one month of employment because of a negative performance review and never raised any complaints is not sufficient to resolve all issues of fact to dispose of the plaintiff's claim.* The standard for a document to be considered documentary' is that it must consist of "a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based." *The affidavit ... cannot meet the essentially undeniable' test because an affidavit can easily be challenged by an opposing affidavit...*

Green v Canarsie A.W.A.R.E., INC., 35 Misc. 3d 1214(A), 951 N.Y.S.2d 86, 2012 N.Y. Misc. LEXIS 1822, (Table) (N.Y. Sup. Ct. April 10, 2012) (emphasis added) (citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 22).

Under *Rovello*, Defendant Perlman's affidavit fails to "conclusively establish" the absence of material facts, dooming Defendants' motion from the start.

II. DEFENDANTS' CHALLENGE TO PLAINTIFF'S ADEQUACY IS BOTH PROCEDURALLY IMPROPER AND MERITLESS

Because Defendants' motion is fatally flawed, the Court need not reach the merits in order to deny Defendants' motion. Regardless, Defendants' arguments also fail on the merits. As Defendants correctly note, Plaintiff's direct and derivative causes of action concerning fiduciary breach are governed by Delaware law. Def. Mem. at 9 n.4.[7] And Delaware law,

[7] *See also Diamond v. Oreamuno*, 24 N.Y.2d 494, 503-504, 301 N.Y.S.2d 78, 85 (1969) (holding that the law "of the State which created the corporation" governs claims for fiduciary breach); *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 607 (S.D.N.Y. 2011) ("New York applies the internal affairs doctrine to claims for breach of fiduciary duty and, thus, applies the law of the state of incorporation to such claims").

including the very cases on which Defendants rely, directly refutes their arguments.[8]

A. **Defendants Fail to Show Economic Antagonism Between Barmash and ESC**

Defendants first seek dismissal because of supposed "economic antagonism" between Barmash and ESC's other shareholder, Bright Power. As a matter of law, however, none of Defendants' argument satisfy Delaware's stringent standard for dismissal.

Defendants bear the "burden of demonstrating that *a serious conflict of interest actually exists.*" *Youngman v. Tahmoush*, 457 A.2d 376, 381 (Del. Ch. 1983) (emphasis added). This inquiry, moreover, is "*highly factual.*" *Canadian Commercial Workers Industry Pension Plan v. Alden*, 2006 Del. Ch. LEXIS 42, at * 39 (Del. Ch. Feb. 22, 2006).[9]

Beyond that stringent standard, four separate rules of law each contradict Defendants' argument. *First*, "[t]he fact that the plaintiff may have interests which go beyond the interests of the class, *but are at least co-extensive with the class interest*, will not defeat his serving as a representative of the class." *Youngman*, 457 A.2d at 380 (emphasis added). *Second*, "purely hypothetical, potential or remote conflicts of interests *never* disable the individual plaintiff." *Id.* (emphasis added). *See also Alden*, 2006 Del. Ch. LEXIS *42*, at *35. *Third*, "inadequacy as a class representative is not made out *merely because of a discordant relationship between plaintiff and defendants*. To the contrary, this may inspire plaintiff to be an even more forceful advocate." *Alden*, 2006 Del. Ch. LEXIS 42, at *43 (citation omitted). *Fourth*, to show that a "serious conflict of interest" exists the defendant must show "that the plaintiff cannot be expected to act in the interests of the others *because doing so would harm his other interests.*"

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[8] Despite raising five different objections to Plaintiff's derivative claims, Defendants do *not* challenge Plaintiff's showing that demand on ESC's Board to assert those claims is excused because Defendant Perlman, after learning of Barmash's intention to file the within Complaint, responded by attempting to manipulate the composition of ESC's Board so as to stack it with two more yes-men answerable to him and Bright Power, in clear violation of ESC's bylaws. *See* Compl. ¶¶ 163-83. Defendants' silence on this score speaks volumes.

[9] Both cases are cited in Def. Mem. at 12.

Emerald Partners v. Berlin, 564 A.2d 670, 674 (Del. Ch. 1989) (citing *Youngman*).

Defendants' contentions cannot survive under these standards. Defendants claim that: (1) in September 2012, Plaintiff purportedly threatened to sue ESC for copyright infringement; (2) before initiating this lawsuit, Plaintiff provided Defendants with a copy of the Complaint in this action; (3) Plaintiff supposedly has failed to satisfy a purported "contractual obligation" to "fully develop" ESC's software. In addition, Defendants claim that Plaintiff is pursuing a "personal goal of a vastly overpriced buy-out."

Before addressing these arguments, it is instructive to see what an *actual* economic antagonism looks like, to see how far Defendants fall short. In *Priestley v. Comrie*, 2007 U.S. Dist. LEXIS 87386 (S.D.N.Y. Nov. 28, 2007), *cited in* Def. Mem. at 10, the plaintiff filed both direct claims seeking to recover on her loans she personally made to the defendant, and derivative claims. The loan recovery sought far outweighed the plaintiff's interest in the derivative claims she asserted. These two sets of claims created an "impermissible conflict of interest" because "if Plaintiff succeeds in recovering on her individual claims, the shareholders may be unable to recover on the derivative action." *Id.* at *9.

Nothing like *Priestley* is alleged here. As to Defendants' first argument, Plaintiff has not in fact sued for copyright infringement. Therefore, any such threat made over 8 months ago falls into the dustbin of "purely hypothetical, potential or remote conflicts of interests [that] *never* disable the individual plaintiff." *Id.* (emphasis added). *Youngman*, 457 A.2d at 180 (emphasis added). By definition, an *unasserted* claim cannot create an *actual* conflict of interest between the Plaintiff's derivative claims and some other claim of Plaintiff's.

As to Defendants' second argument, the mere fact that Plaintiff showed a copy of the Complaint to Defendants prior to initiating litigation similarly creates no actual conflict. Giving

Defendants a preview of the alleged fiduciary breaches and a pre-litigation opportunity to settle the dispute simply does not create an *actual* conflict of interest between the derivative claims asserted by Plaintiff and some other claim asserted by Plaintiff.

Third, the mere fact that the *Defendants* have alleged counterclaims also cannot create a conflict of interest. As the court held in *Zamer v. Diliddo*, 1998 U.S. Dist. LEXIS 22300 (Oct. 22, 1998), *cited in* Def. Mem. at 10, "[i]t would be fundamentally unfair to plaintiffs in shareholder derivative actions involving closely-held corporations if the opposing side could defeat their status as representative plaintiffs by inserting personal counterclaims in the case." *Id.* at *12. Moreover, these allegations of contractual breach rest on the Perlman Affidavit – which is not properly before the Court on a CPLR 3211(a)(7) motion – and are meritless to boot, as demonstrated in Plaintiff's pending motion to dismiss (Motion Sequence No. 3).

This leaves only Defendants' rhetorical statement that Plaintiff is pursuing a "personal goal of a vastly overpriced buy-out." That argument goes nowhere because in this litigation, Plaintiff has not asserted a claim for repurchase of his shares. Consequently, once again, there cannot be any *actual* conflict between the breach of fiduciary claims that Plaintiff is pursuing derivatively and any other claim being pursued by Plaintiff.

Moreover, even assuming *arguendo* that Barmash has a personal interest in having his shares bought out at a fair price – an interest nowhere asserted in this or any other pending litigation – as a matter of law any such interest does not create "economic antagonism": "The fact that the plaintiff may have interests which go beyond the interests of the class, *but are at least co-extensive with the class interest*, will not defeat his serving as a representative of the class." *Youngman v. Tahmoush*, 457 A.2d 376, 380 (Del. Ch. 1983) (emphasis added).

Here, Barmash's derivative claims seek revenues derived from ESC's intellectual

property and corporate opportunities that Perlman diverted from of ESC to Bright Power. Such interests are co-extensive with the interests of ESC. Defendants' allegation that Barmash has interests that go beyond restoring such revenues to ESC is irrelevant because the derivative claims asserted are co-extensive with all shareholders' interests. *Youngman*, 457 A.2d at 381 ("In any event, it takes more than mere hypothesis to disqualify a plaintiff. In this case, it is clear that the plaintiff shares with the other stockholders the common interest of seeking redress from the defendants for alleged breaches of fiduciary duties. Any recovery which results from this action will inure to the benefit of the corporation.").

In sum, Defendants fail to satisfy their burden under Delaware law and CPLR 3211(a)(7). Defendants do not show "that the plaintiff cannot be expected to act in the interests of the others because doing so would harm his other interests." *Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989). Because the *only* claims Plaintiff asserts concern breaches of fiduciary duty owed to all shareholders of ESC, no such antagonism exists.

B. Plaintiff's Request that the Court Enjoin Defendants from Using the Intellectual Property They Misappropriated Is Not Grounds for Dismissal

Defendants seek dismissal of *all* of Plaintiff's derivative causes of action on the grounds that *one* of Plaintiff's requests for relief, among several, is that Defendants Bright Power and Perlman be enjoined from doing so further. Defendants cite no legal authority for this proposition, which is meritless on multiple grounds.

First, Plaintiff's request is appropriate. The Complaint's Eighth Cause of Action alleges misappropriation of ESC's software. *See* Compl. ¶¶ 248-62. As Defendants have not moved to dismiss this claim, it must be presumed to be well-pled. Injunctive relief, however, is an entirely appropriate remedy for this claim. *Invesco Institutional (N.A.), Inc. v Deutsche Inv. Mgt. Ams., Inc.*, 74 A.D.3d 696, 697 (1st Dep't 2010) (affirming grant preliminary injunction on plaintiff's

claim for misappropriation of its proprietary software and database structure).

Second, Defendants' argument rests entirely solely on the unproven allegation that "the revenue ESC derives from BP purchasing the right to use the Software is significant and the fees paid by BP often exceed the fees paid by ESC's direct customers." Perlman Aff. ¶¶ 8-9." Def. Mem. At 13. Such an argument is improper under CPLR 3211(a)(7).

Defendants, moreover, offer no evidence for this self-serving claim. Defendants, for example, offer no evidence of: (1) actual payment of these supposed fees; (2) what these supposed fees are; (3) of who determined these fees; (4) how these fees were set; and (5) whether these fees paid are in fact fair to ESC. Defendants do not address whether they are reselling ESC's software to third parties for much higher fees to Bright Power, and pocketing the difference, nor whether they have misappropriated ESC's software for a Portfolio Analysis program that by all rights belongs to ESC. Defendants are thus asking the Court to assume the truth of their unproven factual allegations grant dismissal on that basis. That is plainly improper.

Third, Defendants are asking the Court to throw out the baby with the bath water. If the Court were to determine, after evidentiary hearing, that the equitable relief requested by Plaintiff is inappropriate, then the Court could always decide to deny such relief, or grant some other form of equitable relief, at that time. Yet Defendants are asking the Court to dismiss *all* of Plaintiff's derivative claims today, before the Court has held any hearing. This, too, is improper.

C. Because Plaintiff Brings Only Derivative Claims Against ESC, Defendants' Argument About Mixing of Direct and Derivative Claims Is Irrelevant

Plaintiff asserts only derivative claims against Perlman on behalf of ESC. *See* Complaint ¶¶ 200-15, 222-28, 229-233, 238-242 , 243-47, and 248-62. Plaintiff asserts no direct claim against either ESC or Perlman. Accordingly, there is no conflict of interest between the Plaintiff and the corporation.

Defendants cite authority holding that a plaintiff may not simultaneously sue in the name of the corporation on a derivative basis, *and* sue the company itself directly on different legal theories. *See, e.g., JFK Family Ltd. P'ship v. Millbrae Natural Gas Development Fund 2005, L.P.*, 2008 N.Y. Misc. LEXIS 5548 (N.Y. Sup. Ct. Sept. 16, 2008). There, plaintiff sued a partnership directly for breach of contract, unjust enrichment and breach of the covenant of good faith and fair dealing. *Id.* at *6-11. At the *same time*, plaintiff also sued *in the name of* the defendant it was suing directly, asserting derivative claims. *Id.* at *11-15. The *JFK* court held that plaintiff cannot both sue a company *and* stand in its shoes. This created a conflict because while "the derivative action seeks to enhance the value of the corporation generally by seeking recovery for the corporation on its own behalf," at the same time, plaintiff was seeking "a recovery *against* the corporation" itself. *Id.* at *46 (emphasis in original).

This is not the situation here. Plaintiff brings *no* claim against ESC directly. Plaintiff is *not* suing ESC. Consequently, there is *no* conflict of interest: plaintiff seeks to enhance ESC's recovery only and has *no* claim against ESC that would damage the corporation directly. Accordingly, Plaintiff's argument is irrelevant.[10]

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[10] In *Baker v. Andover Assocs., Mgmt. Corp.,*, 2009 N.Y. Misc. LEXIS 6587, at *40-46 (Westchester Sup. Ct. Nov. 30, 2009), *cited in* Def. Mem. at 15, plaintiff brought claims that could only be commenced derivatively by the corporation. At the same time, plaintiff wished to sue the corporation directly for claims such as negligent misrepresentation. *Id.* at *10-11. This is the conflict of interest that is not permitted – and it is wholly absent here. *See also Wall St. Sys. v. Lemence*, 04 Civ. 5299, 2005 U.S. Dist. LEXIS 2006, at *2 (S.D.N.Y. Feb. 8, 2005), *cited in* Def. Mem. at 15 (noting that plaintiff sued defendant company WSS directly as well as, at the same time, suing in the name of WSS derivatively); *Ryan v. Aetna Life Ins. Co.*, 765 F. Supp. 133, 136 (S.D.N.Y. 1991), *cited in* Def. Mem. at 15 (holding that plaintiff cannot simultaneously sue corporation directly for damages while suing in the name of the corporation). *Jones v. Citigroup*, 958 N.Y.S.2d 61, 2010 N.Y. Misc. LEXIS 3456 (App. Term. 1st Dep't July 27, 2010), *cited in* Def. Mem. at 15, is a classic example of this conflict: there, plaintiff both sued Citigroup directly for fraud while at the same time claiming the right to sue in its name for breach of fiduciary duty. *Id.* at *1 (though plaintiff did not style the fiduciary duty a derivative claim, as he was required to have done). To like effect are *Balk v. 125 W. 92nd St. Corp.*, 24 A.D.3d 193, 194, 806 N.Y.S.2d 31, 32 (1st Dep't 2005) (plaintiff sued cooperative housing corporation directly and simultaneously briought claims in the cooperative's name derivatively) and *Barbour v. Knecht*, 296 A.D.2d 218, 219, 743 N.Y.S.2d 483, 485 (1st Dep't 2002) (plaintiff both sued in the name of housing cooperative corporation and simultaneously sued the corporation directly). Finally, *Abrams v. Donati*, 66 N.Y.2d 951, 498 N.Y.S.2d 782 (1985) is a New York case not apply Delaware law and is further irrelevant. Moreover, it does not even deal with a mixture of direct and derivative claims, holding simply

Similarly, where the direct and derivative claims are against the same parties, for the same conduct, and the duplicative direct claims are "mirror images" of the derivative claims (and are brought simply under a different legal label), courts have refrained from permitting such claims to proceed.[11] This situation, too, does not exist here. The only claims brought directly herein are for duties that ESC's controlling shareholder, Bright Power, owes to Plaintiff Barmash *directly*. *See* Point III *infra*. Further, Bright Power is not sued derivatively.

In any event, Delaware law recognizes a plaintiff's right to assert derivative and direct claims in the same action. The Delaware Supreme Court's most recent pronouncement is clear and dispositive: "Appellants suggest that, where the facts would support both types of claims, stockholders must pursue only the derivative claim if they have standing to do so. Appellants are mistaken. *Both types of claims may be litigated at the same time*." *Loral Space & Communs., Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 868 (Del. 2009) (emphasis added). *See also id.* at 870 ("Loral offers no authority in support of its position that the pendency of a derivative action precluded Loral's stockholders from bringing a direct action, and we are aware of none."). *Accord Carsanaro v. Bloodhound Techs., Inc.*, 2013 Del. Ch. LEXIS 69, at *81 (Del. Ch. Mar. 15, 2013) (citing *Loral*); *Wilmington Materials, Inc.*, 754 A.2d 881, 902-05, 906-08 (Del.Ch. 1999) (awarding plaintiff damages on his direct claim and awarding separate damages on his derivative claim).

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that a shareholder cannot sue a corporation directly when the wrong sued for is mismanagement by company officers, as that is a derivative action, and a shareholder cannot "confuse" his direct and derivative rights. *Id.* at 953, 498 N.Y.S.2d at 783.

[11] *St. Clair Shores Gen'l Employee Retirement System v. Eibeler,* 06 Civ. 688, 2006 U.S. Dist. LEXIS 72316, at *7 (S.D.N.Y. Oct. 4, 2006). The plaintiff in *St. Clair* both sued directors and officers in the name of the corporation under various derivative theories and simultaneously sued the same directors and officers, for the same conduct, under direct legal theories as well. *Id.* at *7-8. *See also Tuscano v. Tuscano*, 403 F. Supp. 2d 214, 223 (E.D.N.Y. 2005) (claims brought derivatively and directly against same company officer for similar conduct simultaneously). *See id.* at 223. That is not the case here. Plaintiff sues no party in both derivative and direct capacities simultaneously.

ATR-Kim Eng Fin. Corp. v. Araneta, 2006 Del. Ch. LEXIS 215 (Del. Ch. Dec. 21, 2006), *aff'd,* 930 A.2d 928 (Del. 2007) is also directly on point. In *ATR*, plaintiff ("ATR"), a 10% shareholder, alleged that defendant, who held the remaining 90% of shares of the corporation ("Delaware Holding Company"), transferred key asserts of the corporation to family members in breach of his fiduciary duties. The court noted that ATR's complaint "alleges direct and derivative injuries" caused by this transfer, alleging both that ATR was "harmed as a stockholder of the Delaware Holding Company" and that "the corporation itself was injured by this transaction." 2006 Del. Ch. LEXIS 215, at *25. Far from dismissing the derivative claims, the court held, after trial, that the controlling shareholder's breaches caused *both* types of injuries: "The major breach of fiduciary duty in this case is one that injured the Delaware Holding Company in the first instance and ATR secondarily as a minority shareholder." *Id.* at *77. *Accord Fischer v. Fischer*, 1999 Del. Ch. LEXIS 217, at *11- *12 (Del. Ch. Nov. 4, 1999) (permitting both direct and derivative claims where the remaining shareholders transferred key assets to a separate corporation in which the plaintiff shareholder had no interest; "[t]he pleaded fundamental wrong alleged underlies both the asserted individual and the derivative claims").

D. <u>Defendants Fail to Establish "Vindictiveness"</u>

Defendants argue that Barmash is "vindictive" because his prior counsel asserted unjustified copyright claims. Once again, Delaware law is to the contrary.

Under Delaware law, merely alleging "a larger pattern of harassment that includes allegedly unjustified demands ... falls far short of establishing facts that would disqualify [plaintiff] as a representative of the shareholder class based on its alleged 'vindictiveness'." *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, 1995 Del. Ch. LEXIS 140, at *15 n.2 (Del. Ch. Nov. 21, 1995). Moreover, "inadequacy as a class representative is not made out merely

because of a discordant relationship between plaintiff and defendants." *Canadian Commercial Workers Industry Pension Plan v. Alden*, 2006 Del. Ch. LEXIS 42, at *43. For these reasons, Defendants' argument fails.

E. Plaintiff's Supposed Lack of Support from Non-Shareholders is Irrelevant

Finally, Defendants seek dismissal because two individuals who are not shareholders, but merely "hold[] options to purchase ESC shares," have "indicated that they do not support Plaintiff's action in any way. Perlman Aff., ¶ 23." Def. Mem. At 16. Defendants, however, do not offer sworn statements from these two option holders, but instead relay on hearsay affidavit evidence from Perlman, which is procedurally improper under CPLR 3211(a)(7). Beyond that, since the two individuals in question, Messrs. Braman and Laver, do not in fact hold any stock, their views on the litigation are irrelevant – particular since they are both Bright Power employees. *See* Compl. ¶¶ 115, 158. Even if these individuals were stockholders, however, it would make no difference: "A stockholder derivative claim may be maintained although it does not have the support of a majority of the corporations shareholders or even the support of all of the minority stockholders." *Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989).

Defendants further argue that since Bright Power does not favor a lawsuit against itself for its fiduciary breaches, the lawsuit must be dismissed. That argument is not simply wrong as a matter of law (*see Emerald Partners, supra*; *see also ATR, Boyle*, and *Fischer*, discussed in Point II.C), but perverse. According to Defendants, if the dominant shareholder and the president pillage a closely-held corporation and then disapprove of suing themselves, the oppressed minority shareholder may not do so, and therefore the defendants are immune from suit. Defendants cite no Delaware law for this proposition, and none exists. *See ATR, supra* (recognizing 10% shareholder's right to assert derivative claims against 90% shareholder);

Greenberg v. Acme Folding Box Co., 84 Misc. 2d 181, 374 N.Y.S.2d 2d 997 (Sup. Ct. Kings Co. 1975) (minority stockholder not precluded from derivative action simply because benefits would accrue to defendants, who hold 91% of stock), *cited in* Def. Mem. at 18.

III. PLAINTIFF'S CLAIMS AGAINST CONTROLLING SHAREHOLDER BRIGHT POWER ARE DIRECT

Plaintiff's Complaint alleges seven direct claims against Bright Power for breaching its fiduciary duty to Plaintiff (¶¶ 216-21), waste of corporate assets (¶¶ 222-28), unjust enrichment (¶¶ 229-33), constructive trust (¶¶ 238-42), an accounting (Compl. ¶¶ 243-47), misappropriation of confidential business information (¶¶ 248-62), and aiding and abetting in Perlman's breaches of fiduciary duty (¶¶ 234-37).

Defendants assert that these claims are derivative "because any damages resulting from the alleged wrongful actions would flow to ESC and not to Plaintiff directly." Def. Mem. at 17. Defendants' contention is meritless.

Plaintiff alleged well-pleaded facts to show that Bright Power is ESC's controlling shareholder. The Complaint alleges that Bright Power is almost a 70% shareholder of ESC (¶¶ 57-59). Defendants themselves admit that Bright Power is the only shareholder besides Barmash. Moreover, Bright Power dominates every facet of ESC's business and decision-making. ESC is both operated and directed exclusively by Bright Power and its employees (¶¶ 96-99, 139, 143-56, 166-81). Bright has Power assigned itself ESC's own valuable software for its own benefit (¶¶ 90-107), used ESC's assets and abilities to market and promote Bright Power, not ESC (¶¶ 80-97) and established a "Portfolio Analysis Program" at Bright Power using data and capacities ESC developed to make money for Bright Power, not ESC (¶¶ 108-20).

Under Delaware law, Bright Power is a controlling shareholder for two independently sufficient reasons: first, because it holds over 50% of ESC's stock, and second, because it

actually has dominated and controlled ESC's decisions. *Kahn v. Lynch Communication Sys.*, 638 A.2d 1110, 1114 (Del. 1994) (so holding). For both of these reasons, ESC owed a fiduciary duty directly to minority shareholder Barmash. *Id.* at 1113-14 (holding, under Delaware law, that a controlling shareholder "owes a fiduciary duty" if it either "owns a majority interest in or exercises control over the business affairs of the corporation").

Bright Power thus clearly owes duties directly to Plaintiff, not merely through ESC. Accordingly, Plaintiff has the right to sue Bright Power directly for this breach. *ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 Del. Ch. LEXIS 215 (Del. Ch. Dec. 21, 2006), *aff'd,* 930 A.2d 928, (Del. 2007) is directly on point. In *ATR*, like the case at bar, plaintiff was the principal minority shareholder with a 10% stake in a Delaware company. Defendant Araneta held the other 90%. *Id.* at *13. For his 10%, ATR invested roughly $4 million dollars. *Id.* at *10. Araneta, for his part, contributed several operating companies to the Delaware company.

After inception, the majority shareholder stripped the Delaware company of its key assets, the operating companies, for nothing in return. *Id.* at *25.

ATR held that "as the majority stockholder of the Delaware Holding Company, Araneta owed fiduciary duties to the minority shareholders of the corporation when dealing with the corporation's property. In this role, Araneta "was prohibited from using his position of control to extract value from the corporation to the exclusion of, and detriment to, the minority stockholders." *Id.* at *57. Plaintiff brought both claims directly as well as derivatively for this conduct. *Id.* at *24. After trial, the Chancery Court awarded *direct* damage to the plaintiff for the controlling shareholder's breaches of fiduciary duties for almost $4 million. *Id.* at *88. The Delaware Supreme Court affirmed the judgment. *See ATR,* 930 A.2d 928 (Del. 2007).

Nor does *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), *cited*

in Def. Mem. at 17, require a contrary result. As discussed in Point II.C, even after *Tooley*, the Delaware courts continue to recognize that claims can be both derivative and direct under Delaware law. Moreover, post-*Tooley* cases, including *ATR* – which was decided three years *after Tooley* – have held that where, as here, a controlling shareholder dissipates the value of a Delaware corporation to benefit the controlling shareholder disproportionately, such a claim is *both* derivative and direct. *ATR*, 2006 Del. Ch. LEXIS 215 (holding that controlling shareholder was liable to the sole minority shareholder on both direct and derivative claims, and awarding *direct* damages); *Rhodes v. Silkroad Equity*, 2007 Del. Ch. LEXIS 96, at *19 (Del. Ch. July 11, 2007) (denying motion to dismiss breach fiduciary duty claims and holding that claim was direct because "[i]f the alleged facts supporting the claims are taken as true, they allow the Court to infer that the Defendants' actions had the 'true substantive effect' of harming the Plaintiffs, as minority shareholders in SilkRoad Holding, in substantially different fashion from SilkRoad Equity (i.e., Filipowski and Roszak), as controlling shareholder").

This case is indistinguishable from *ATR* and *Rhodes*. Bright Power has expropriated ESC's intellectual properties and corporate opportunities to itself. This alleged wrongdoing directly and disproportionately harms only the minority shareholder, Barmash, not Bright Power, since Bright Power has simply transferred to itself the value that it has stripped from ESC.

Defendants cite nothing else of relevance. To the contrary: they refer to a footnote in a Delaware case dealing with claims against directors, not controlling shareholders,[12] and to New York cases that do not apply Delaware law.[13] Defendants also muddy the issue by claiming,

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[12] *Benihana of Tokyo v. Benihana, Inc.*, 891 A.2d 150, 155 n.3 (Del. Ch. 2005), *cited in* Def. Mem. at 17, referred only to claims against individual directors, not claims against controlling shareholders brought by minority shareholders, as is alleged here.

[13] *Fisher v. Big Squeeze (NY), Inc.*, 349 F. Supp. 2d 483 (E.D.N.Y. 2004), *cited in* Def. Mem. at 15, dealt with a New York corporation (*id.* at 485), applied New York law, and has nothing to with Delaware law. Similarly,

without citation, that Plaintiff "purports to assert 'direct' claims against Perlman" as well. Def. Mem. at 16. That claim, too, is false, as Plaintiff's claims against Perlman are solely derivative.

Even if Defendants were correct, however, it would gain them nothing. As controlling shareholder, Bright Power clearly owes fiduciary duties under Delaware law, whose breach is actionable. Defendants do not dispute that proposition. Plaintiff has plainly alleged, within the four corners of the complaint, Bright Power's breach of such duties, and therefore plainly has stated a cause of action. The only issue Plaintiff's motion presents is one of nomenclature, i.e., whether to style Plaintiff's claims against Bright Power as direct or derivative. Since Plaintiff is both (1) entitled under Delaware law to assert derivative or direct claims, and (2) the only possible shareholder who could do so, that is a distinction without a difference.

IV. DEFENDANTS' PROCEDURALLY IMPROPER ESTOPPEL ARGUMENT, WHICH IS BEREFT OF FACTUAL SUPPORT, ALSO FAILS

Finally, Defendants argue that their rampant thefts and diversions of corporate opportunity are immunized because, they claim, Plaintiff did not object to Defendants' rampant thefts, breaches of fiduciary duty and misappropriation before filing of this suit. Def. Mem. at 18-19. This argument is meritless.

First, this argument is procedurally improper. The supposed "facts" on which defendants rely derive from the Perlman Affidavit – in particular, Perlman Aff. ¶ 10 -- which cannot be considered on this CPLR 3211(a)(7) motion. Even if the Court could consider the merits of this argument on a motion directed at the pleading, however, it would fail. Defendants establish neither Barmash's "knowledge" of any transaction, nor any affirmative approval by Barmash on which Defendants justifiably relied.

Abrams v. Donati, 66 N.Y.2d 951, 498 N.Y.S.2d 782 (1985) (cited Def. Mem. at 15) applies New York only, has nothing to do with claims involving controlling shareholders, and says nothing about Delaware law.

As to "knowledge," Defendants do nothing more than claim that Barmash somehow should be "charged with knowledge" of all of their wrongdoing simply because he had "voting rights" (Def. Mem. at 18). Yet Defendants have not put before this Court (1) a single, written licensing agreement for ESC's software, much less the totality of self-interested transactions in which, Defendants admit, Bright Power has engaged, (2) a single document showing how those terms were arrived at, or that those terms were fairly negotiated, (3) any evidence that Barmash played any role in those transactions, or (4) any evidence that Barmash was called upon to "vote" his approval for any of these supposed transactions.[14]

Moreover, there can be no estoppel unless Defendants show they justifiably relied on Plaintiff's conduct. *J.P. Doumak, Inc. v. Westgate Fin. Corp.*, 4 A.D.3d 62, 66-67, 776 N.Y.S.2d 1, 5 (1st Dep't 2004). Here, Defendants do not claim that they relied on any *affirmative act* of approval by Plaintiff of Defendants' misconduct. Defendants do not allege – contrary to what their cited authority requires – that Plaintiff in fact voted to approve or ratify of any Defendants' misconduct,[15] that he abstained upon voting for the supposed misconduct at any duly called

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[14] Even assuming Plaintiff learned of Defendants' wrongdoing at the time it occurred, of course, that would not give rise to an *estoppel*. Plaintiff may have had "equal voting rights" with Perlman – whatever that means, particularly when nothing was presented for a vote – but Defendants themselves admit that Perlman had \exclusive operational control. Defendants' argument is in any event confused. A plaintiff who learns of misconduct must of course bring suit within appropriate statutes of limitation (which Plaintiff has done here). A Plaintiff does not waive his right to commence an action because he did not instantaneously register an objection even though he had no legal duty to do so (by vote or otherwise).

[15] Thus, *Wellington Bull & Co., Inc. v. Morris*, 132 Misc. 509, 514, 230 N.Y.S. 122, 130 (N.Y. Sup. Ct. 1928) (cited in Def. Mem. at 18) is inapposite, as it found estoppel due to plaintiff having used "its own proxy to hav[e] voted to approve the very transaction under attack." Also irrelevant is *Kranich v. Bach*, 209 A.D. 52, 204 N.Y.S. 320 (1st Dep't 1924), which dealt with a situation where virtually of the plaintiffs had voted to ratify all of the corporation's proceedings for *over eleven years*, and where they had voted specifically to ratify "all the acts of the directors of this company since the annual election in February, 1903, with reference. So too, *Winter v. Bernstein*, 149 Misc. 2d 1017, 566 N.Y.S.2d 1012 (N.Y. Sup. Ct. 1991), *cited in* Def. Mem. at 18, dealt with a situation where plaintiff in fact continually voted to approve the salary and dividend policies at issue, and conceded that fact. *Id.* at 1019-20, 566 N.Y.S.2d at 1014.

meeting of the board of the directors or shareholders,[16] or even that he received corporate minutes specifying the precise misconduct and misappropriation alleged in the Complaint at issue and then approved it.[17]

Defendants' own authority contradicts this claim. *Greenberg v. Acme Folding Box Co.*, 94 Misc. 2d 181, 374 N.Y.S.2d 997 (Sup. Ct. Kings Co. 1975), *cited in* Def. Mem. at 18, denied a motion to dismiss premised on such a claim, where, as here, "[t]here is no claim by the defendants herein that the plaintiff was a participant in defendants' alleged wrongdoing and consequently she should not be estopped from maintaining this action." *Id.* at 183, 374 N.Y.S.2d at 1000. Here, similarly, Defendants point to no board resolution Plaintiff approved, no vote Plaintiff cast – in short, no act whatsoever by Plaintiff that even hinted at approval of Defendants' extreme misconduct. Accordingly, the argument fails as a matter of law.

V. DISCOVERY IS REQUIRED UNDER CPLR 3211(d) TO ADDRESS DEFENDANTS' DISPUTED FACTUAL CONTENTIONS

If the Court is prepared to entertain the factual assertions made by Defendants in the Perlman Affidavit in deciding this motion, then Plaintiff requires discovery under CPLR 3211(d) to oppose those assertions. Defendant Perlman admits that Plaintiff's role in ESC was simply to develop software, whereas Perlman handled all sales. Perlman Aff. ¶ 4(D). Moreover, Perlman runs Bright Power, in which Barmash has never had any involvement. Finally, Perlman and Bright Power, not Barmash, have exclusive custody, possession and control of all of ESC's transactional and corporate documents as concern any contracts ESC has entered. Accordingly,

[16] This was the situation in *Jacobson v. Van Rhyn*, 127 A.D.2d 743, 512 N.Y.S.2d 135 (2d Dep't 1987), *cited in* Def. Mem. at 18. In that case, plaintiff was held to have waived the right to challenge an incentive compensation plan that was presented to him for approval and on which vote he abstained. *See id.* at 744, 512 N.Y.S.2d at 136.

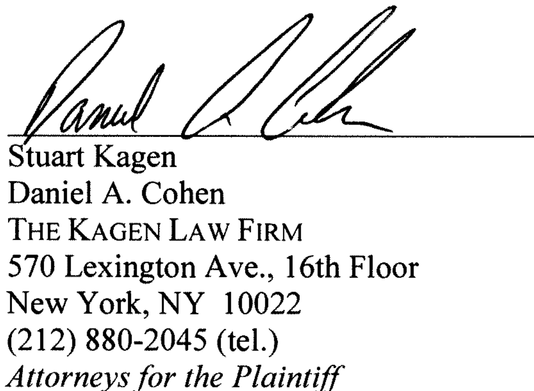
[17] By contrast, in *Winter v. Bernstein*, 149 Misc. 2d 1017, 1019, 566 N.Y.S.2d 1012, 1014 (N.Y. Sup. Ct. 1991), *cited in* Moving Br. at 18, the plaintiff *admitted* receiving copies of corporate minutes showing the challenged conduct specifically being approved and also showing plaintiff's approval of such conduct. It is the complete absence of such proof here that requires denial of Defendants' motion.

at a minimum, Barmash is entitled to discovery of (1) each and every licensing agreement involving ESC software, (2) minutes of any Board meeting concerning such agreements, (3) other documents reflecting how the terms of those agreements were arrived at, and (4) all documents concerning Bright Power's use of ESC's software and other information in connection with the Portfolio Analysis Program marketed by Bright Power. Discovery is thus required because Defendants alone possess the documentary evidence needed to test, and refute, Perlman's self-serving allegations.

CONCLUSION

For the reasons set forth above, the Court should deny Defendants' motion to dismiss and grant such other relief as it deems appropriate.

Dated: New York, New York
April 8, 2013



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