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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 CORPORATION; STEVEN ZACHARIUS; JUDITH ZACHARIUS,

Defendants.

Index No.: 652460/2012

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

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PRELIMINARY STATEMENT

Plaintiff Suzanne Mangold Zacharius ("Plaintiff") respectfully submits this Memorandum of Law in opposition to *Defendants' Motion To Dismiss Plaintiff's Amended Complaint In Its Entirety* (the "Motion" or "Mot.").[1]

Plaintiff, the largest single shareholder of Kensington Stock, brought this action to determine the validity and/or effect of a voting agreement (the "Purported Voting Agreement") that Defendants purportedly entered into with Plaintiff's deceased husband, Walter Zacharius ("Walter" or "Decedent"). Plaintiff also brought this action on behalf of Kensington, in her derivative capacity as shareholder, to address misconduct by the Individual Defendants that constitutes a breach of their fiduciary duties to Kensington and to its stockholders, including, but not limited to, Decedent's adopted son, Defendant Steven Zacharius, lining his pockets with millions of dollars in self-voted salary increases as Kensington's "President" immediately upon the death of Walter Zacharius.

Desperate to deny Plaintiff her day in Court, Defendants again move to dismiss the Amended Complaint "in its entirety." We understand why.

If Plaintiff's Amended Complaint is not dismissed, how will Defendants explain or justify how it is that Steven Zacharius agreed to pay defendant Judith Zacharius a six-digit salary from Kensington for a no-show job for Kensington (Judith lives in Alaska, Kensington is located in New York City), in return for her agreement to allow Steven to vote her shares of the Company?

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[1] The Motion was jointly brought by defendants Kensington Publishing Corp. ("Kensington") and Judith and Steven Zacharius (the "Individual Defendants"). Accordingly, Plaintiff's references to "Defendants" herein mean the collective defendants.

If Plaintiff's Amended Complaint is not dismissed, how will Steven Zacharius explain or justify the fact that, shortly after Walter's death, he unilaterally voted himself a multi-million dollar raise and agreed (with himself) to pay himself a multi-million dollar salary, all while failing to provide Plaintiff (the single largest shareholder of Kensington) or any other shareholder for that matter, a single dollar in Kensington profits?

If Plaintiff's Amended Complaint is not dismissed, how will Steven Zacharius explain or justify the fact that, since his adoptive father's death, in a clear attempt to squeeze his step-mother financially while lining his own pockets, Kensington, at Steven Zacharius' direction, has failed to make any profit distribution to Plaintiff or any other shareholder and has instead kept all such profits "on hand" within the Company?[2] Based upon the limited information that Plaintiff's counsel has secured, it appears that at the direction of Steven Zacharius, the Company has increased its cash on hand position from $3.48 million in 2009 to a staggering $23.755 million as of March of 2012 – all while refusing to make any profit distribution to shareholders.[3]

These are just a few of the questions that Defendant Steven Zacharius, no doubt, wishes to avoid.

As further evidence of the Individual Defendants' bitter feelings toward their step-mother, and their desire to now deprive of her of her rightful inheritance (an inheritance that Defendants' brief clearly shows they are bitter about) and the rights that go along with her stock

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[2] Kensington is a closely held corporation and thus, although not distributed to her, Kensington's profits are taxed to Plaintiff. As a result, Kensington has made certain tax payments "on behalf of" Suzanne Zacharius, but it has not paid her any actual profit distributions. Further showing the vitriolic intent of Defendant Steven Zacharius, at his command and direction, Kensington has refused to provide Plaintiff with sufficient evidence of these tax payments, thereby interfering with Plaintiff's ability to file her tax returns for the year.

[3] Defendant's actions in this regard (his unilateral raise, etc.) appear to be self-interested and therefore do not fall within the "business judgment rule."

ownership, Defendants' brief spends numerous paragraphs and several pages on a so-called "background" section. Defendants' "background" section, although entirely irrelevant to this Motion, provides a very telling window into the Individual Defendants' motivations, *to wit*, they are squeezing their step-mother financially because they are angry that their adoptive father left his estate to Plaintiff and not to the Individual Defendants.

Defendants' disgraceful innuendos and disrespectful statements, not surprisingly, are devoid of any factual support in the record whatsoever – no affidavits to support the specious, irrelevant and defamatory claims, no documents to support the vitriolic insults and personal attacks against Plaintiff – nothing. Moreover, the "background section" is entirely irrelevant to the present Motion, and clearly is intended by Defendants' counsel to besmirch Plaintiff in the hope that such false personal attacks will color the Court's view of Plaintiff. By way of example, using such adjectival and inflammatory words and phrases such as "engineered", "managed to arrange", "zeal to strip", "complete her plan", etc., Defendants' brief recites, among other irrelevancy that: (1) Plaintiff was "married twice previously" before wedding decedent Walter Zacharius;[4] (2) Plaintiff purportedly "managed to arrange" to have the decedent change his Will to provide for Plaintiff; and (3) Plaintiff "engineered the complete reversal" of a prenuptial agreement.

[4] In another blatant attempt to besmirch and insult Plaintiff personally, during oral argument, counsel for Defendants, once again, overzealously and falsely advised the Court that decedent was Plaintiff's "second, or third or fourth husband . . . ." *See* Transcript, Ex. A to the Affirmation of Daniel A. Schnapp in Support Of Defendants' Motion to Dismiss, p. 9, lines 17-19.

Obviously, none of these so-called "facts" have any relevance whatsoever to the present Motion.[5] Instead, it is clear that Defendants try to use them to infer that Plaintiff somehow "engineered" or "planned" to have the decedent change his Will, to her benefit – all false statements and totally irrelevant to this matter. Of course, if any of it were true, the Individual Defendants would have, no doubt, initiated a Will contest years ago – which of course, they did not. Instead, Defendants' counsel now uses these false facts and implications to paint a picture that Plaintiff is somehow undeserving of her stock ownership.

In any event, Defendants now urge the Court to dismiss this action in its entirety via a panoply of strained and misguided arguments, many of which are predicated on supposed "facts" that Defendants assert in their brief, without any evidentiary support whatsoever, which as demonstrated above, is clearly designed to do nothing except malign Decedent's wife, Plaintiff Suzanne Zacharius, and her counsel. Moreover, as set forth more fully herein, Defendants' Motion asks this Court to (i) ignore the proper standard of review on a CPLR § 3211(a)(7) motion; (ii) ignore the relevant case law and documentary evidence that contradicts their arguments; and (iii) ignore the well-pleaded facts of the Complaint. As such, Defendants' Motion fails.

Indeed, Defendants' Motion is truly nothing more than a mischaracterization of the pleading itself; a mischaracterization of the law that bears on Plaintiff's claims; and an attempt to, with respect to the Purported Voting Agreement, argue the supposed "intent" of the parties

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[5] Defendants also complain (again) that Plaintiff amended her complaint after oral argument was conducted before the Court on January 15, 2013. Mot. 1-2. Defendants have already lodged this "complaint" with the court and argued that plaintiff should not be allowed to amend her pleading pursuant to CPLR § 3025(a). That issue was addressed and conclusively decided by the court in Plaintiff's favor on February 14, 2013. Thus, its is respectfully submitted that the court need not waste more time addressing Defendants' unfounded and legally meritless complaints on this issue.

without support of affidavits or other evidence. In other words, Defendants just offer their slanted view of the case to convince the Court that Plaintiff does not have any cause of action stated in her Amended Complaint. But these self-serving, legally meritless arguments do not warrant dismissal of *any* of Plaintiff's claims, much less the entire Complaint.

LEGAL STANDARD

Undoubtedly, this Court is well aware of the legal standard on a motion to dismiss. On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading must be afforded a liberal construction. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The test "is not whether the plaintiff has artfully drafted the complaint, but whether, deeming the complaint to allege whatever can reasonably be implied from its statements, a cause of action can be sustained." *Jones Lang Wooten USA v. LeBoeuf, Lamb, Greene & MacRae*, 674 N.Y.S.2d 280, 285 (1st Dep't 1998). The Court is to accept the facts as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon*, 84 N.Y.2d at 88. Whether or not plaintiff will be able to establish his allegations by competent evidence is not a pertinent consideration. *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 562 (1968).[6] Moreover, where extrinsic evidence demonstrates that a cause of action may exist, dismissal is inappropriate. *Johnson City Cent. Sch. Dist. v. Fidelity & Deposit Co. of Md.*, 263 A.D.2d 580, 581 (3d Dep't 1999).

[6] In *Metz v. Roth* No. 103414/09, 2010 N.Y. Misc. LEXIS 2091, at * 14 (N.Y. Sup. Ct. N.Y. Cty. May 14, 2010), the court explained: "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims. Further, it is well settled that evidence submitted in opposition to a motion does not have to be the form admissible for trial. Therefore, on a motion to dismiss, the Court may consider evidence constituting hearsay." *Id.* (citing *Josephson v Crane Club, Inc.*, 264 A.D.2d 359, 360 (1st Dep't 1999) (holding that the testimony of the plaintiff's brother, although inadmissible at trial, may be considered in determining "whether a triable issue exists to defeat the motion")).

ARGUMENT

I. The First Cause Of Action Recited In The Amended Complaint Sufficiently States A Cause Of Action For Declaratory Relief

Plaintiff's first cause of action seeks a declaration that the Purported Voting Agreement is invalid because, *inter alia*, Walter Zacharius did not sign the Purported Voting Agreement. Compl. ¶¶ 97-102. In support of this cause of action, Plaintiff alleges numerous facts, not conclusions, that refute the validity of the Purported Voting Agreement. *Id.* at ¶¶ 29-39. In the face of a motion to dismiss, these facts must be accepted as true. *Leon*, 84 N.Y.2d at 88. In their Motion, however, Defendants offer only their self-serving mischaracterization of Plaintiffs' allegations and/or demonstrably false "statements of fact," but <u>nothing</u> to "flatly contradict" Plaintiff's allegations. *Three Hands Holdings v. Lipman*, No. 104011, 2010 N.Y. Misc. LEXIS 5711, at *7 (N.Y. Sup. Ct. N.Y. Cty. Nov. 24, 2010); *Rovello v. Orfino Realty Co.*, 40 N.Y.2d 633, 636 (1976).

To wit: Defendants argue that Plaintiff's allegations are conclusively disproved by "the existence of Walter's *notarized* signature" on the Purported Voting Agreement. Mot. 9 (emphasis added). Of course, this is patently false – none of the signatures on the Purported Voting Agreement are notarized, and Plaintiff has identified this fact as one that casts doubt on the authenticity of the Purported Voting Agreement. *See* Compl. ¶ 33; *id*, Ex. A at 5. Defendants also contend that Plaintiff "explicitly acknowledges" that the Purported Voting Agreement "was executed by each of the Initial Stockholders;" and that "Plaintiff concedes" that the signatures on the Purported Voting Agreement are "genuine." Mot. 9. Plaintiff makes no such acknowledgments or concessions; rather, she only states that the Purported Voting Agreement appears to be signed by the parties identified. Compl. ¶ 30. Plaintiff goes on to describe why these signatures are suspect. *Id.* at ¶¶ 31-39.

Defendants also attempt to misconstrue the Purported Voting Agreement itself, arguing that it "states only that it is *effective* 'as of' December 16, 2005" (Mot. 10), in an attempt to explain away Plaintiff's allegations that Walter and Judith could not have signed the document on that date. See Compl. ¶ 32. This is not what the document says. Page one of the Purported Voting Agreement states that it was "*dated* as of December 16, 2005," which certainly suggests that this is when the un-notarized agreement was supposedly signed by all parties. Compl., Ex. A at 1. At minimum, the purported contract is ambiguous as to when it was signed – which counsels against dismissal, and in favor of discovery, particularly where Plaintiff has alleged facts that contradict that the Purported Voting Agreement could have been signed on December 16, 2005. *Airco Inc. v. Niagra Mohawk Power Corp.*, 430 N.Y.S.2d 179, 184 (4th Dep't 1980); ("where such ambiguity or equivocation exists and the extrinsic evidence presents a question of credibility or a choice among reasonable inferences, the case should not be resolved by way of [dismissal].").

Equally unavailing is Defendants' argument that Plaintiff's allegations rest upon hearsay. The ultimate admissibility of the evidence Plaintiff relies upon in her Amended Complaint is not a factor to be considered by the Court in the face of Defendants' motion to dismiss, and on a motion to dismiss, the Court may consider evidence constituting hearsay. *See supra* at 5, n. 6. The only relevant inquiry is whether Plaintiff has, in her first cause of action, stated a claim for relief. She has, particularly in light of New York's liberal pleading standard.

Defendants' final gambit in their attack on Plaintiff's first cause of action is to advance a different voting agreement for a different company that was allegedly signed at the same time as the Purported Voting Agreement, and suggest that this conclusively disproves Plaintiff's allegations. Mot. 10-11. First, this document, unsupported by any affidavit, cannot bear on

Plaintiff's allegations. Defendants have not established the authenticity of the "new" voting agreement, which is also not notarized, nor offered any evidence that could establish that it was "signed" the same day. Second, this document, without more, says nothing about Plaintiff's allegations as to the Purported Voting Agreement. Plaintiff has not made any claims regarding the "new" agreement, nor does she need to. The focus of her allegations is on the invalidity of the Purported Voting Agreement. Plaintiff does not need to explain to the Court why this document does not disprove her allegations; rather, it is for Defendants to explain how it "negate[s Plaintiff's allegations] beyond substantial question."[7] *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999). Of course, it does not and cannot.

Accordingly, dismissal of Plaintiff's first cause of action is inappropriate. Plaintiff challenges both the validity of the Purported Voting Agreement and the authenticity of Walter's signature on the same. Compl. ¶¶ 32-36. Numerous issues of fact as to the signature exist which makes dismissal inappropriate. *Trofien Steel & Constr. Inc. v. Rybak*, No. 10959/09, 2010 N.Y. Misc. LEXIS 283, at * 16 (N.Y. Sup. Ct. Kings Cty. Feb. 8, 2010) (no dismissal where validity of signature on documentary evidence is questioned); *State of N.Y. v. Storrs*, 207 N.Y. 147, 151-53 (1912) (where authenticity of signature is challenged, issue is properly submitted to trier of fact). Indeed, Plaintiff has alleged facts which demonstrate that the Purported Voting Agreement is a complete fiction – including that it was never ratified by Kensington in accord with its own By-Laws and New York State law (an allegation Defendants do not even attempt to address in their Motion). Compl. ¶¶ 55-57. Defendants argue that Plaintiff's evidence is circumstantial,

[7] If the "new" voting agreement speaks at all to Plaintiff's allegations, it is because it reinforces Plaintiff's allegations concerning the many flaws in the Purported Voting Agreement – the "new" agreement, at least, does not manifest so many inadequacies. Compl. ¶ 34. Indeed, this "new" agreement prompts more questions than it answers – questions that can only be answered through discovery. As such, Defendants' submission implicates CPLR § 3211(d), and evidences that further facts essential to Plaintiff's opposition to the motion to dismiss may exist, but cannot now be stated. This is a further reason against dismissal.

but it is more than adequate to state a claim for declaratory relief, particularly where Defendants offer no legitimate facts or evidence to contradict her allegations. *Museum Trading Co. v. Bantry*, 281 D.A.2d 524, 525 (2d Dep't 2001) (dismissal not warranted where defendant's "evidentiary submissions failed to show that a material fact alleged by the plaintiff to be true '[was] not a fact at all' and that 'no significant dispute exist[ed] regarding it'").

II. The Second Cause Of Action Recited In The Amended Complaint Sufficiently States A Cause Of Action For Declaratory Relief

Plaintiff's second cause of action seeks a declaration that the Purported Voting Agreement is unsupported by valid consideration. Compl. ¶¶ 40-41, 103-107. Defendants argue that the Purported Voting Agreement recites that "mutual promises" between the parties were the consideration for the agreement. Mot. at 11. But this argument does not support dismissal.

First, as discussed above, the Amended Complaint alleges that the Purported Voting Agreement is itself a fiction. Thus, there cannot have been any "mutual promises" – Plaintiff has alleged that Walter Zacharius was unaware of the Purported Voting Agreement, and, for purposes of Defendants' Motion, this must be accepted as true. *Leon*, 84 N.Y.2d at 88.

Second, Plaintiff has alleged that, to the extent it was signed, Walter Zacharius received *nothing* in return for his alleged participation in the Purported Voting Agreement (Compl. ¶¶ 40-41). In other words, he did not receive a benefit that *could be* "acceptable to the promisee," which would make the consideration valid, and it is settled law that "the presence of consideration . . . is a fundamental requisite" to any valid contract. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 464 (1982). Defendants response is to say that Walter did not "cede his voting control" for nothing, but that he "simply agreed to vote his shares in a way to keep the Company under the management of the Zacharius family." Mot. 11-12. But this is just Defendants urging their construction of the Purported Voting Agreement and/or their version of the "facts" – which

is an issue for the finder of fact, and not a cause for dismissal. At best, Defendants' argument suggests that the issue of consideration is ambiguous, and where such ambiguity exists, and the extrinsic evidence presents a question of credibility or a choice among reasonable inferences, the claim should not be dismissed. *Airco*, 430 N.Y.S.2d at 184; *67 Wall Street Co. v. Franklin Nat. Bank*, 37 N.Y.2d 245, 249 (1st Dep't 1975).

If there was no valid consideration, there was no contract. Defendants cannot erase that Plaintiff has properly articulated an issue as to the validity of the alleged consideration for the Purported Voting Agreement.

III. The Third Cause Of Action Recited In The Amended Complaint Sufficiently States A Cause Of Action For Declaratory Relief

A. The Termination Provision Was Triggered

The Purported Voting Agreement spells out, in plain language, how it can be terminated. Compl., Ex. A at 2 ("Termination"). The Purported Voting Agreement terminates upon "the closing of any transaction or series of transactions . . . 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 . . . ." *Id.* The Amended Complaint sets forth what occurred to trigger the Termination provision. Compl. ¶¶ 54-58, 108-114. Indeed, Plaintiff has alleged that just such a "series of transactions" occurred – namely Walter's transfer of a majority of voting shares to a trust, and then to Plaintiff. Compl. ¶¶ 54-58. Thus, pursuant to the unambiguous language of the Termination clause, and as alleged in the Amended Complaint, these transactions – the transfer of shares to a trust, and the subsequent transfer of the shares to Plaintiff upon the death of Walter Zacharius – terminated the Purported Voting Agreement.

Defendants nevertheless argue for dismissal of Plaintiff's third cause of action on the premises that: (a) enforcement of the Termination provision "would obviate the effect" of the

Purported Voting Agreement; (b) the Termination provision only applies to "corporate transactions;" and (c) the application of the Termination provision is "contrary to the reasonable expectations of the parties" (*i.e.*, "intent") and other provisions of the agreement – all of which appear, based on Defendants' own presentation, to be issues of fact. Mot. at 12-15. In sum, then, Defendants urge the Court to ignore: (i) the unambiguous language of the Termination provision in the Purported Voting Agreement; (ii) the relevant New York law that informs the Court's consideration of the contract at issue; and (iii) Plaintiff's well-pleaded allegations that establish a cause of action on the basis of the termination of the Purported Voting Agreement.

Defendants' arguments for dismissal are nothing more than advocacy for *their* interpretation of the Purported Voting Agreement. However, the Termination provision is not ambiguous, and Defendants' arguments do not make it so. *Moore v. Kopel*, 237 A.D.2d 124, 125 (1st Dep't 1997) ("a contract is not rendered ambiguous just because one of the parties attaches a different, subjective meaning to one of its terms."). The bottom line is that the subject Termination provision is part of that contract; it is not ambiguous, and it therefore reflects the "reasonable expectations of the parties."

Moreover, Defendants' skewed "interpretation" cannot withstand even modest scrutiny. Defendants, who apparently only invoke the language of the Purported Voting Agreement when they believe it suits their cause, "interpret" the Purported Voting Agreement so as to avoid the express language of the Termination provision. (Defendants similarly attempt to avoid the express language of the "Modification" and "Binding Effect" clauses in their attack on Plaintiff's fourth cause of action – *see* Mot. 17-18.) Defendants' argument is that the express language of the Termination provision (and its effect when triggered) is incompatible with the "purpose" of

the Purported Voting Agreement and its other provisions, and must be presumed to apply only to "corporate transactions." Mot. 12-14. This argument is meritless.

First, because of its inclusion, it must be presumed that the parties sought to terminate the Purported Voting Agreement if and when any of the described circumstances occurred. Where, as here, circumstances occurred to trigger the Termination provision, Defendants cannot now argue that this clause (and its effect) must be ignored because it contradicts what they conveniently argue is the "true purpose" of the agreement. Nor can Defendants graft a limitation, exception or qualification onto the Termination clause based solely on their *ipse dixit* as to the "sole purpose" of the agreement. In fact, there is simply no basis for Defendants' skewed reading of the Termination provision that would limit its application to only "corporate transactions." Mot. at 14. Rather, a fair reading of the express language in the clause makes it abundantly clear that the Purported Voting Agreement is not so limited, and terminates upon "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 . . ." (emphasis added).[8] Had the parties wanted to limit the Termination provision only to "corporate transactions," the parties could have done so. But they did not.

Second, the Termination clause is *not* incompatible with the Status of Transferees or Binding Effect clauses in the Purported Voting Agreement. Mot. at 14. Under the former provision, a transferee may "acquir[e]" shares of stock and be deemed a "Stockholder . . . subject

[8] Contrary to Defendants' argument, Plaintiff's interpretation of the "Termination" clause does not render the words "the surviving or continuing entity" meaningless. Mot. 15. Indeed, Plaintiff alleges that a series of transactions has occurred, and these transactions have resulted 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." Kensington is certainly a "continuing" entity after Walter's transfer of shares to Plaintiff.

to all the terms and conditions" of the Purported Voting Agreement. However, any transfer of stock does not satisfy the circumstances described in the Termination provision if it is not a "transaction or series of transactions 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 . . ." Compl., Ex. A at 2. Thus *any* transfer does not terminate the Purported Voting Agreement, only those described in the Termination clause. A transferee might well be held to the agreement – the clauses are not incompatible. Nor is the "Binding Effect" clause at odds with the Termination provision, or with Plaintiff's third cause of action. In fact, Plaintiff's third claim posits that if the Purported Voting Agreement is valid, then it must be enforced according to its terms. In other words, if the agreement is deemed legitimate, "the provisions of this Agreement shall be binding upon and inure to the benefit" of Plaintiff – including the Termination provision. Compl. ¶¶ 50, 52; Ex. A at 3.

It is clear that Plaintiff has alleged in the Amended Complaint that the closing of a series of transactions occurred – namely, the transfer by Walter Zacharius of the majority of voting shares to a trust, and then the distribution of those shares to Plaintiff upon Walter's death. Compl. ¶¶ 54, 58. At best, Defendants' "interpretation" could only suggest that the plain language of the agreement is ambiguous (it is not), and where such ambiguity exists the case should not be resolved by way of dismissal. *Airco*, 430 N.Y.S.2d 184. Plaintiff's third claim states a cause of action for declaratory relief.

B. The Purported Voting Agreement Is Invalid By Operation of Kensington's By-Laws and New York State Law

Plaintiff has also alleged that New York law and Kensington's own By-Laws establish what must occur for the Purported Voting Agreement to have been validated, and the Amended Complaint makes it clear this did *not* occur. Compl. ¶¶ 55-56. Considering each of these

allegations, it is clear that Plaintiff has stated a valid claim for declaratory judgment that the Purported Voting Agreement is invalid, or was a nullity by operation of New York law. *Kalisch-Jarko v. City of N.Y.*, 72 N.Y.2d 727, 731 (1988) (declaratory judgment action "an appropriate vehicle for settling justiciable disputes as to contract rights and obligations").

Defendants (again) do not even address the fact that the Purported Voting Agreement was rendered invalid, null and void based on Kensington's failure to comport with Article 8 of the New York State Business Corporation Law ("BCL"), and Kensington's own By-Laws. Compl. ¶¶ 55-57. Specifically, the By-Laws require that every stockholder gets one vote for every share of Kensington stock "standing in his or her name." Compl., Ex. B at 8-9. Any alteration to this guarantee had to be provided for in Kensington's Certificate of Incorporation. *Id.* Kensington's Certificate of Incorporation is silent as to a deviation from the "one share-one vote" standard; therefore, any change to this principle had to be effected via an amendment to the Certificate of Incorporation. Compl. ¶ 55. BCL §§ 803(a), 804 require that amendments to the voting provisions in the Certificate of Incorporation (*e.g.*, the Purported Voting Agreement) be voted on by all shareholders. (Notably, the Purported Voting Agreement expressly states that it is to be "governed by and construed in accordance with the laws of the State of New York." Compl. ¶ 56; Ex. A at 4.) No vote occurred, and there is no evidence that the Certificate if Incorporation was amended to incorporate the Purported Voting Agreement. Compl. ¶ 55. This fact alone dooms the Motion.

IV. The Fourth Cause Of Action Recited In The Amended Complaint Sufficiently States A Cause Of Action For Declaratory Relief

Plaintiff's fourth cause of action alleges that, assuming the validity of the Purported Voting Agreement, a 2009 Voting Trust Agreement (Compl., Ex. C) between Steven and Judith Zacharius – but not Walter Zacharius – represented an impermissible modification to the

Purported Voting Agreement, inasmuch as it did not comport with the express requirement found in the "Modification" provision in the Purported Voting Agreement, thereby breaching the Purported Voting Agreement. Compl. ¶¶ 59-75; Compl., Ex. A at 3. In response, Defendants strain to find some colorable reading of these respective agreements to both defend their unauthorized, improper modification of the Purported Voting Agreement, and (amazingly) to urge dismissal of Plaintiff's fourth cause of action on this basis. Mot. at 15-18.

Defendants' specious arguments against Plaintiff's allegations, and in favor of dismissal, defy common sense. Defendants avoid squarely addressing the language of the Modification clause (Compl., Ex. A at 3), and the fact that Walter Zacharius was not a party to the Voting Trust Agreement between Steven and Judith Zacharius. Compl. ¶ 59. Thus, Defendants entirely gloss over the fact that the Purported Voting Agreement was <u>not</u> properly modified in 2009 "by a written instrument duly executed by <u>each</u> party," notwithstanding that the Voting Trust Agreement altered what Defendants insist was the very "purpose" of the Purported Voting Agreement – to ensure that voting control and management of Kensington was vested with the Zacharius "family," *so long as each family member was living*. Mot. 4, 9, 12. Rather, to sidestep this problem, Defendants appear to argue that the 2009 Voting Trust Agreement was *not* a modification to the Purported Voting Agreement at all, and thus did not require such a writing. Mot. at 17-18. But this does not comport with the plain language of the Purported Voting Agreement *or* the Voting Trust Agreement, Defendants' selective quotations aside.

If valid, the Purported Voting Agreement called for each of Walter, Steven and Judith Zacharius to "*severally and not jointly* agree[] to vote or act with respect to all shares registered in their respective names or beneficially owned by them" for "such persons *as may be agreed upon by all of the Initial Stockholders*." *Id*. at 1, §§ 1-2. However, the subsequent Voting Trust

Agreement, which was only signed by Steven and Judith Zacharius, vested all voting rights and powers as between Steven and Judith solely with Steven.[9] Compl. ¶¶ 59-75; Ex. C. Thus, this subsequent Voting Trust Agreement modified the stated intent and terms of the Purported Voting Agreement – *i.e.*, several-but-uniform voting for just those directors upon whom Steven, Judith and Walter agreed upon. Compl. ¶¶ 59-65, 69-70; Ex. A at 1-2; Ex. C at §§ 2(b), 3, 10(a). Per the subsequent Voting Trust Agreement, Judith lost her voting "powers and rights," which is all the Purported Voting Agreement speaks to, and removed her voice from director votes.

Thus, even if Judith Zacharius' "role in the management of Kensington" was "preserved" (Mot. 17), it does not make the "result entirely consistent with the [earlier Purported] Voting Agreement" which is solely about voting. Mot. at 16. However, even worse for Defendants is Plaintiff's unrefuted allegation (which must be accepted as true) that per the Voting Trust Agreement, Judith has abdicated a meaningful role in the management of Kensington (despite the fact that she is a "surviving" Initial Stockholder). Compl. ¶¶ 65, 67-68, 79-81, 93. Hers is now just a no-show job. *Id*. Thus, her sale of her voting power to Steven not only violated New York law (Compl. ¶ 81), it also means she has no role in the running of Kensington – which Defendants insist was the very purpose of the Purported Voting Agreement. Mot. 4, 9, 12.

At bottom, the Voting Trust Agreement was – by its own terms and those of the Purported Voting Agreement – a modification to the Purported Voting Agreement (*i.e.*, it altered the agreement of the parties as to the "subject matter" of the contract). Compl. ¶¶ 47-49, 59-75; Ex. A at 3; Ex. C. As such, it triggered the requirement of a "written instrument duly executed

[9] This fact entirely betrays Defendants' remarkable argument that Judith Zacharius' "transfer" of shares to the Voting Trust to be entirely voted by Steven Zacharius somehow means that they are still voted "severally." Mot. at 17. Again, only Defendants' curious "interpretation" of the respective agreements permits such an argument – it finds no support in the express language of the agreements. Indeed, Defendants appear to acknowledge the speciousness of this position where they later attempt to explain away Steven Zacharius' sole decision-making and voting as only "technical[ly]" voting jointly. *Id*.

by each party." Ex. A at 3. Defendants' argument does not forgive the Individual Defendants' failure to satisfy this simple requirement.

Defendants next argue that this breach is not material. Of course, this argument depends on Defendants' *ipse dixit* as to what is "material" to the Purported Voting Agreement. Defendants again contend that a breach of the express Modification provision is not material in light of what they interpret to be the overall "purpose" of the agreement. Defendants conspicuously avoid offering any further explanation of how the Modification clause (or others that are implicated by a breach of the Modification clause – *see* Compl. at ¶¶ 69, 71, 72-74) is immaterial; or how the loss of voting rights by one of the Initial Stockholders under the Purported Voting Agreement is also immaterial – a curious failure given Defendants' repeated insistence that the "purpose" of the agreement was to vest voting control with the Zacharius "family," so long as each family member was living. Mot. 4, 9, 12.

Defendants cannot have it both ways. If, as they claim, the "purpose" of the Purported Voting Agreement was to vest control of Kensington's management with the Initial Stockholders, as long as they are living, then it is axiomatic that the Voting Trust Agreement between Steven and Judith Zacharius contravened that purpose, and, at minimum, had to be effectuated in strict compliance with the Modification clause or it was a material breach of the Purported Voting Agreement.[10] Moreover, Defendants' arguments are insufficient to explain why the unambiguous language of the Modification provision can be disregarded. *Palermo v. Palermo*, 34 A.D.3d 548, 550 (2d Dep't 2006) ("In interpreting a contract, a court should aim to arrive at a practical interpretation of the intention of the parties as expressed in *all* of the

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[10] Defendants' "immaterial breach" argument is not a basis for dismissal for an additional reason – the determination of whether a material breach has occurred is generally a question for the finder of fact. *Met. Nat'l. Bank v. Adelphi Academy*, No. 7389/08, 2009 Misc. LEXIS 1261, at *4 (Sup. Ct. Kings Cty. May 27, 2009) (*citing* Restatement (2d) of Contracts for circumstances to be considered in determining "materiality).

language employed in the contract, with an eye to the parties' reasonable expectations . . . and which does not leave contractual clauses meaningless.") (emphasis added; internal quotations and citations omitted); *Moore*, 237 A.D.2d at 125. Words in a contract "are never to be construed as meaningless if they can be made significant by any reasonable construction." *67 Wall Street Co.,* 37 N.Y.2d at 248. Plaintiff's fourth cause of action cannot be dismissed..

V. The Fifth Cause Of Action In The Amended Complaint Is Ripe For Adjudication

Plaintiff's fifth cause of action seeks a declaration of her rights under the Purported Voting Agreement if it is deemed presently valid and operative. Compl. ¶¶ 122-27. More specifically, Plaintiff seeks a judicial determination as to the meaning of the Termination clause in the Purported Voting Agreement, as the operation of the clause itself ultimately informs the present value of Plaintiff's shares of Kensington stock. *Id.* ¶ 126-27. The injury Plaintiff seeks to remedy through her request for declaratory relief is the <u>present</u> devaluation of her Class A "voting" shares of Kensington stock if the Purported Voting Agreement is both valid and presently in effect. Notably, a declaratory judgment action is "an appropriate vehicle for settling justiciable disputes as to contract rights and obligations." *Kalisch-Jarko*, 72 N.Y.2d at 731.

Here, it is Steven and Judith Zacharius who tendered an admittedly low-ball offer to purchase Plaintiff's shares, which offer was wholly informed by their insistence that the Purported Voting Agreement *is* effective and has not been terminated – thereby depressing the present market value of Plaintiff's shares. *Id*. ¶¶ 21-23. Conversely, Plaintiff contends that the Purported Voting Agreement has been terminated, and therefore that the present value of her shares are higher. *Id.* ¶¶ 54-58. Plaintiff has subsequently entered into discussions with another publishing house concerning a possible sale of her shares. Compl. ¶¶ 27, 124. Not surprisingly, the issue of her voting power under these shares has been flagged as a factor that impacts the

value of the shares. *Id.* ¶27. Accordingly, Plaintiff seeks a declaratory judgment as to the meaning and effect of the Purported Voting Agreement, if valid; and she needs this relief now.

Plaintiff's claim for declaratory relief in her fifth cause of action is analogous to the declaration sought by plaintiffs in *Birnbaum v. New York State Teachers Ret. Sys*., 5 N.Y.2d 1 (1958). In that action, plaintiffs sought a declaration of the value of their retirement benefits, notwithstanding that they had not yet retired and did not claim their retirement was imminent. Defendant claimed that plaintiffs did not have standing to seek the declaratory relief, and would not until (or if) they sought retirement and applied for their benefits. The New York Court of Appeals determined that plaintiffs had standing to sue because the value of the retirement benefits was of "vital concern to the plaintiffs and might well be the determining factor in their decision to continue in the teaching profession, or seek more lucrative employment." *Id*. at 6. Plaintiff seeks a declaration here for similar reasons: this determination will inform the present value of her shares, and this may be the decisive factor that leads her to keep or to sell her shares.

Defendants' argument that Plaintiff's fifth cause of action is not ripe, then, is nothing more than a mischaracterization of the relief Plaintiff seeks. Accordingly, the cases to which Defendants analogize are inapposite. This is not a situation where Plaintiff seeks a declaratory judgment for a "completely hypothetical and speculative sale" of her shares, not certain to occur; rather, it is a request for declaratory relief that informs both Plaintiff's present rights under, and the present value of, her stock. Defendants argue that "the declaratory judgment procedure is intended to deal with actual problems" and that "the dispute must be real, definite, substantial and sufficiently matured so as to be ripe for judicial review." Mot. at 18-19 (citations omitted). Plaintiff agrees. This is such a dispute, and Plaintiff's fifth claim is ripe for adjudication.

VI. The Sixth Cause Of Action Recited In The Amended Complaint Sufficiently States A Cause Of Action For Breach Of Fiduciary Duties

A cause of action for breach of fiduciary duty lies where there exists a fiduciary relationship; the defendant has engaged in some misconduct that violates his duty to fiduciaries; and damage was directly caused by such misconduct. *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2nd Dep't 2007). Plaintiff has pled such facts. Compl. ¶¶ 76-96. However, Defendants argue that Plaintiff's sixth cause of action fails because 1) Plaintiff's claims concerning the Purported Voting Agreement conflict with her derivative claims; 2) Plaintiff does not have standing to bring a derivative claim, and 3) Plaintiff did not make a demand of Kensington's Board of Directors concerning her allegations in accord with BCL 626(c), and did not establish that a demand would be futile. Mot. at 19-24. Defendants are wrong.

A. Plaintiff's Direct Claims For Declaratory Relief Do Not Conflict With Her Derivative Claims

Plaintiff's direct claims are for declaratory relief, to ascertain both the existence of the Purported Voting Agreement, and, if valid, its meaning and effect. Plaintiff's derivative claim on behalf of Kensington is addressed to the Individual Defendants' self-dealing and other breaches of their fiduciary duties, and seeks relief that will inure to the benefit of Kensington and its shareholders. Defendants posit that Plaintiff's discussion with another publishing house concerning the sale of her shares means she has an "actual conflict" of interest that bars her from asserting a derivative claim. Mot. 20. This is ludicrous.

First, nothing in the pleading supports Defendants' position that Plaintiff has a "personal animus" such that she has an "actual conflict," and cannot adequately represent the interests of the shareholders. *Id*. Plaintiff is Kensington's largest shareholder (Compl. ¶ 20), and her derivative claims are designed to remedy the self-dealing and corporate waste by the Individual

Defendants that injures Kensington and all of its shareholders, Plaintiff included. Thus, contrary to Defendants' convoluted reasoning (*see* Mot. 21), Plaintiff's fiduciary claims are asserted in her own interest and those of Kensington – those interests are the same.

Moreover, Plaintiff's discussions of the possible sale of her shares does not demonstrate a "personal animus" – rather, those discussions were prompted by the Individual Defendants' suggestion that her shares were devalued by the Purported Voting Agreement, and Defendants' simultaneous refusal to allow Plaintiff to vote her shares. Compl. ¶¶ 23-24. Plaintiff, who is foreclosed from voting her shares until resolution of this action, simply seeks to understand her options and the value of her shares. This is not the "personal animus" described in *Steinberg v. Steinberg*, 106 Misc.2d 720 (N.Y. Sup. Ct. 1980). There, a plaintiff offered to drop her derivative suit for a direct payment to her of $1 million, and also sued derivatively for leverage in her matrimonial proceeding.[11] Plaintiff's consideration of a possible sale is not analogous; moreover, Defendants' argument would bar any shareholder who discussed the sale of his or her shares from suing derivatively. Such a result is absurd, and is unsupported in the law.

Second, Defendants' own authority contradicts its argument. In *Ryan v. Aetna Life Ins. Co.*, 765 F. Supp. 133, 135 (S.D.N.Y. 1991) and *Cordts-Auth v. Crunk*, 815 F. Supp.2d 778, 794 (S.D.N.Y. 2011), the courts characterized an "actual conflict" as an incompatibility of the relief sought under the direct and derivative claims. In *Crunk*, the court explained that a plaintiff's direct and derivative claims were in conflict where "substantial recovery of the [direct] claim . . . reduce[s] the potential recovery on behalf of the [business entity] on the derivative claim." *Id*, at 794. Here, the declaratory relief sought by Plaintiff on her direct claims is not in any way

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[11] Similarly, in *Gilbert v. Kalikow*, 272 A.D.2d 63 (1st Dep't 2000), two partners in a limited partnership filed lawsuits against one another, and the court suggested that a conflict was likely where it appeared that some of the suits were retaliatory. These are not our facts.

incompatible with the relief she seeks on behalf of Kensington, *i.e.*, damages and an accounting. Plaintiff's success on her direct claims will not in any way compromise Kensington's recovery if she is also successful on her derivative claim.

B. Plaintiff Has Standing To Assert Her Derivative Claims

Defendants argue that Plaintiff cannot satisfy the "contemporaneous ownership" requirement set forth in BCL § 626(b). This provision requires that "it shall be made to appear that the plaintiff is [a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates] at the time of bringing of the action and that he was a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law."

However, the contemporaneous ownership requirement is relaxed where a plaintiff alleges a "continuing wrong" – *i.e.*, some misconduct that was initiated before a plaintiff's acquisition of share interest and is still going on. *Austin v. Gardiner*, 68 N.Y.S.2d 664, 665 (N.Y. Sup. Ct. N.Y. Cty. 1947); *York Properties, Inc. v. Neidoff,* 170 N.Y.S.2d 683, 685 (N.Y. Sup. Ct. N.Y. Cty. 1957). Here, the conduct complained of began prior to Plaintiff's acquisition of her shares of Kensington stock, but continues today. Compl. ¶¶ 66-96. "[A] plaintiff stockholder can sue directors for looking the other way and doing nothing with respect to wrongful conduct on the part of other directors and officers, and such status should be accorded to plaintiff in reference to the alleged misconduct occurring after acquisition of his stock. The cover-up of the original wrong is a new and independent wrong." *Gluck v. Unger*, 202 N.Y.S.2d 832, 834 (N.Y. Sup. Ct. N.Y. Cty. 1960).

Further, Defendants concede Plaintiff's standing to sue for breaches of fiduciary obligations that post-date February 2012. Mot. 22. This alone means that Plaintiff's "standing"

is not a reason to dismiss her derivative claim – particularly where Judith's "no-show" job extends until 2019, and Steven continues to "vote" himself millions in salary. Compl. ¶¶ 92-93. Nor is Plaintiff's possible sale of her shares at some point in the future a fact which *presently* compromises her standing to sue derivatively, as Defendants suggest. Mot. 21-22. It does not, and the Motion is conspicuously devoid of any authority to suggest otherwise.

C. A Demand Of Kensington Was Futile

Plaintiff did not make a demand of Kensington concerning the self-dealing of directors Judith and Steven Zacharius because, as Plaintiff has alleged, such a demand was futile.

As Defendants admit (Mot. at 24), a demand is futile where a complaint alleges 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 v. Akers*, 88 N.Y.2d 189, 200 (1996). Here, Steven and Judith Zacharius are themselves directors of Kensington. Compl. ¶¶ 77, 82. They are both "interested" in the challenged transactions – Judith has profited from her illegal sale of her shareholder votes; and Steven has misappropriated Kensington assets and/or monies, and now uses his control of the board to self-vote himself salary increases of millions of dollars. Compl. ¶¶ 79-96. Moreover, under the Purported Voting Agreement (advanced by Defendants as legitimate and presently operative), Steven Zacharius is voting in or keeping only directors who either sanitize his self-dealing and/or corporate waste, or who turn a blind eye to it. *Id.* ¶¶ 89-94. These directors, who are predominantly relatives of Steven and Judith, are all beholden to Steven for their continued positions as directors of Kensington. *Id.*

Thus, Plaintiff has alleged the futility of a demand with particularity: Steven and Judith Zacharius were (and are) patently "interested" in the subject transactions; and the remainder of

the Kensington board was (and is) controlled by Steven to such a degree that it is not independent. This means that *at least* "a majority" of the board was interested. *Marx v. Akers*, 88 N.Y.2d 189, 200 (1996). Indeed, "[d]irector interest may either be self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a transaction is 'controlled' by a self-interested director." *Tsutsui v. Barasch*, 67 A.D.3d 896, 897-98 (2nd Dep't 2009) (reversing the trial court and finding that demand would be futile where the majority of the board of directors was interested); *see also Bansbach v. Zinn*, 1 N.Y.3d 1, 12 (2003) (finding that demand would be futile where defendant dominated and controlled the corporation's hand-picked board and caused them to place his interests above those of the corporation).

The facts also establish futility under the second prong of the *Marx* test as well. Kensington's directors "did not fully inform themselves about the challenged transactions to the extent reasonably appropriate under the circumstances." *Marx*, 88 N.Y.2d at 200. This is borne out by the remaining directors' "passive rubber-stamping of the decisions of active managers" (*id.*) – *i.e.*, the Individual Defendants – when they engaged in the sale of votes under the Voting Trust Agreement with virtually no response from the remaining board members. Compl. ¶¶ 93-94. These same directors also ignored or sanctioned Steven Zacharius' misappropriations of company monies and assets, a practice which continues today. *Id.* ¶¶ 87-94. Even the board's failure to ratify the Purported Voting Agreement (if valid), in accordance with New York law, illustrates their unreasonable failure of care and diligence under the circumstances. *Id.* ¶ 94; *In re Comverse Technology Inc.*, 56 A.D.3d 49, 54-56 (1st Dep't 2008) (demand was futile where directors failed to stay informed of subject improper transactions).

Accordingly, Plaintiff reasonably believed that a demand of interested directors to act against themselves for their own wrongdoing and/or willful ignorance was futile. *Id.* ¶¶ 95-96. Put simply, a demand of Kensington concerning the fiduciary breaches by Steven and Judith Zacharius would, effectively, be a demand of Steven to police himself. Even now there is no separating Steven and Judith Zacharius from Kensington itself – the bare fact that the same counsel represents all three Defendants in this suit, and has argued that the interests of all three Defendants are perfectly aligned, is testament to that fact. Thus, Plaintiff's sixth cause of action cannot be dismissed for Plaintiff's failure to make a demand of Kensington.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Motion be denied.

Dated: New York, New York
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