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

PRESENT: EILEEN BRANSTEN **PART** 3

Justice

ZACHARIUS, SUZANNE MANGOLD

INDEX NO. 652460/2012

MOTION DATE 10/30/2013

- V -

KENSINGTON PUBLISHING

MOTION SEQ. NO. 005

The following papers, numbered 1 to 3, were read on this motion to/for Dismiss

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) 1

Answering Affidavits - Exhibits ..... No(s) 2

Replying Affidavits ..... No(s) 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

DATED: 1/6/2014

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE : [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS : [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE : [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

SUZANNE MANGOLD ZACHARIUS, Individually and Derivatively on Behalf of Kensington Publishing Corporation,

Plaintiff,

- *against* -

KENSINGTON PUBLISHING CORPORATION, STEVEN ZACHARIUS and JUDITH ZACHARIUS,

Defendants.

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Index No. 652460/2012
Motion Date: 10/29/13
Motion Seq. No.: 005

BRANSTEN, J.

In motion sequence 005, Defendants Kensington Publishing Corporation ("Kensington"), Steven Zacharius and Judith Zacharius (collectively, "Defendants") move to dismiss Plaintiff Suzanne Mangold Zacharius's Amended Complaint pursuant to CPLR 3211(a)(7). Plaintiff opposes. For the reasons set forth below, Defendant's motion to dismiss is granted in part and denied in part.

Background

This case arises out of a dispute concerning control of Kensington, the largest independent publisher of mass-market books in the United States. (Am. Compl. ¶ 15). Kensington was founded in 1974 by Walter Zacharius, who helped Kensington achieve

$70 million in revenue annually until he stepped down as president and CEO in 2005. (Am. Compl. ¶¶ 15, 16). In 2005, Walter Zacharius's son, Steven Zacharius, assumed the roles of president and CEO. (Am. Compl. ¶ 16).

The instant action stems from a quarrel over control of Kensington between Steven Zacharius and his step-mother, Plaintiff. Walter Zacharius married Plaintiff, his second wife, in June 2006. (Am. Compl. ¶ 36). When Walter Zacharius died on March 2, 2011, Plaintiff became the largest single shareholder of Kensington stock, holding 59% of the voting equity. (Am. Compl. ¶ 20). Plaintiff received her shares under the terms of the Walter Zacharius Revocable Trust Agreement (Six Amendment and Restatement), dated October 29, 2010. (Am. Compl. ¶ 19). However, Plaintiff has never voted her shares due to the existence of a document entitled "Voting Agreement," which allegedly was entered into by Walter Zacharius and his two children, Steven and Judith Zacharius ("Voting Agreement"). (Am. Compl. ¶ 28).

The instant action centers around the enforceability of the Voting Agreement. The Voting Agreement is dated December 16, 2005, and states that the three "Initial Stockholders," Walter, Steven and Judith Zacharius, will vote on Kensington directors as "may be agreed upon by all of the Initial Stockholders." (Am. Compl. Ex. A at 1). The Voting Agreement further provides that if only two Initial Stockholders are alive, such as Steven and Judith, then the two surviving Initial Stockholders will elect directors for all

the shares representing the three Initial Stockholders. (Am. Compl. Ex. A at 1). Under the Voting Agreement, Plaintiff alleges that she has not been entitled to vote for directors under the shares she received from Walter Zacharius because Plaintiff is not an Initial Stockholder, and the Voting Agreement is binding on the Initial Stockholders' heirs and assigns. (Am. Compl. Ex. A at 3). Plaintiff's inability to vote for directors, whom control the corporation, has greatly reduced the sale value of the shares in her contemplated sale to a major publishing house. (Am. Compl. ¶ 124).

In addition to the Voting Agreement, Steven and Judith Zacharius have entered into a voting trust agreement ("Voting Trust Agreement"). (Am. Compl. ¶ 59). Under the terms of the Voting Trust Agreement, Steven and Judith transferred their shares to a trust, and Steven was named the trustee. (Am. Compl. ¶ 60). The Complaint alleges that Steven is able to elect a majority of directors according to the Voting Agreement and Voting Trust Agreement, and thereby has control of Kensington's board of directors. (Am. Compl. ¶ 89).

The Complaint further alleges that Steven Zacharius has used his control of Kensington's board to "self-vote" salary increases. (Am. Compl. ¶ 92). In addition, the Complaint alleges that Steven Zacharius improperly billed personal expenses as business travel, and that Steven Zacharius travels to work each day via limousine. (Am. Compl. ¶ 88). Further, the Complaint avers that Steven granted Judith Zacharius a "no-show job"

at Kensington in exchange for granting Steven the ability to vote her shares under the Voting Trust Agreement. (Am. Compl. ¶ 93).

Plaintiff brought this action on July 16, 2012, seeking to invalidate the Voting Agreement. Plaintiff filed the Amended Complaint on February 5, 2013. Plaintiff seeks relief on six causes of action in the Amended Complaint: (i) a declaratory judgment that the Voting Agreement is void because it was not duly executed, (ii) a declaratory judgment that the Voting Agreement is void because of a lack of consideration, (iii) a declaratory judgment that the Voting Agreement was terminated by Walter Zacharius' transfer of his shares, (iv) a declaratory judgment that the Voting Agreement has been materially breached by Steven and Judith Zacharius, (v) a declaratory judgment that the Voting Agreement would be voided upon Plaintiff's sale of her shares, and (vi) a derivative claim on behalf of Kensington for breach of fiduciary duty and accounting against Steven and Judith Zacharius. Defendants moved to dismiss the Amended Complaint on February 25, 2013. Plaintiff opposed.

I. Defendants' Motion to Dismiss

Defendant moves to dismiss the Complaint pursuant to CPLR 3211(a)(7), on the grounds that the Voting Agreement is valid and enforceable, and that Plaintiff has not

made a demand on the Kensington board of directors. Plaintiff opposes, arguing that the Voting Agreement is void and that any demand on the board would be futile.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

B. *Due Execution of Voting Agreement*

Plaintiff's first cause of action seeks a declaratory judgment that the Voting Agreement is void because it was not actually signed by Walter Zacharius. Plaintiffs argue that the Amended Complaint puts forth several facts that refute the validity of the

Voting Agreement. In support of their motion to dismiss, Defendants argue that Plaintiff does not have first-hand knowledge regarding the validity of Walter Zacharius's signature, and therefore the claim must be dismissed.

"Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 99 (1st Dep't 2009) (internal quotation omitted). Determining ownership interests in a corporation is a proper use for a declaratory judgment. *See Pross v. Jadam Equities Ltd.*, 134 A.D.2d 154, 155 (1st Dep't 1987) (vacating summary judgment that granted declaratory relief and ordering further discovery where issues of fact exist as to ownership of partnership interest); 43 N.Y. Jur. 2d *Declaratory Judgments* § 135 (2013) ("Matters dealing with the rights and status of corporations and their stockholders, and the relation between them, have frequently been the subject matter of declaratory judgment actions.").

There are several facts pled by Plaintiffs that require this Court to deny the motion to dismiss. First, the Voting Agreement is "dated as of December 16, 2005," and that the signature page states that "the parties have duly executed this Agreement as of the date first written above." The Complaint avers that Walter Zacharius could not have executed

the Voting Agreement on December 16, 2005, because he was in Connecticut. *See* Compl. ¶ 32. The Complaint also avers that Judith Zacharius was in Alaska on that date, and did not arrive in New York until December 30, 2005. *See* Compl. ¶ 32.

Second, there are several cross-references to sections of the Voting Agreement that do not exist. For example, there are references to Section 2.1, 2.9, and 2.11, none of which exist in the Voting Agreement. Finally, Plaintiff notes that the signature block is isolated on the final page of the document, while there was ample space to fit the signature block on the preceding page.

Defendants argue that Plaintiff's first cause of action must be dismissed because Plaintiff has failed to "plead substantial and material facts." *See* Memorandum of Law in Support of Defendants' Motion to Dismiss at 9. However, as stated above, on a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). The contentions put forth by the parties raise issues of credibility not amenable to determination on a motion to dismiss. Defendants' motion to dismiss the first cause of action is denied.

C. *No Lack of Consideration*

Plaintiff's second cause of action seeks to invalidate the Voting Agreement based upon a lack of consideration. Plaintiffs contend that, despite the recitation in the Voting Agreement of "the mutual promises set forth," Walter Zacharius did not receive anything of value by signing the Voting Agreement. Plaintiff's contentions are without merit.

"Nominal consideration is sufficient to support [a] contractual duty to plaintiffs; 'the issue of inadequacy of consideration is for the parties to resolve upon entering into the contract.'" *AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co.*, 10 A.D.3d 293, 295 (1st Dep't 2004) (quoting *Roffe v. Weil*, 161 A.D.2d 509 (1st Dep't 1990)). The Voting Agreement states that "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."

In addition, the operative terms of the Voting Agreement, regarding "Initial Stockholders [that] are alive," shows that the ensuring succession was purpose of the agreement. Under the Voting Agreement, Walter Zacharius was able to bequeath his shares to Plaintiff while ensuring that management of Kensington remained with Steven and Judith Zacharius. Allowing Walter Zacharius to execute his estate plan as he saw fit certainly serves as "sufficient" consideration.

Plaintiff also argues that the agreement is ambiguous as to consideration, which is a question of law for courts. *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009). By looking at the four corners of a document, the court must determine whether the agreement is reasonably susceptible to multiple interpretations. *See Chimart Ass'n v. Paul*, 66 N.Y.2d 570, 573 (1998). This Court finds that the language of the Voting Agreement is unambiguous and clearly states that consideration was furnished by all parties for the Voting Agreement. Accordingly, Plaintiff's second cause of action is dismissed.

D. *Voting Agreement Has Not Been Terminated*

Plaintiff's third cause of action seeks to invalidate the Voting Agreement on two grounds. First, Plaintiff argues that the Voting Agreement's termination provision was triggered by Walter Zacharius' transfer of his Kensington shares to a trust, and then the trust's subsequent transfer of those shares to Plaintiff. Second, Plaintiff argues that the Voting Agreement violates Kensington's Bylaws by interfering with Bylaw 2.10. Bylaw 2.10 requires that "every stockholder . . . shall be entitled . . . to one vote for each share . . . standing in his or her name."

1. *Termination Clause Not Triggered*

The Voting Agreement provides that

> Unless sooner terminated, this Agreement shall terminate (a) on the closing 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) written agreement of all Stockholders ("Termination Clause").

See Am. Compl. Ex. A at 2.

Plaintiff argues that Walter Zacharius's transfer of shares to Plaintiff was the contemplated "series of transactions" that terminated the Voting Agreement. Defendants argue that the language of the Termination Clause indicates that it only applies to corporate transactions. Defendants further argue that Plaintiff's interpretation would render meaningless the clause that states the Voting Agreement is "binding upon . . . assigns, heirs, and personal representatives."

Courts must "giv[e] practical interpretation to the language employed [in contracts] and the parties' reasonable expectations." *112 W. 34th St. Assocs., LLC v. 112-1400 Trade Props. LLC*, 95 A.D.3d 529, 531 (1st Dep't 2012). Under the canon of *ejusdem generis*, a series of specifics things or concepts is used to interpret a generic one in the same series. *See 242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 31 A.D.3d 100, 103-04 (1st Dep't 2006). Here, the specifically listed items are "reorganization,

merger, or consolidation." Using these specific items as a reference, this Court finds that the generic term "transaction" was meant to refer to transaction of a similar nature to the corporate transactions listed, such as a statutory stock exchange.

Therefore, discerning the parties' reasonable expectations from the four corners of the contract, this Court finds that the Voting Agreement was not terminated under Section A of the Termination Clause.

2. *No Violation of Bylaws or State Law*

Plaintiff also argues that the Voting Agreement is invalid under both Kensington's Bylaws and the New York Business Corporation Law ("BCL"). Plaintiff contends that the Voting Agreement illegally modified the "one share, one vote" principle delineated in Section 2.10 of Kensington's Bylaws. Plaintiff notes that BCL Section 612(a) provides that shareholders are entitled to one vote for every share, unless otherwise provided in the certificate of incorporation. According to Plaintiff, any alteration to the "one share, one vote" Bylaw required an amendment to Kensington's Articles of Incorporation.

Plaintiff's argument fails because the Voting Agreement did not alter the "one share, one vote" structure. Each share is still entitled to one vote. Instead, the Voting Agreement merely states how each share will cast its one vote. The BCL specifically authorizes voting agreements and New York law has long upheld stockholder agreements

to elect directors. *See* N.Y. Bus. Corp. Law § 620(a) (McKinney 2013); *Clark v. Dodge*, 269 N.Y. 410, 417 (1936) ("The only restrictions on Dodge were (a) that as a stockholder he should vote for Clark as a director – *a perfectly legal contract*") (emphasis added).

The Voting Agreement did not violate Kensington's Bylaws or the BCL's mandates. Therefore, Plaintiff's third cause of action is dismissed.

E. *Voting Agreement Has Not Been Materially Breached*

Plaintiff's fourth cause of action seeks to nullify the Voting Agreement because the Voting Trust Agreement was an improper modification and material breach of the Voting Agreement. Plaintiff argues that the "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." *See* Memorandum of Law in Opposition ("Opp. Br.") 15 (emphasis in original). Plaintiff contends that the Voting Trust Agreement, which empowered Steven Zacharius to vote both his and Judith's shares as trustee, constitutes a violation of the Voting Agreement's "several but not joint" voting provision.

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was said in the writing. *See, e.g.*, *Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). Plaintiff's fourth cause of action fails because it relies on a

misreading of the Voting Agreement. The Voting Agreement provides that "each Stockholder (as defined below) severally and not jointly agrees to vote or act with respect to all shares . . ." *See* Am. Compl. Ex. A at 1.

The language "severally and not jointly" language modifies "agrees," and not "to vote or act." The Voting Agreement does not require that the three signatories "severally and not jointly" vote. Rather, the language signals that the Voting Agreement was "severally and not jointly" agreed upon. Therefore, Plaintiff's contention that the Voting Trust Agreement was a breach of the Voting Agreement is unpersuasive, and the fourth cause of action is dismissed.

F. *Voting Agreement Would Not Be Terminated by Sale of Shares*

Plaintiff's fifth cause of action seeks a declaration that the Voting Agreement would be terminated by Plaintiff's sale of her shares. Plaintiff states that she is in "present negotiations with a major publishing house for the sale of her shares of Kensington stock." *See* Am. Compl. ¶ 124. Defendants argue that Plaintiff's claims are not ripe as Plaintiff has not yet entered into a sale contract for her shares.

The Court finds that it need not reach the ripeness issue because, even if the issue was ripe, Plaintiff's requested relief could not be granted. Expanding upon the discussion above regarding the Termination Clause, Plaintiff's sale of her shares, unaccompanied by

approval from Kensington's board of directors, would not terminate the Voting Agreement. "Giving practical interpretation to the language employed [in contracts] and the parties' reasonable expectations," the Termination Clause contemplated a board-approved corporate transaction. *See 112 W. 34th St. Assocs., LLC v. 112-1400 Trade Props. LLC*, 95 A.D.3d 529, 531 (1st Dep't 2012).

The last line of the Termination Clause states the initial shareholders must not have "at least a majority of the voting power of the surviving or continuing entity." Reading this language in tandem with the "closing" and "merger" language highlighted above, the Termination Clause contemplates the exercise of board discretion in approving a transaction, and not the unilateral sale of stock by one shareholder. *See* N.Y. Bus. Corp. Law § 903(a) (McKinney 2013) ("The board of each constituent corporation, upon adopting such plan of merger or consolidation, shall submit such plan to vote of shareholders").

The language employed by the Termination Clause is typically found in corporate transactions. *See* N.Y. Bus. Corp. Law § 901(a)(4) (defining "surviving" entity); N.Y. Bus. Corp. Law § 913(b), (c) (requiring board approval for share exchanges). Further, the operative provision of the Voting Agreement concerns the election of directors, again tying the language of the Termination Clause to the board of directors.

Therefore, interpreting the reasonable expectations of the signatories to the Voting Agreement based upon the words of the contract, this Court finds that the Voting Agreement would not be terminated by Plaintiff's sale of her shares, and the fifth cause of action is dismissed.

G. *Breach of Fiduciary Duty and Accounting*

Plaintiff's final cause of action asserts a derivative claim, on behalf of Kensington, against Steven and Judith Zacharius for breach of their fiduciary duties as directors. The Complaint alleges that Judith Zacharius breached her fiduciary duty to shareholders by selling her voting rights to Steven Zacharius in exchange for a "no-show" job. *See* Am. Compl. ¶ 79. The Complaint also alleged that since 2009, Steven Zacharius has improperly charged tens of thousands of dollars of personal expenses to Kensington. *See* Am. Compl. ¶ 87.

The Complaint also alleges that Steven Zacharius has used his voting control of Kensington to appoint a "hand-picked" board of directors. *See* Am. Compl. ¶ 89. The Complaint further avers that the directors are under Steven Zacharius's control and not independent because he is the majority shareholder and controls their "livelihood." *See* Am. Compl. ¶¶ 89, 91, 96, 131. The Complaint also alleges that the "board has remained silent" regarding Steven Zacharius's transgressions. *See* Am. Compl. ¶¶ 90, 92, 93.

Therefore, according to Plaintiff, a demand on the board of directors to remedy the alleged self-dealing would be futile. *See* Am. Compl. ¶ 96.

Plaintiff's sixth cause of action has not fulfilled the statutory requirements to plead demand futility. New York law requires that shareholder derivative actions "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." *See* N.Y. Bus. Corp. Law § 626(c) (McKinney 2013). The Court of Appeals clarified this statutory stricture in *Marx v. Akers*, 88 N.Y.2d 189, 200 (1996), holding that "[d]emand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transactions . . . or is 'controlled' by a self-interested director."

Control or lack of independence of directors must be alleged with particularity. *See* BCL § 626(c); *Marx*, 88 N.Y.2d at 200. Director interest may be either self-interest in a transaction, or a lack of independence "owing to complete domination and control by a self-interested director." *See Bansbach v. Zinn*, 1 N.Y.3d 1, 11 (2003). The allegation that a shareholder has appointed directors to the board does not place their independence in doubt. *See Balling v. Casabianca*, 285 A.D. 20, 21 (1st Dep't 1954); *Batkin v. Softbank Holdings*, 270 A.D.2d 177, 178 (1st Dep't 2000) (applying analogous Delaware statute); 15 N.Y. Jur. 2d *Business Relationships* § 1254 ("an allegation that a demand

would be futile because the entire board of directors is constituted of appointees of one individual and is subservient to him or her, standing alone, is insufficient to satisfy the demand requirements.").

The Complaint fails to name any directors besides Steven and Judith Zacharius, or even how many directors sit on the board. The sole averment in the Complaint relating to directors is that they were appointed by Steven Zacharius. New York law requires a description of self-interest or control with greater particularity than simply stating that the board was "hand-picked." *See Balling*, 285 A.D. at 21; *Abramson v. Blakeley*, 25 Misc. 2d 967, 971 (Sup. Ct. N.Y. Cnty. 1960) ("an allegation that a demand would be futile because the entire board is constituted of appointees of one individual and is subservient to him is, standing alone, insufficient").

The Complaint's sufficiency can further be determined by a comparison with *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003), where the Court of Appeals found demand futility sufficiently pled. In *Bansbach*, the former founder, chairman, majority shareholder and CEO, Zinn, gave bonuses to himself and certain employees in the amount donated to the election campaign of U.S. Representative Maurice Hinchey. *Bansbach*, 1 N.Y.3d at 5. Zinn was later indicted for causing the company to violate federal election and tax laws. *Bansbach*, 1 N.Y.3d at 5.

The complaint averred that Zinn dominated and controlled the board such that the board put Zinn's interests above those of the corporation. *Bansbach*, 1 N.Y.3d at 12. This control was exemplified by the board's immediate approval of Zinn's defense fees even after Zinn pled guilty and admitted using the company in his scheme. *Bansbach*, 1 N.Y.3d at 12. Further, the plaintiff alleged that board members only belatedly sought partial repayment from Zinn of damages suffered by the company, and only in the form of a promissory note. *Bansbach*, 1 N.Y.3d at 12. Finally, the board voted to fully indemnify Zinn when the Supreme Court initially dismissed the derivative action, but before the Appellate Division reversed dismissal. *Bansbach*, 1 N.Y.3d at 12.

In contrast to the particularized allegations of control in *Bansbach*, here plaintiff makes generalized allegations of the board's lack of independence. The Complaint alleges that Steven Zacharius improperly used corporate funds for personal items and that Judith sold her shares for a "no-show" position. *See* Am. Compl. ¶ 89. However, the only connection alleged between Kensington's board and the alleged wrongdoing is that Kensington's board "is responsible for approving all 'compensation arrangements' . . . with ultimate oversight of Company expenses." *See* Am. Compl. ¶ 89.

The Complaint does not show the requisite "domination and control" by Steven or Judith Zacharius, such that the board could not have exercised its business judgment and put the interests of Kensington before that of Steven and Judith. Without any

particularized allegations showing that Steven or Judith Zacharius dominated and controlled the board such that any demand would be futile, the Complaint fails to meet the burden imposed by BCL section 626(c).

As Plaintiff has failed to plead her derivative action with sufficient particularity, the Court need not reach the issues of standing and conflict with Plaintiff's direct claims. Plaintiff's sixth cause of action is dismissed.

(Order of the Court appears on the next page.)

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Defendants' motion to dismiss is GRANTED in part, and the second, third, fourth, fifth, and sixth causes of action asserted in the Amended Complaint are dismissed; and it is further

ORDERED that Defendants' motion to dismiss is otherwise DENIED; and it is further

ORDERED that Plaintiff is granted leave to serve a Second Amended Complaint so as to replead the sixth cause of action within 20 days after service on Plaintiff's attorney of a copy of this order with notice of entry; and it is further

(Order of the Court continues on the next page.)

ORDERED that in the event that Plaintiff fails to serve and file a Second Amended Complaint in conformity herewith within such time, leave to replead shall be deemed denied, and defendant is then directed to serve an answer of the Amended Complaint within 40 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to appear for a status conference on February 18, 2014, in Part 3, Room 442, 60 Centre St, at 10:00 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 16, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.