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

SUZANNE MANGOLD ZACHARIUS, Individually and Derivatively on Behalf of Kensington Publishing Corporation, Plaintiff, -against- KENSINGTON PUBLISHING CORP., STEVEN ZACHARIUS, and JUDITH ZACHARIUS, Defendants.	Index No.: 652460/2012

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT IN ITS ENTIRETY

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PRELIMINARY STATEMENT

Defendants Kensington Publishing Corp. ("Kensington" or the "Company"), Steven Zacharius ("Steven"), and Judith Zacharius ("Judith") (collectively, "Defendants") respectfully submit this Memorandum of Law in support of their Motion to Dismiss the Amended Complaint (the "Amended Complaint") of Suzanne Mangold Zacharius ("Plaintiff"), brought individually and (allegedly) derivatively on behalf of Kensington, in its entirety.

The Initial Complaint

Plaintiff filed her initial Complaint on July 16, 2012 (the "Complaint"). In response to the Complaint, Defendants filed a Motion to Dismiss the Complaint in its entirety (the "Motion to Dismiss") because Plaintiff failed to state a cause of action and her claims were contradicted by the documentary evidence attached to her own pleading, and a motion to stay discovery.

After the motions were fully briefed, and three months after Defendants appeared in this case, Plaintiff filed an Order to Show Cause seeking to disqualify Fox Rothschild LLP as counsel to Defendants. On January 15, 2013, the parties appeared before the Court for oral argument on the three motions. A copy of the transcript of those proceedings is attached to the Affirmation of Daniel A. Schnapp, dated February 25, 2013 ("Schnapp Aff.") as Exhibit A.

After hearing oral argument and reviewing the affidavit Plaintiff offered in opposition to the Motion to Dismiss, the Court expressed skepticism about certain assertions contained in Plaintiff's Complaint and affidavit, noting that they amounted to "hearsay and hearsay and more hearsay" (Schnapp Aff., Ex. A (Transcript 35:5)), and denied the motion to disqualify without prejudice. Further, at the conclusion of oral argument, the Court issued a stay of discovery and indicated that it might dismiss the Complaint in its entirety. (Id. at Ex. A (Transcript 49: 9-25)).

Plaintiff did not suggest, prior to, during, or after the oral argument on the Motion to Dismiss, that she would seek to attempt replead her Complaint. On the contrary, Plaintiff's position was that the Complaint had no deficiencies and that the Court should simply deny the Motion to Dismiss. However, three weeks after oral argument, and five months after the parties fully briefed the Motion to Dismiss, Plaintiff filed her Amended Complaint. She did so even though she was well aware that the Court and the parties had already spent considerable time and resources reviewing the allegations of the Complaint. Her only attempt to "explain" the eleventh-hour amendment was the assertion in a letter to the Court that the "Amended Complaint resolves the issues raised by Defendant' counsel in the Motion to Dismiss" – "issues" which Plaintiff had for many months dismissively contended were without any merit. In a blatant disregard of the Court's order staying all discovery and of the rules of professional conduct, Plaintiff's counsel, on February 15, 2013, directly contacted Kensington's Chief Financial Offer and requested a copy of the Company's 2012 tax return and "a schedule listing all the tax payments made on Suzanne's behalf since Walter's death."

The Amended Complaint

Contrary to Plaintiff's assertion that her "new" pleading "resolves the issues" that rendered the Complaint subject to dismissal, the Amended Complaint fails for the same reasons as the initial Complaint and, in certain instances, suffers from even worse defects. The Court should dismiss the Amended Complaint with prejudice because Plaintiff's additional allegations establish her inability to state a cause of action and to plead derivatively. In particular, Plaintiff:

- now alleges harm to Kensington and its shareholders in an attempt to properly plead a shareholder derivative claim. (See Amended Complaint, ¶ 11). In almost the same breath, however, Plaintiff discloses that she is currently engaged in supposed negotiations for the

sale of her purported shares to an unidentified "large publishing house". (Id., ¶ 124). This claim, if accepted as true, not only shows that Plaintiff's attempts to act as a derivative plaintiff are entirely self-interested, but disqualifies her from ever acting in a derivative capacity, since she clearly is not loyal to the Company's best interests and is acting solely for her own individual benefit;

- attempts to incorporate her improper prior affidavit, which the Court has already described as unsupported "hearsay and hearsay and more hearsay," into the body of the amended pleading. (Id., ¶¶ 32-41). Plaintiff again, without any factual basis whatsoever, claims that she alone has "knowledge" about when the Voting Agreement – which she was not a signatory to – was signed. (Id., ¶¶ 32, 33). Plaintiff makes these assertions despite the fact that the Voting Agreement was drafted by Duane Morris LLP, she herself affirmatively alleges that it appears to be duly executed, and it was expressly signed only "as of" the effective date. The existence of the Voting Agreement may be an inconvenient truth for Plaintiff, since it will likely prevent her from placing control of Kensington, a closely-held company run by the Zacharius family for decades, into the hands of a large publishing house, but it remains a valid contract. Accordingly, as set forth herein, all of Plaintiff's claims must fail, and the Court should not permit her another chance to replead her baseless allegations.

Background

Kensington is an independent book publishing company that has been privately owned and operated by the Zacharius family for decades. Through its various imprints, Kensington publishes approximately 450 fiction and nonfiction books a year, with total annual net sales of approximately $65 million, accounting for approximately 5% of all mass-market paperback sales in the United States.

In recent years, nearly all of Kensington's shares were held or controlled by its founder, the late Walter Zacharius ("Walter"), his late wife, Alice, and their two children, Steven and Judith. Steven joined the company in 1992, and, for many years, has run it as President, Chief Executive Officer, and Chairman of the Board.

Alice died in 2004, after 55 years of marriage. Shortly thereafter, Walter, then 81 years old, became engaged to Plaintiff, who was then 54 years old. Plaintiff, a lawyer with no known experience in the publishing field, was married twice previously, most recently to Sanford Schlesinger, a well-known New York estate attorney, who had also been Walter's longtime personal and estate lawyer.

Plaintiff claims that she is the owner of certain Kensington shares of stock that Walter bequeathed to her. In the last months of her elderly and ailing husband's life, Plaintiff successfully engineered the complete reversal of her written prenuptial agreement with Walter and his longtime estate plan. By means of at least six different will and trust instruments signed over the last ten months of his life, Plaintiff managed to arrange it so that nearly all of her husband's assets – including all of his stock in the company that he founded – were left not to his children, as Walter had specified in prior wills, but to her instead.

In her zeal to strip Steven and Judith of their inheritance for her personal benefit, however, Plaintiff evidently overlooked a Voting Agreement by which her husband had voluntarily restricted the voting rights of his stock in Kensington. Having failed to appreciate the import of this contract prior to her husband's death, and wanting now to complete her plan to completely dispossess Walter's children of the ability to manage the business that the family has run for decades, Plaintiff has manufactured this baseless lawsuit.

Plaintiff wants to undo the Voting Agreement because it precludes her from electing her own directors and seizing control of Kensington. The Voting Agreement requires that Kensington's initial stockholders – Walter, Steven, and Judith – and anyone to whom they transfer their shares, vote only for directors that they, or the survivors among them, agree upon. The effect of the Voting Agreement is to keep the company family-run.

More than three years after the Voting Agreement was executed, Steven and Judith also entered into a Voting Trust Agreement, which permits Steven to vote shares on behalf of himself and Judith. Both the Voting Agreement and Voting Trust Agreement are presumptively valid shareholder agreements under New York law, and have not been terminated.

STATEMENT OF FACTS

"As of" December 16, 2005, Walter entered into a voting agreement regarding his Kensington stock with his two children, Steven and Judith. Amended Complaint, ¶ 28; see also Amended Complaint, Exhibit "A" (cited throughout as the "Voting Agreement").

Concerned about the possible effect on the company if majority control should fall into the hands of someone other than himself or his children, Walter ensured that the Voting Agreement contained two principal provisions: in the event that Walter, Steven or Judith died, the two surviving family members would vote only for directors that they agreed upon; and the agreement would be binding on anyone else who received stock from one of these three initial shareholders. See Voting Agreement, p. 1-2.

The Terms of the Voting Agreement

In the Voting Agreement, Walter, Steven, and Judith are defined as the "Initial Stockholders." Id., p. 1. With respect to *any* "Stockholder," either initial or future, the Voting Agreement provides as follows:

> Section 1 . . . . [E]ach Stockholder (as defined below) severally and not jointly agrees to vote or act with respect to all shares of Voting Common Stock . . . so as to cause the election to the Board of Directors of the Company (the "Board") of the following persons, who shall hold office, subject to the By-laws of the Company, until their respective successors shall have been elected and shall have qualified:
> Section 2. if, at the time of such meeting or act, all of the Initial Stockholders are alive, such persons as may be agreed upon by all of the Initial Stockholders;
> Section 3. if, at the time of such meeting or act, two of the Initial Stockholders are alive, such persons as may agreed upon by such two living Initial Stockholders; and
> Section 4. if, at the time of such meeting or act, one of the Initial Stockholders are alive, such persons designated by such living Initial Stockholder; provided, however, that if the living Initial Stockholder is Judith, then such person(s) as are designated by David Marks (which may include himself).

Voting Agreement, p. 1 (emphasis supplied).

The Voting Agreement makes clear that these terms are binding not just on the Initial Stockholders, but on anyone to whom they transfer their shares. Thus, under the heading "Status of Transferees," the Voting Agreement provides as follows:

> Any person acquiring any share of Voting Common Stock from a Stockholder, by accepting it, shall be deemed to be a Stockholder, and shall be deemed to be a party to this Agreement and to agree to be subject to all the terms and conditions of this Agreement as if he signed this Agreement as Stockholder.

Voting Agreement, p. 2. Furthermore, the term "Stockholder" is expressly defined to mean "each Initial Stockholder and each person deemed a Stockholder in accordance with [the preceding section] by acquiring a share of Voting Common Stock from a Stockholder." Id., p. 1.

Similarly, under the heading "Binding Effect," the Voting Agreement states that "[t]he provisions of this Agreement shall be binding upon . . . the respective assigns, heirs, and personal representatives of the individual parties hereto." Id., p. 3.

The Voting Trust Agreement

In 2009, Steven and Judith entered into the Voting Trust Agreement so that Steven could vote shares on behalf of himself and Judith. Amended Complaint, ¶ 59; see also Amended

Complaint, Exhibit "C" (cited throughout as "Voting Trust Agreement"). Thus, under the Voting Trust Agreement, Steven, as the "Voting Trustee," could vote the shares previously registered to Steven and Judith. Voting Trust Agreement, p. 8.

Specifically, the terms of the Voting Trust Agreement require that:

> The Stockholders shall deposit with the Trustee the certificates representing all of their respective Class A Shares of the Company . . . . All such stock certificates delivered to the Trustee shall be endorsed, or accompanied by such instruments of transfer as will enable the Trustee to cause such certificates to be transferred into the name of the Trustee, as hereinafter provided.

Id., p. 2.

To effectuate this transfer, the Voting Trust Agreement provides that:

> All certificates for Class A Shares of the Company transferred and delivered to the Trustee [Steven] by the Stockholders pursuant to this Agreement shall be surrendered by the Trustee to the Company; the same shall be cancelled, and new certificates therefore shall be issued to, and held by the Trustee in the name of "STEVEN as Voting Trustee."

Id.

Once the transfer was complete and the Voting Trustee held control of the subject shares, he had "the right . . . to exercise, in person or by his nominees or proxies, all shareholders' voting rights and powers in respect of all shares deposited [t]hereunder." Id., p. 8.

STANDARD OF REVIEW

A party may move for judgment dismissing one or more causes of action asserted against him or her on the ground that the pleading fails to state a cause of action under CPLR § 3211(a)(7). In considering a complaint on a motion to dismiss, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference." Art Capital Group, LLC v. Getty Images, Inc., 2009 WL 2913531, at *4 (N.Y. Sup. 2009), quoting Biondi v. Beekman Hill

House Apt. Corp., 692 N.Y.S.2d 304, 308 (1st Dep't 1999). Accordingly, "a motion to dismiss pursuant to CPLR § 3211(a)(7) may entail not only an assertion with respect to a pleading's prima facie lack of 'legal sufficiency,' but may also involve an assessment of the viability of a pleading's factual allegations." Mikos v. Board of Educ. Of the City School Dist. Of the City, 2007 WL 4693200, at *4 (N.Y. Sup. 2007), citing 7 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 3211:36 at 32-108 (2006). Importantly, while the pleadings standard generally "bespeaks liberality, it cannot be used as a substitute for matters of substance, nor may conclusory statements of law be utilized to supply material facts by inference within the doctrine of liberal construction." Didier v. Macfadden Publications, 299 N.Y. 49, 53 (1949).

Moreover, when extrinsic evidence is submitted in connection with a pleading, courts should inquire into "whether the proponent of the pleading has a cause of action, not whether he has stated one . . . this entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it." Art Capital Group, LLC v. Getty Images, Inc., 2009 WL 2913531, at *4 (Sup. Ct. 2009), citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977).

ARGUMENT

1. Count One Fails Because Plaintiff Pleads Only Conclusory and Contradictory Allegations that the Voting Agreement Was Not "Duly Executed"

In Count One of the Amended Complaint, Plaintiff alleges, "**upon information and belief**," that Walter "did not duly execute the [ ] Voting Agreement." (Amended Complaint, ¶ 100) (emphasis supplied)). In addition to that conclusory allegation, Plaintiff asserts that the signature page should have had contract text on it (and the fact that is a stand-alone page is somehow evidence that the Voting Agreement was not actually signed by Walter) (id., ¶ 33), and that the Voting Agreement is somehow invalid because it mentions a term that does not exist in

the document (id. at ¶ 34). These contentions, however, are all unsustainable. Plaintiff's claims, boiled down to their essence, are that she cannot fathom, "upon information and belief," why her late husband would have chosen, during their engagement, to repose voting control of a business run by the Zacharius family for almost 40 years in the hands of his children, without telling her.

Plaintiff has failed to satisfy the pleading requirements under New York law. Plaintiff is required to plead substantial and material facts, since "[a] complaint is insufficient if based solely on conclusory statements, [and is] unsupported by factual allegations . . . ." Redmond v. Bailey, 2012 WL 1463424 (N.Y. Sup. 2012), quoting Melito v. Interboro Mut. Indem. Ins. Co., 423 N.Y.S.2d 742, 744 (4th Dep't 1979). Moreover, this Court cannot permit Plaintiff "to supply material facts by inference." Didier v. Macfadden Publications, 299 N.Y. 49, 53 (1949).

Here, Plaintiff has not alleged any facts that support her **"information and belief"** that the Voting Agreement was not duly executed by Walter. In fact, the existence of Walter's notarized signature on the document contradicts and conclusively disproves Plaintiff's claims. Since this Court must reject factual allegations that are flatly contradicted by documentary evidence, Plaintiff's claims should be rejected. See Art Capital Group, supra, 2009 WL 2913531, at *4 (N.Y. Sup. 2009), quoting Biondi, supra, 692 N.Y.S.2d at 308. Indeed, the Amended Complaint explicitly acknowledges that the Voting Agreement was executed by each of the Initial Stockholders – Walter, Steven and Judith. (Amended Complaint, ¶ 30).

Plaintiff contradicts her own allegations. She alleges, "**upon information and belief**, [that Walter] did not know of the existence of the [ ] Voting Agreement and . . . did not himself sign the [ ] Voting Agreement." (Amended Complaint, ¶ 31 (emphasis supplied)). At the same time, however, Plaintiff concedes that the other signatures (of the Initial Stockholders) on the Voting Agreement are genuine. (Amended Complaint ¶ 30).

The Court has already expressed skepticism regarding the adequacy of these very "upon information and belief" allegations, finding them to be "hearsay and hearsay and more hearsay." (Schnapp Aff., Ex. A (Transcript 33:12-13)). The Court further commented on Plaintiff's ploy: "[Y]ou're saying to me that Suzanne, who has an interest in this case, Walter who has gone to the great beyond, we can't knock on his door and ask for his deposition, so Suzanne tells the Court, 'Oh, you know, we were someplace else.'" (Id. at Ex. A (Transcript, 32:17-22)).

In addition, Plaintiff claims that the "Voting Agreement was supposedly signed on December 16, 2005," without any factual support whatsoever. (Amended Complaint, ¶ 32). However, the only place that a date appears in the Voting Agreement is on the first page, which states only that it is effective "as of" December 16, 2005. Plaintiff's challenge to the Voting Agreement based on Walter's alleged presence in Connecticut is therefore meaningless, as there was no requirement for him to have actually signed it on December 16, 2005. Elescano v. Eighth–19th Co., LLC, 785 N.Y.S.2d 447, 448 (1st Dep't 2004) (parties can enter into contracts that are effective "as of" a particular date).

Equally flawed is Plaintiff's allegation, already commented upon by the Court (Schnapp Aff., Ex. A (Transcript, 38:22-23)), that because Walter did not tell her about the Voting Agreement, he therefore could not have known of its existence. (Amended Complaint, ¶¶ 36, 38, 39). Plaintiff also alleges, "upon information and belief" that Walter, Steven and/or Judith had no communications concerning the election of Kensington directors. (Id. at ¶ 37). Yet, Plaintiff was not a shareholder and was not privy to Kensington business.

Finally, at the same time that Walter and the other parties signed the Voting Agreement regarding Kensington, they also signed a virtually identical voting agreement for one of its affiliate companies. (Schnapp Aff., Ex. C). Unless Plaintiff would have the Court believe that

Walter did not actually sign that agreement either, her claim concerning the Voting Agreement for Kensington cannot be sustained. Thus, Count One must be dismissed.

2. Count Two Fails Because the Voting Agreement Explicitly Recites the Consideration for It

In Count Two, Plaintiff alleges that Walter did not receive any valuable consideration for entering into the Voting Agreement (Amended Complaint, ¶ 40) or in exchange for allegedly ceding his voting control of Kensington. (Id. ¶ 41). However, Plaintiff ignores the explicit language on the very first page of the Voting Agreement that sets forth the mutual consideration:

> NOW, THEREFORE, **in consideration of the foregoing recitals and the mutual promises set forth in this Agreement**, the parties hereto, intending to be legally bound, agree as follows . . ."

(Voting Agreement, p. 1). This provision clearly contradicts Plaintiff's allegations.

Under New York law, mutual promises in any kind of contract are sufficient consideration. See Trans Packers Services Corp. v. National Union Fire Ins. Co., 2012 WL 593096, at *5 (N.Y. Sup. 2012), quoting Kowalchuk v. Stroup, 61 A.D.3d 118, 125 (1st Dep't 2009); Whitmore Group, Ltd. v. Zurich American Ins. Co., 2006 WL 758635, at *3 (N.Y. Sup. 2006), citing Johnson v. Johnson, 191 A.D.2d 257 (1st Dep't 1993); see also Brown v. Ingersoll, 226 N.Y.S.2d 479, 486 (N.Y. Sup. 1962). The consideration set forth in the agreement only needs to be nominal for the agreement to be enforceable. See, e.g. AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co., 781 N.Y.S.2d 88, 90 (1st Dep't 2004) (holding nominal consideration sufficient to support contract); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 464 (1982) (accepting coextensive promises as consideration). The exchange of mutual promises explicitly set forth in the Voting Agreement constitutes sufficient consideration to support it.

Further, Walter did not cede his voting control, as claimed by Plaintiff. Walter, like the other Initial Stockholders, simply agreed to vote his shares in a way to keep the Company under

the management of the Zacharius family. Since the language of the Voting Agreement contradicts Plaintiff's claims, Count Two must be dismissed.

3. Count Three Fails Because the Voting Agreement Has Not Been Terminated

In Count Three of the Amended Complaint, Plaintiff seeks a declaration that the Voting Agreement has been terminated.[1] (Amended Complaint, ¶ 112). Plaintiff claims that the Voting Agreement was automatically terminated by the transfer of Walter's shares to her, since that left the surviving Initial Stockholders no longer holding a majority of the voting stock.

Plaintiff's strained interpretation of the termination provision, however, would obviate the entire effect of the Voting Agreement, which is to ensure that the surviving Initial Stockholders would maintain their role in Kensington's management after the death of Walter, Steven, or Judith.

Pursuant to Section 620(a) of the Business Corporation Law ("BCL"), "[a]n agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them." (emphasis supplied). Here, the Voting Agreement is wholly authorized by BCL § 620(a). The terms of the Voting Agreement require the Initial Stockholders of Kensington – Walter, Steven, and Judith – and their transferees, to vote to elect directors as agreed upon by them or their

[1] The Termination Provision provides, in full, as follows:

> Unless sooner terminated, this Agreement shall terminate (a) on the closing of any transaction or series of transactions (including, without limitation, any reorganization, merger or consolidation) that results in the Company's stockholders immediately prior to such transaction not holding (solely by virtue of Company securities owned immediately prior to such transaction) at least a majority of the voting power of the surviving or continuing entity or (b) by written agreement of all Stockholders.

Voting Agreement, p. 2.

survivors. This allows the surviving Initial Stockholders to oversee and determine Kensington's management, ensuring stability and continuity, even after the death of one of them.

Sections 1-4 of the Voting Agreement provide that the survivor(s) among Walter, Steven, and Judith have the power to determine how outstanding shares will be voted in a director election. Section 1 states that the Initial Stockholders jointly and severally agree "to vote or act with respect to all shares of Voting Common Stock registered in their respective names." Sections 2, 3, and 4 of the Voting Agreement concern how the election of directors occurs, based upon how many of the Initial Stockholders are alive at the time of the election.

Plaintiff alleges in her Amended Complaint that Walter's alleged transfer of Kensington stock to her constituted "transactions or a series of transactions" that terminated the Voting Agreement. However, the plain language of Sections 3-4 sets forth how directors are to be elected in the event that one or more of the Initial Shareholders, including Walter, should die. Plaintiff's proffered interpretation would therefore result in the Voting Agreement terminating at precisely the time that Sections 3-4 come into effect.

In essence, Plaintiff contends that any transfer by Walter of his shares (which always constituted a majority of voting control of the company) to anyone would automatically terminate the Voting Agreement. (Indeed, under Plaintiff's theory, Walter's initial transfer of his shares to his own revocable trust did so.) This argument is absurd, and would render the core provision of the Voting Agreement meaningless. It is directly contrary to the obvious intent of the Voting Agreement.

Moreover, Plaintiff's claim contradicts other express provisions in the Voting Agreement that make it binding not just on the Initial Stockholders themselves, but on anyone to whom any

of them transfers their shares. See e.g., Voting Agreement, p. 2 ("Legend").[2] Among other things, the Voting Agreement provides that "[a]ny person acquiring any share of Voting Common Stock from a Stockholder, by accepting it, shall be deemed to be a Stockholder, and shall be deemed to be a party to this Agreement and to agree to be subject to all the terms and conditions of this Agreement . . . ." Voting Agreement, p. 2. Similarly, the Voting Agreement states that "[t]he provisions of this Agreement shall be binding upon . . . the respective assigns, heirs and personal representatives of the individual parties hereto." Id., p. 3. Nowhere does the Voting Agreement suggest that it is binding on transferees of Steven or Judith, but not of Walter.

As noted above, Plaintiff's claim relies exclusively on the provision in the Voting Agreement stating that it would terminate "on the closing of any transaction or series of transactions (including, without limitation, any reorganization, merger or consolidation) that results in the Company's stockholders immediately prior to such transaction not holding . . . at least a majority of the voting power of the surviving or continuing entity . . . ." Read properly and in context, this language clearly refers to corporate "transactions," *i.e.*, those involving the company as a whole, rather than shares of an individual stockholder. That is made evident by the references to a "reorganization, merger or consolidation" and to "the surviving or continuing entity," as well as "the closing of any transaction or series of transactions" (emphasis supplied), a term that is not ordinarily used in describing an individual's estate plan. Indeed, a mere transfer of shares from one party to another does not in any way affect the nature character of a corporate

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[2] The Voting Agreement provides that a legend will be placed on all certificates representing shares of stock in Kensington as follows:

> The shares of Class A Common Stock represented by this certificate are subject to restrictions on voting, as provided in an agreement dated December 16, 2005 among the Company and certain holders of its Class A Common Stock, a copy of which is on file with the Secretary of the Company.

Voting Agreement, p. 2.

entity, the way that a reorganization, merger or consolidation would. Thus, Plaintiffs' proffered interpretation would render the words "the surviving or continuing entity" meaningless. Kean v Maryland Cas. Co., 223 N.Y.S. 373, 381 (1st Dep't 1927) (the law disfavors construction that renders words in a contract without meaning).

In short, Plaintiff's claim would lead to an absurd result, contrary to the reasonable expectations of the parties, and violative of the clear language of the agreement. This result is not permitted under New York law. In re Lipper Holdings, LLC, 766 N.Y.S.2d 561, 562 (1st Dep't 2003). Courts "should not adopt a construction of [contractual terms] which would frustrate one of the explicit central purposes of the agreement," Ronnen v. Ajax Elec. Motor Corp., 88 N.Y.2d 582, 589 (1996), or "construe [a] covenant as prohibiting in one subdivision that which it expressly sanctions in another." Id. at 590-91.

Since the plain language of the Voting Agreement demonstrates that it has not been terminated, Count Three must be dismissed.

4. Count Four Fails Because the Explicit Terms of the Voting Agreement and the Voting Trust Agreement Contradict Plaintiff's Claims

In Count Four, Plaintiff alleges that Steven's ability under the Voting Trust Agreement to "jointly" vote shares owned by both himself and Judith is an impermissible modification of the Voting Agreement that repudiates it. (Amended Complaint, ¶ 118). However, Plaintiff's claim that Steven votes his shares "jointly" is contradicted by the plain terms of both the Voting Agreement and the Voting Trust Agreement.

Steven votes shares "severally," not "jointly." Under the terms of the Voting Trust Agreement, Steven and Judith transferred their shares to Steven, as Voting Trustee:

> All certificates for Class A Shares of the Company transferred and delivered to the Trustee by the Stockholders pursuant to this Agreement shall be surrendered

> by the Trustee to the Company; the same shall be cancelled, and new certificates thereof shall be issued to, and held by the Trustee in the name of "STEVEN as Voting Trustee."

Voting Trust Agreement, § 2(b), Transfer of stock to trustee (emphasis supplied). This unambiguous language in the Voting Trust Agreement demonstrates that the Voting Trustee is the holder of record of the subject shares, and votes only the shares re-issued in his name "severally". New York law expressly permits this transfer. See BCL § 621(a) ("Any shareholder or shareholders, under an agreement in writing, may transfer his or their shares to a voting trustee or trustees for the purpose of conferring the right to vote thereon . . . The certificates for shares so transferred shall be surrendered and cancelled and new certificates therefor issued to such trustee . . . and in the entry of such ownership in the record of the corporation that fact shall also be noted . . . ."); Application of Bacon, 287 N.Y. 1, 5 (1941) ("The voting trustees become the holders of record of the stock deposited in accordance with a voting trust agreement.").

Contrary to Plaintiff's claim, this result is entirely consistent with the Voting Agreement, which reserves decision-making authority regarding Kensington's management to the surviving Initial Stockholders, even if they do not necessarily retain actual voting shares. The Voting Agreement states, in relevant part, that when an election of directors is held:

> . . . each Stockholder (as defined below) severally and not jointly agrees to vote or act with respect to all shares of Voting Common Stock registered in their respective names or beneficially owned by them (including shares acquired after the date hereof), and the Company shall take all necessary and desirable actions within its control, so as to cause the election to the Board of Directors of the Company (the "Board") of the following persons . . . .

Voting Agreement, Section 1, p. 1 (emphasis supplied).

Therefore, under the Voting Agreement, each Stockholder "severally and not jointly agrees to vote or act" regarding his or her shares. The agreement does not provide, as Plaintiff

alleges, that a Stockholder must "vote his or her shares 'severally.'" (See Amended Complaint, ¶ 65).

Even if Plaintiff had correctly interpreted the Voting Trust Agreement, which she has not, her allegations would not amount to a material breach, much less repudiation, of the Voting Agreement. A material breach is one that is so substantial and fundamental that it defeats the object of the parties making the contract. Smolev v. Carole Hochman Design Group, 913 N.Y.S.2d 79, 79 (1st Dep't 2010); Awards.com v. Kinko's, 42 A.D.3d 178, 186-87 (1st Dep't 2007) (ruling that a material breach is one which substantially defeats the parties' contractual objective); In re Lavigne, 114 F.3d 379, 387 (2d Cir. 1997) (stating that a material breach is one which substantially defeats the purpose, and goes to the root, of the contract).

Here, the Voting Agreement seeks to maintain control of Kensington's management in the hands of Walter, Steven, and Judith, regardless of the death of one of them. Voting Agreement, Sections 1-4, p. 1. Under the Voting Trust Agreement, Steven, as Voting Trustee, must "exercise his best judgment to select suitable directors for the Company . . . ." Voting Trust Agreement, ¶ 10(b). Should Judith not "agree[ ] upon" the Voting Trustee's election of a director, she retains the right to declare that the operative terms of the Voting Agreement have been materially breached. Voting Agreement, p. 1. Even if Steven as Voting Trustee "jointly" elects a director that Judith does not agree with, she retains the right to object to such an election. This right preserves Judith's role in the management of Kensington even if the Voting Trustee, as a technical matter, could be viewed as voting his shares "jointly." Therefore, the core provisions of the Voting Agreement are not impaired even if Plaintiff's interpretation is correct.

Further, even if Plaintiff's interpretation of the Voting Trust Agreement were correct, it still would not in any way modify, much less invalidate, the prior Voting Agreement. Nor could

it, since the Voting Trust Agreement is between only Steven and Judith, and not the other parties to the Voting Agreement, namely, Walter (who was still alive at the time) and the Company.

Moreover, Plaintiff's reliance on the "no oral modification" clause in the Voting Agreement is entirely misplaced. Even assuming that anything in the Voting Trust Agreement purports to modify the Voting Agreement – and it does not – the "no oral modification" clause would simply mean that the modification was ineffective, *not* that any such purported modification was a "breach" of the Voting Agreement. Further, Plaintiff nowhere explains, because she cannot, how the Voting Trust Agreement between Steven and Judith is harmful to the other signatories to the Voting Agreement (*i.e.*, Walter during his lifetime and the Company). Thus, it is an absurd claim on its face that the Voting Trust Agreement worked a material breach.

Accordingly, since Plaintiff bases her allegations on erroneous interpretations of the Voting Agreement and the Voting Trust Agreement, Count Four must be dismissed.

5. Count Five Fails Because It Is Not Ripe for Adjudication

As a threshold matter, Count Five, in which Plaintiff seeks a declaration regarding the effect of a hypothetical and speculative sale of her alleged Trust Shares, depends upon the viability of her previous claims that the Voting Agreement is invalid or terminated. As discussed above, however, these claims are baseless.

In addition, the declaratory judgment claim must be dismissed due to a lack of ripeness and justiciability. (Amended Complaint, ¶¶ 126, 127). Under CPLR § 3001, "[t]he Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy . . . ." (Emphasis supplied). It is well-settled that "[t]he declaratory judgment procedure is intended to deal with actual problems and not with remote possibilities which may never eventuate." Shui Fong Loo v.

HSBC Mortgage Corp. (USA), 2012 WL 3139879, at *3 (N.Y. Sup. 2012), quoting Fairhaven Props., Inc. v. Garden City Plaza, 501 N.Y.S.2d 422, 422 (2d Dep't 1986). Accordingly, to maintain an action for declaratory judgment, "the dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial review." Waterways Development Corp. v. Lavalle, 813 N.Y.S.2d 485, 486 (2d Dep't 2006).

Plaintiff alleges that a sale of her alleged Kensington shares, at some unspecified and uncertain future time, will result in the termination of the Voting Agreement. (Amended Complaint, ¶¶ 126, 127). Plaintiff has not pled and cannot plead, however, that a sale of her shares is imminent or pending. Rather, she claims only that she is in "present negotiations" with an unspecified buyer for such a sale. (Amended Complaint, ¶ 124). Therefore, her claim remains premature, not ripe for adjudication, and renders Count Five subject to dismissal.

6. Count Six Fails Because Plaintiff Has Not Properly Pleaded a Derivative Claim for Breach of Fiduciary Duty

In the Amended Complaint, Plaintiff now acknowledges that Count Six, her claim for breach of fiduciary duty, is actually a derivative claim, and not a direct one. Defendants previously demonstrated that Count Six of the initial Complaint did not state a derivative claim, and did not plead any presuit demand, as required by BCL § 626(a), or futility that would excuse it. Plaintiff's latest amendment in an attempt to cure her multiple pleading deficiencies, however, only underscores that she labors under an incurable conflict in purporting to bring such a derivative claim, lacks standing to assert the bulk of her attempted derivative claim, and fails to plead any presuit demand or adequately plead demand futility.

(a) Plaintiff's Direct Claims Conflict with Her Pursuit of a Derivative Claim

Plaintiff attempts to assert both direct claims and a derivative claim, purportedly on Kensington's behalf. However, her direct claims show that she is not looking out for the interest

of Kensington, a requirement for her to maintain a derivative action, but rather for her own pecuniary interest. Plaintiff claims that she is in "present negotiations with a major publishing house of the sale of her Kensington stock." (Amended Complaint, ¶ 124). Stated differently, Plaintiff wants to cash out Walter's shares in the family run business (which is and has remained thriving under Steven's management) to a major publishing house. Because, at least according to her amended pleading, Plaintiff desires to cash out her shares, she tacitly admits that she could not care less about advancing Kensington's interests and the remaining Kensington shareholders, to whom she is obligated to protect in her derivative claim. Thus, Plaintiff cannot adequately and fairly represent the Company and absent shareholders in a derivative action.

Stock ownership, although an absolute precondition to the maintenance of action, does not automatically entitle a shareholder to sue derivatively. Steinberg v. Steinberg, 106 Misc.2d 720 (N.Y. Sup. Ct. 1980). When a plaintiff seeks to use a remedy designed to vindicate rights of a corporation and the other shareholders, she makes herself a fiduciary. Id. The plaintiff must demonstrate that she will fairly and adequately represent the interests of the shareholders and the corporation, and that she is free of adverse personal interest or animus. Id. (citing Auerbach v. Bennett, 408 N.Y.S.2d 83 (N.Y.A.D. 1978), modified, 47 N.Y.2d 619 (1979)).

"While there is always a theoretical conflict of interest in situations where a plaintiff in a single lawsuit seeks redress on behalf of the [business entity] and from the [business entity]," Kamerman v. Pakco Cos., 1978 WL 1055, at *2 n. 3 (S.D.N.Y. Feb. 6, 1978), it is indisputable that "[t]he existence of an actual conflict disqualifies a plaintiff from acting as representative in these dual capacities." Ryan v. Aetna Life Ins. Co., 765 F. Supp. 133, 135 (S.D.N.Y. 1991). See also Cordts-Auth. Crunk, 815 F. Supp.2d 778, 794 (S.D.N.Y. 2011); Gilbert v. Kalikow, 272 A.D.2d 63, 707 N.Y.S.2d 100 (1st Dep't 2000); Sigfeld Realty v. Landsman, 234 A.D. 148 (1st

Dept 1996); Josepthal Holdings, Inc. v. Weisman, 2001 WL 36168547 (N.Y. Sup. Ct. Oct. 23, 2011); Steinberg v. Steinberg, 106 Misc. 2d 720, 434 N.Y.S. 2d 877 (N.Y. Sup. 1980).

The gravamen of Plaintiff's "derivative" claim is that the individual Defendants, Steven and Judith, are allegedly engaged in self-dealing. (Amended Complaint, ¶ 132). However, what Plaintiff actually seeks in this action is to invalidate the Voting Agreement. In her amended pleading, she makes clear that she seeks the relief so that she can cash out Walter's shares at the highest possible value. Plaintiff's direct claims are thus completely contrary to her purported derivative claim, and she cannot fairly represent Kensington.

Indeed, Plaintiff's personal incentive is clear from the Amended Complaint. Plaintiff claims that she was presented with a "low offering" price for Walter's shares. (Amended Complaint, ¶¶ 22, 23). Thus, by her own admission, all Plaintiff cares about is cashing out and making money; this lawsuit has nothing to do with helping Kensington or its other shareholders. Plaintiff's allegations indicate her strong financial inducement to settle on terms advantageous to her as an individual, rather than as a fiduciary; at the very least Plaintiff's Amended Complaint proves a willingness, if not an intent, to personally profit. The allegations taken as a whole strongly indicate that the derivative claim was added to obtain leverage on her direct claims.

Finally, if and when Plaintiff concludes a sale of her shares, she will no longer have standing to prosecute her derivative claim. BCL § 626(b) "[h]as been interpreted as requiring a plaintiff in a shareholder derivative action to not only have been a shareholder at the time of the transaction complained of as well as at the time of the commencement of the action, but also that the plaintiff maintain its shareholder status throughout the pendency of the action without interruption. If the plaintiff's shares are disposed of during the pendency of the action, the action abates." Bronzaft v. Caporali, 162 Misc. 2d 281, 283 (Sup. Ct. N.Y. Cty. 1994) (citations

omitted). Plaintiff's stated plan to sell her shares will necessarily undermine both her legal capacity to represent the Company and its other shareholders.

(b) Plaintiff Does Not Have Standing

Plaintiff lacks standing to raise the bulk of her purported derivative claim. Plaintiff claims she has standing to raise a derivative claim based on her contention, with no support whatsoever, that, "[s]ince at least September 8, 2009, Steven Zacharius has improperly charged tens of thousands of dollars, or more, of personal expenses to the Company – misconduct which continues today." (Amended Complaint, ¶ 87). However, Plaintiff does not have standing to complain of any corporate act that occurred before she became an alleged Kensington shareholder, which she concedes did not happen until February 2012. BCL § 626(b) (one must be a holder of shares at the time of bringing the action and at the time of the transaction of which she complains, or her shares must have devolved upon her by operation of law).[3]

Moreover, in the time since Plaintiff became a shareholder, she does not identify a single allegedly unlawful expense for which she bases her specious claim. Stating "upon information and belief" that there are "unlawful" expenses does not a claim make. Redmond v. Bailey, 2012 WL 1463424 (N.Y. Sup. 2012) ("[a] complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations . . . ."), quoting Melito v. Interboro Mut. Indem. Ins. Co., 423 N.Y.S.2d 742, 744 (4th Dep't 1979).

Thus, even if Plaintiff's Count Six could somehow stand, she cannot have any claim from before February 2012.

[3] Plaintiff did not receive her shares by "devolution of interest by operation of law" under BCL § 626(b). Courts interpreting this provision have made clear that property passing through a trust, as Plaintiff claims occurred with regard to her shares here, passes by contract, and not operation of law. See Stephenson v. Landegger, 337 F. Supp. 591, 594 (S.D.N.Y. 1971). Thus, under New York law, Plaintiff does not satisfy BCL § 626(b), and does not have standing to complain of acts that allegedly occurred before she received her alleged shares.

(c) Plaintiff Failed to Make Any Demand Upon Kensington's Board of Directors

Plaintiff does not allege that she made any demand upon Kensington's Board of Directors to institute suit, a threshold defect that itself warrants dismissal. A shareholder's right to bring a derivative action on behalf of the corporation derives from statute. See BCL § 626(a) ("An action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates."). BCL § 626(c) sets forth the demand precondition to commencing a derivative action, requiring that "[i]n any such action, the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." The necessity of enforcing the demand precondition stems from its purpose, as it is "generally designed to weed out unnecessary or illegitimate shareholder derivative suits." Marx v. Akers, 88 N.Y.2d 189, 194 (1996).

Here, Plaintiff acknowledges that she made no demand upon Kensington's Board of Directors, mandating dismissal of Count Six.

(d) Plaintiff's Allegations of Demand Futility Must Fail

Plaintiff did not and cannot with the requisite specificity plead demand futility to excuse her lack of presuit demand. Plaintiff's attempts to excuse presuit demand are a repeat of her suspect, specious, and "upon information and belief" allegations that (a) Steven allegedly has an exorbitant salary (Amended Complaint, ¶ 92), (b) there was a September 8, 2009 amendment to the Voting Trust Agreement whereby Judith receives compensation (id. at ¶ 93), and (c) the Kensington board is comprised of Zacharius relatives (because it is a closely-held family business) (id. at ¶ 94). However, Plaintiff's specious allegations do not and cannot excuse presuit demand under New York law.

In New York, an exception to the demand requirement exists where the plaintiff demonstrates that a demand on the corporation's board of directors would be futile. Marx, supra, 88 N.Y.2d at 198; see also Gillette v. Sembler, 2012 WL 373100, at *1 (N.Y. Sup. 2012) ("No demand is necessary if the complaint alleges acts for which a majority of the directors may be liable and the plaintiff has reasonably concluded that the board would not be responsive to a demand.") (emphasis supplied). A demand is futile where a complaint alleges, with particularity, that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction." Marx, supra, 88 N.Y.2d at 194 (emphasis supplied). Under New York law, "a director may be interested under either of two scenarios: self-interest in the transaction or loss of independence due to the control of an interested director." In re Comverse Technology, Inc., 866 N.Y.S.2d 10, 15 (1st Dep't 2008).

In determining futility, it is "[c]lear that it is not sufficient merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers to justify failure to make a demand." Marx, supra, 88 N.Y.2d at 199-200. Demand cannot be excused in such cases because "it permits plaintiffs to frame their complaint in such a way as to automatically excuse demand, thereby allowing the exception to swallow the rule." Id. at 200.

Plaintiff's allegations do not rise to the level of demand futility, which would justify a failure to make presuit demand. Indeed, Plaintiff's complaints relate to Steven, not to the Board of Directors. (Amended Complaint, ¶¶ 91-96). In essence, Plaintiff has pled exactly what the Marx case says not to do – that Steven "purports to hold the majority of shareholder voting power" (Amended Complaint, ¶ 96), and therefore the Board of Directors must somehow be

under his control. Neither has Plaintiff alleged that a majority of Kensington's Board of Directors would be interested in the alleged transaction, as required to excuse demand. See id. at 194. Accordingly, Plaintiff's allegations procedurally fail, and Count Six must be dismissed.

CONCLUSION

Accordingly, Plaintiff's Amended Complaint should be dismissed with prejudice and in its entirety.

Dated: New York, New York
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Respectfully submitted,
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