

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

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CAROLYN LE BEL, AS EXECUTRIX OF THE  
ESTATE OF MARYA LENN YEE,

Index No. 652200/10

Plaintiff,

Motion Sequence No. 4

-against-

MARY A. DONOVAN and  
DONOVAN & YEE, LLP,

Defendants.

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**PLAINTIFF'S MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

**GALLET DREYER & BERKEY, LLP  
845 Third Avenue  
New York, NY 10022  
(212) 935-3131**

**Attorneys for Plaintiff**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	i
PRELIMINARY STATEMENT.....	1
RELEVANT FACTS.....	2
Marya Lenn Yee's Untimely Death.....	2
The Dissolution of Donovan & Yee Upon Yee's Death.....	3
Donovan's Continuing Refusal to Acknowledge the Dissolution of Donovan & Yee.....	7
The Causes of Action in This Lawsuit.....	8
ARGUMENT.....	9
POINT I     BOTH THE EXPRESS LANGUAGE OF THE PARTNERSHIP AGREEMENT AND THE UNDISPUTED FACTS MANDATE THAT PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER BREACH OF CONTRACT CLAIM.....	11
POINT II    THE UNDISPUTED FACTS LIKEWISE DEMONSTRATE THAT PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER BREACH OF FIDUCIARY DUTY CLAIM.....	15
POINT III   GIVEN THE DISSOLUTION OF DONOVAN & YEE, PLAINTIFF IS INARGUABLY ENTITLED TO AN ACCOUNTING.....	16
POINT IV    GIVEN THE PROVISIONS OF THE PARTNERSHIP AGREEMENT AND THE UNDISPUTED FACTS, PLAINTIFF IS ENTITLED TO A DECLARATION THAT DONOVAN & YEE DISSOLVED UPON YEE'S DEATH.....	17
POINT V     THE COURT SHOULD ISSUE AN INJUNCTION PROHIBITING DONOVAN FROM USE OF YEE'S NAME IN CONNECTION WITH DONOVAN'S LAW PRACTICE.....	18
CONCLUSION.....	19

## TABLE OF AUTHORITIES

### Cases

<u>Alizio v. Perpignano</u> 176 A.D.2d 279, 574 N.Y.S.2d 213 (2d Dept. 1991) .....	15
<u>Amatulli v. Delhi Construction Corp.</u> 77 N.Y.2d 525, 571 N.E.2d 645, 569 N.Y.S.2d 337 (1991).....	10
<u>Andre v. Pomeroy</u> 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974).....	10
<u>Appell v. LAG Corp.</u> 41 A.D.3d 277, 838 N.Y.S.2d 541 (1st Dept. 2007) .....	15
<u>Birnbaum v. Birnbaum</u> 73 N.Y.2d 461, 541 N.Y.S.2d 746, 539 N.E.2d 574 (1989).....	15
<u>Brodsky v. Stadlen</u> 138 A.D.2d 662, 526 N.Y.S.2d 478 (2d Dept. 1988) .....	14
<u>Burger, Kurzman, Kaplan &amp; Stuchin v. Kurzman</u> 139 A.D.2d 422, 527 N.Y.S.2d 15 (1 <sup>st</sup> Dept. 1988) .....	11
<u>D'Amour v. Ohrenstein &amp; Brown, LLP</u> 17 Misc. 3d 1130(A), 851 N.Y.S.2d 68 (N.Y. Co. 2007).....	16
<u>Dauman Displays, Inc. v. Masturzo</u> 168 A.D.2d 204, 562 N.Y.S.2d 89 (1st Dept. 1990) .....	10
<u>D'Esposito v. Gusrae, Kaplan &amp; Bruno PLLC</u> 44 A.D.3d 512, 844 N.Y.S.2d 214 (1 <sup>st</sup> Dept. 2007) .....	13
<u>Donadio v. Crouse-Irving Memorial Hospital</u> 75 A.D. 2d 715, 427 N.Y.S.2d 118 (4th Dept. 1980).....	10
<u>Gaentner v. Benkovich</u> 18 A.D.3d 424, 795 N.Y.S.2d 246 (2d Dept. 2005) .....	11
<u>Green v. Albert</u> 199 A.D.2d 465, 605 N.Y.S.2d 395 (2d Dept. 1993) .....	16
<u>Klein, Wagner &amp; Morris v. Lawrence A. Klein, P.C.</u> 186 A.D.2d 631, 588 N.Y.S.2d 424 (2d Dept. 1992).....	17
<u>Kurtzman v. Berstol</u> 40 A.D.3d 588, 835 N.Y.S.2d 644 (2d Dept. 2007) .....	15

<u>Mayer v. McBrunigan Construction Corp.</u>	
105 A.D.2d 774, 774, 481 N.Y.S.2d 719, 720 (2d Dept. 1984) .....	10
<u>Mazur v. Greenberg</u>	
110 A.D.2d 605, 488 N.Y.S.2d 397 (1 <sup>st</sup> Dept. 1985) .....	14
<u>McKinney v. Setteducatti</u>	
183 A.D. 2d 879, 584 N.Y.S.2d 130 (2d Dept. 1992). ....	10
<u>Mudge Rose Guthrie Alexander &amp; Ferdon v. Pickett</u>	
11 F. Supp. 2d 449 (S.D.N.Y. 1998) .....	15
<u>Peirez v. Queens P.E.P. Associates Corp.</u>	
148 A.D.2d 596, 539 N.Y.S.2d 61 (2d Dept. 1989) .....	11
<u>Posner v. Posner</u>	
280 A.D.2d 318, 720 N.Y.S.2d 465 (1 <sup>st</sup> Dept. 2001) .....	16
<u>Ramirez v. Goldberg</u>	
82 A.D.2d 850, 439 N.Y.S.2d 959 (2d Dept. 1981) .....	14
<u>Seligson v. Russo</u>	
16 A.D.3d 253, 792 N.Y.S.2d 34 (1 <sup>st</sup> Dept. 2005) .....	17
<u>Shine &amp; Company LLP v. Natoli</u>	
89 A.D.3d 523, 932 N.Y.S.2d 479 (1 <sup>st</sup> Dept. 2011) .....	13
<u>Smith v. Johnson Products Co.</u>	
95 A.D.2d 675, 463 N.Y.S.2d 464 (1st Dept. 1993) .....	10
<u>Statutes and Rules</u>	
CPLR 3212(b).....	9
CPLR 3212(c) .....	9
N.Y. Partnership Law § 62(d).....	11, 17
N.Y. Partnership Law § 63 .....	17

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**PLAINTIFF'S MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Preliminary Statement

Marya Lenn Yee, one of the two partners in the law firm of Donovan & Yee, LLP, was tragically killed in a plane crash. Following Yee's death, the other partner, defendant Mary A. Donovan, sought to compound the family's tragedy by improperly pocketing for herself the assets of the law firm that Yee had spent much of her professional life building. Specifically, in blatant contravention of the express terms of Yee and Donovan's partnership agreement, and the settled law of the State of New York, Donovan refused -- and continues to refuse -- to acknowledge that upon Yee's death the firm of Donovan & Yee, LLP dissolved, that Yee's Estate is entitled to one half of the assets of the firm as of the December 1, 2008 date of Yee's demise, and that Donovan is no longer allowed improperly to profit by continuing to use Yee's name in Donovan's current law firm.

The facts demonstrating Donovan's wrongdoing, and the Estate's manifest entitlement to judgment as a matter of law, are undisputed. Accordingly, the Court should grant plaintiff's motion for summary judgment and enter an Order:

(a) awarding plaintiff summary judgment as to liability on plaintiff's First Cause of Action, for breach of contract;

(b) awarding plaintiff summary judgment as to liability on plaintiff's Second Cause of Action, for breach of fiduciary duty;

(c) awarding plaintiff summary judgment on plaintiff's Fourth Cause of Action, for an accounting;

(d) awarding plaintiff summary judgment on plaintiff's Fifth Cause of Action and declaring that Donovan & Yee, LLP dissolved upon Yee's death on December 1, 2008;

(e) awarding plaintiff summary judgment on plaintiff's Sixth Cause of Action and issuing an injunction prohibiting Donovan from any continued or further use of Yee's name in furtherance of or in connection with Donovan's law practice;

(f) setting this matter down for an inquest as to the damages to be awarded to plaintiff on plaintiff's claims and the amount that defendants must pay over to plaintiff as an accounting; and

(g) awarding such other and further relief as this Court deems just and proper.

#### Relevant Facts

##### Marya Lenn Yee's Untimely Death

The facts underlying this case are straightforward, as is the wrongfulness of defendants' actions and plaintiff's entitlement to judgment as a matter of law. Mary

Lenn Yee was, and Mary A. Donovan is, a lawyer specializing in the field of intellectual property. Yee and Donovan, together with a third attorney, Bela Amladi, entered into a Partnership Agreement dated as of July 15, 1997 (“Partnership Agreement”), forming a firm then known as Donovan Amladi & Yee, LLP. Amladi left the firm shortly after its formation, and the firm continued under the name Donovan & Yee, LLP (“Donovan & Yee”), with just two partners, Yee and Donovan, until Yee’s tragic death in late 2008. (Affidavit of David S. Douglas, Exhibits 3; 7 at 11-13, 16).

On November 30, 2008, a small plane in which Yee was a passenger crashed in Coalinga, California. Yee died the next day, December 1, 2008, as a result of the injuries that she suffered in that plane crash. (Douglas Aff’t, Exhibit 4).

#### The Dissolution of Donovan & Yee Upon Yee’s Death

Pursuant to the terms of the Partnership Agreement and governing New York State law, Donovan & Yee dissolved upon Yee’s death. Specifically, Section 6.8(a) of the Partnership Agreement provides:

Priority Among Provisions. A voluntary dissolution (including any dissolution by law resulting from only one Partner remaining in the Partnership following the death, retirement, expulsion or withdrawal of the other Partner(s)) and termination of the Partnership shall override any of the provisions of this Article VI then in effect. . . .

(Douglas Aff’t, Exhibit 3). Under New York law, a limited liability partnership is automatically dissolved as a matter of law when there remains only one partner in the partnership, absent contractual agreement to the contrary. N.Y. Partnership Law § 62(4).

Moreover, Donovan has admitted that, upon Yee's death, Donovan was the sole remaining "partner" for purposes of the Partnership Agreement. (Douglas Aff't, Exhibits 7 at 16, 34-36, 39-40, 46; 8 at 15-18; 12).<sup>1</sup>

Accordingly, upon Yee's death on December 1, 2008, Donovan & Yee dissolved as a matter of law, as Donovan was the only remaining partner.

In a desperate -- and deceptive -- attempt to evade the dissolution of Donovan & Yee, Donovan engaged in a sham transaction after Yee's death in which she purported to add another "partner." Given § 6.8(a), such an attempt was ineffectual and too late. Moreover, even apart from the language of § 6.8(a), Donovan's action was a transparent ruse.

What Donovan attempted to do to evade her obligations to the beneficiaries of her former partner's Estate is as follows. In addition to § 6.8(a), the Partnership Agreement also contains a § 6.8(b), which provides:

Continuation of the Partnership. The death, retirement, disability, withdrawal or expulsion of any Partner shall not cause the dissolution of the Partnership, unless following such death, retirement, disability, withdrawal or expulsion only one Partner shall remain in the Partnership and no additional Partner shall be admitted within (90) days following such death, retirement, disability, withdrawal or expulsion.

(Id., Exhibit 3). Section 6.8(b) is ineffective under the circumstances presented here, as, by its express terms, § 6.8(a) takes priority and mandates that the dissolution by operation

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<sup>1</sup> Prior to Yee's death, Donovan & Yee had entered into an employment agreement with one of Donovan & Yee's associates, Andrea Calvaruso, under which Donovan & Yee agreed that Calvaruso would be held out to third parties as a "partner." Calvaruso, however, did not actually become a "partner" of Donovan & Yee in any legal sense, had no rights or obligations of a partner, and continued in all respects to be treated as an employee of Donovan & Yee. (Douglas Aff't, Exhibits 5; 8 at 13-14). Donovan has admitted that Calvaruso was not in fact a "partner" at the time of Yee's death. (Id., Exhibit 7 at 16, 46; 8 at 15-18).

of law that occurred upon Yee's death overrides any of the other provisions of Article VI of the Partnership Agreement.<sup>2</sup>

Donovan nonetheless sought to seize upon § 6.8(b) and avoid the dissolution of Donovan & Yee by pretending to admit another "Partner" to the firm within 90 days of Yee's demise. She prevailed upon Andrea Calvaruso, one of the firm's employees, to sign a document that purported to give Calvaruso the rights of a "Partner." (Id., Exhibits 6; 7 at 34-36, 39-40, 43-44). As both Donovan and Calvaruso made clear in their respective deposition testimony, however, that document was a sham, and Calvaruso never in fact had any of the rights or obligations of an actual "Partner" and never was treated as a "Partner."

For instance, the only money that Calvaruso received was a guaranteed salary, and she did not receive any distributions or a share of any of the firm's profits. While the written document purported to provide for Calvaruso supposedly receiving a percentage of net profits, in reality she did not receive any share of the net profits whatsoever. She likewise did not share in any losses. Indeed, when Calvaruso requested on multiple occasions to see the firm's financial statements, Donovan refused to provide them to her. Calvaruso did not make any capital contributions or buy-in payments to Donovan & Yee and no capital account was set up for Calvaruso; Donovan never even asked Calvaruso to make a capital contribution. Donovan excluded Calvaruso from involvement in the making of any major decisions concerning the firm, and there were no actual votes taken on any issue concerning the firm. Likewise, Calvaruso had no involvement with any

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<sup>2</sup> Section 6.2 of the Partnership Agreement -- which governs situations where a Partner has died but there is more than just a single Partner remaining -- is likewise inapplicable to the circumstances here.

financial aspects of the firm, other than sending bills to specific clients with which she was dealing. (Id., Exhibits 7 at 48-49, 56; 8 at 21-28, 33-35; 13; 14; 15).

Calvaruso left the firm that very same year for the precise reason that she and Donovan never in fact came to any agreement on what the terms of what their illusory “partnership” were to be:

Q. And did there come a time when you ceased to be affiliated with the firm?

A. Yes.

Q. Any when was that?

A. At the end of December in 2009.

Q. For what reason did you cease to be affiliated?

A. Mary and I couldn't come to terms on what -- come to agreement on what the terms of our partnership would be.

....

A. I left because we could not come to terms -- come to agreement on the terms of what our partnership was going to be.

(Id., Exhibit 8 at 38, 64; emphasis added).

Thus, even if § 6.8(b) of the Partnership Agreement had any bearing on this matter -- which it does not -- no additional Partners were admitted to Donovan & Yee within ninety days of Yee's death, and the firm dissolved upon Yee's death for this reason as well.

Donovan's Continuing Refusal to Acknowledge the Dissolution of Donovan & Yee

Donovan has failed and refused to acknowledge the dissolution of Donovan & Yee. To the contrary, she has continued to act as if Donovan & Yee remains an ongoing entity.

Donovan has failed and refused to acknowledge that, given the dissolution of Donovan & Yee, the Estate is entitled to receive one-half of the assets of the firm (including accounts receivable and work-in-progress) as of December 1, 2008, less any accrued liabilities as of such date and any direct expenses incurred in dissolving Donovan & Yee. Donovan has failed to cause the Estate to be paid the monies to which the Estate is entitled under the terms of the Partnership Agreement and New York law effecting the dissolution of Donovan & Yee, an amount that is not less than one half of the \$415,520.00 amount of Partners' Capital indicated in the financial statement provided to plaintiff, i.e., \$207,760.00. (Douglas Aff't, Exhibits 3; 9).<sup>3</sup>

Additionally, despite repeated requests that Donovan cease use of Yee's name, Donovan has improperly sought to trade and profit on Yee's good will and reputation by

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<sup>3</sup> There are questions of fact concerning the amount owed to Estate. A financial statement that Donovan has provided to plaintiff indicates that, as of December 31, 2008, Donovan & Yee had Partners' Capital of \$415,520.00. (Douglas Aff't, Exhibit 9). The actual Partners' Capital may well be a sum greater than that amount. For instance, Donovan tried to deceive plaintiff by providing multiple, conflicting versions of what were purported to be Donovan & Yee's financial statements. The financial statements, moreover, fail to conform to accounting standards, including with respect to the handling of receivables. Such issues concerning the precise amount of damages, however, raise factual issues that are properly addressed at an inquest. In contrast, as demonstrated throughout these motion papers, there are no disputed material questions of fact as to Donovan's liability to the Estate.

continuing to use Yee's name in Donovan's current firm and marketing materials. (Id., Exhibits 7 at 75-76; 10).<sup>4</sup>

#### The Causes of Action in This Lawsuit

Donovan's actions left the Executrix of Yee's Estate with no choice but to commence this action seeking redress for Donovan's wrongdoing, which is in blatant violation of the terms of the Partnership Agreement into which Yee and Donovan had entered and the laws of the State of New York. Plaintiff is pressing several causes of action:

The First Cause of Action is for Donovan's breach of her contractual obligations under the Partnership Agreement. As demonstrated in these motion papers, plaintiff is entitled to an award of summary judgment as to liability on this claim, with the precise amount of damages to be determined at an inquest. The Second Cause of Action is for Donovan's breach of her fiduciary obligations as Yee's partner. Plaintiff is similarly entitled to summary judgment as to liability on this claim.<sup>5</sup>

The Fourth Cause of Action is for an accounting. Plaintiff is entitled to summary judgment on this claim. The Fifth Cause of Action is for a declaration that Donovan &

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<sup>4</sup> As a further example of Donovan's ill will and wrongful placement of her own self-interest over her contractual and fiduciary obligations to Yee and her Estate, following Yee's death, Donovan improperly and prematurely cancelled the medical insurance covering Yee, including coverage for medical treatment and services rendered while Yee was still alive, resulting in the Estate unnecessarily being charged for such medical expenses. Fortunately, the Estate was ultimately able to convince the insurer to cover most of these expenses. (Douglas Aff't, Exhibit 11).

<sup>5</sup> In a Decision and Order entered on October 24, 2011, this Court rejected defendants' attempt to have these causes of action dismissed. The Court granted defendant's motion only insofar as the Court dismissed, without prejudice, the Third Cause of Action, which sounded under the doctrines of unjust enrichment, money had and received, and constructive trust. (Douglas Aff't, Exhibit 16). On appeal, the First Department upheld this Court's Decision and Order, ruling that this Court had correctly denied defendant's misguided challenge to the First and Second Causes of Action (The Court's ruling as to the Third Cause of Action was not a subject of appeal). (Id., Exhibit 17).

Yee dissolved upon Yee's death on December 1, 2008, a declaration to which plaintiff is likewise entitled as a matter of law on this motion. Plaintiff is further entitled to summary judgment on the Sixth Cause of Action, for the issuance of an injunction prohibiting Donovan from any continued or further use of Yee's name in furtherance of or in connection with Donovan's law practice.

### ARGUMENT

The undisputed -- and indisputable -- evidence, and equally settled governing law, demonstrate plaintiff's manifest entitlement to judgment in her favor as to defendants' liability under each of plaintiffs' causes of action.

CPLR 3212(b) provides that:

[A summary judgment] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.

CPLR 3212(c) further provides:

If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages. . . the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

Summary judgment is warranted when there is no genuine issue of material fact which exists sufficient to require a trial. E.g., Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974) (summary judgment awarded to plaintiff, as uncontested facts demonstrated defendant's liability); Dauman Displays, Inc. v.

Masturzo, 168 A.D.2d 204, 562 N.Y.S.2d 89 (1st Dept. 1990). The Court's responsibility is not to resolve disputed issues of fact, but, rather, simply to assess whether there are any factual issues to be tried. E.g., McKinney v. Setteducatti, 183 A.D. 2d 879, 584 N.Y.S.2d 130 (2d Dept. 1992).

In order to overcome a motion for summary judgment, the party opposing summary judgment must produce admissible evidentiary proof sufficient to establish a material question of fact. Amatulli v. Delhi Construction Corp., 77 N.Y.2d 525, 571 N.E.2d 645, 569 N.Y.S.2d 337 (1991), aff'd, 77 N.Y.2d 525, 571 N.E.2d 645, 569 N.Y.S.2d 337. "[M]ere conclusory assertions, devoid of evidentiary facts" or reliance on "surmise, conjecture and speculation" is insufficient to defeat a motion for summary judgment. Smith v. Johnson Products Co., 95 A.D.2d 675, 463 N.Y.S.2d 464 (1st Dept. 1993). "It is well-settled that 'a shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough' to defeat a motion for summary judgment." Mayer v. McBrunigan Construction Corp., 105 A.D.2d 774, 774, 481 N.Y.S.2d 719, 720 (2d Dept. 1984) (quoting Gelb v. Bucknell Press, 69 A.D.2d 829, 830, 415 N.Y.S.2d 89, 91 (2d Dept. 1979)) (plaintiff awarded summary judgment where defendants were unable to produce more than conclusory assertions). Summary judgment is an appropriate method to "eliminate unnecessary expense to named litigants where no issue of a material fact is presented to justify trial against them." Donadio v. Crouse-Irving Memorial Hospital, 75 A.D. 2d 715, 427 N.Y.S.2d 118, 119 (4th Dept. 1980).

Plaintiff readily satisfies these standards here. Accordingly, the Court should grant plaintiff's motion for summary judgment as to liability on plaintiff's claims, award the declaratory and injunctive relief to which plaintiff is entitled, and set this matter down

for an inquest as to the damages to be awarded to plaintiff on plaintiff's claims and the amount that defendants must pay over to plaintiff as an accounting.

#### POINT I

#### BOTH THE EXPRESS LANGUAGE OF THE PARTNERSHIP AGREEMENT AND THE UNDISPUTED FACTS MANDATE THAT PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER BREACH OF CONTRACT CLAIM

Donovan and Yee expressly agreed in their Partnership Agreement that, should one of them die, leaving the other as the sole remaining partner, Donovan & Yee would dissolve as a matter of law. Thus, upon Yee's death on December 1, 2008, the firm inarguably dissolved.

##### A. Donovan and Yee Dissolved Pursuant to § 6.8(a) of the Partnership Agreement

Under New York law, "Dissolution is caused. . . by the death of any partner." N.Y. Partnership Law § 62(d); see also, e.g., Gaentner v. Benkovich, 18 A.D.3d 424, 795 N.Y.S.2d 246 (2d Dept. 2005) (partner's death dissolved partnership by operation of law). It is only where partners specifically agree that such dissolution is not to occur upon such demise of a partner that such dissolution by operation of law is overridden. E.g., Peirez v. Queens P.E.P. Associates Corp., 148 A.D.2d 596, 539 N.Y.S.2d 61 (2d Dept. 1989) (absent specific agreement to contrary, partnership dissolves upon death of partner); Burger, Kurzman, Kaplan & Stuchin v. Kurzman, 139 A.D.2d 422, 527 N.Y.S.2d 15 (1<sup>st</sup> Dept. 1988) (partnership dissolved upon death of partner absent specific agreement to contrary).

In the Partnership Agreement, Yee and Donovan expressly agreed that that, should one of them die, leaving only the other as a Partner, the Donovan & Yee would

dissolve, as contemplated by New York law, and that such dissolution would override any and all provisions contained in the balance of § 6 of the Agreement. Section 6.8(a) explicitly states:

Priority Among Provisions. A voluntary dissolution (including any dissolution by law resulting from only one Partner remaining in the Partnership following the death. . . of the other Partner(s)) and termination of the Partnership shall override any of the provisions of this Article VI then in effect. . . .

Thus, under both New York law and the express contractual agreement of the parties, Donovan & Yee dissolved upon Yee's death on December 1, 2008 following the plane crash. Donovan's refusal to recognize that dissolution therefore constitutes a breach of the Partnership Agreement. Accordingly, the Court should grant summary judgment in favor of plaintiff as to Donovan's liability under the First Cause of Action.

B. The Undisputed Facts Demonstrate that Donovan & Yee Dissolved Even if § 6.8(b) of the Partnership Agreement Were Applicable

Even if § 6.8(b) were applicable to this case -- which it is not -- the undisputed facts still demonstrate that Donovan & Yee dissolved as a result of Yee's death.

As an initial matter, it is beyond cavil that § 6.8(b) has no bearing on this matter. Section 6.8(a) provides that in the event of a dissolution by law -- including one resulting from the death of a Partner -- the balance of the provisions in Article 6 are "overridden."

In any event, even if § 6.8(b) were at all relevant, that provision states that Donovan & Yee was to be deemed dissolved where only one Partner remained and no additional Partner was admitted within 90 days following the death that caused there to be only one remaining Partner. Here, upon Yee's death, only one Partner remained, and no additional Partner was in fact admitted within the 90 days thereafter.

Donovan sought to evade dissolution by pressuring Calvaruso to enter into an agreement calling her a “partner.” But the testimony of both Calvaruso and Donovan herself make crystal clear that the written agreement between Calvaruso and Donovan was a sham, that Donovan never intended Calvaruso to be Partner in any real-world sense and never treated her as a Partner, and that Calvaruso never had the rights or obligations that are integral and necessary elements of being a “Partner.” Calvaruso received no money except a guaranteed salary, did not receive any distributions or a share of the firm’s profits, did not share in any losses, was denied access to the firm’s financial statements, made no capital contribution and had no capital account, was not involved in any major decisions, did not participate in any actual votes, and had no involvement with any financial aspects of the firm. Moreover, in her view, she did not consider herself a true “partner”, but rather that she and Donovan had failed ever to reach agreement on the terms of any actual partnership.

Therefore, even if § 6.8(b) were in any way pertinent, the undisputed facts adduced during discovery demonstrate that Calvaruso did not become an actual “Partner.” See, e.g., Shine & Company LLP v. Natoli, 89 A.D.3d 523, 932 N.Y.S.2d 479 (1<sup>st</sup> Dept. 2011) (sharing in profits and losses are both essential elements of partnership; party was not partner regardless of reference to him as “equity partner” in written agreement and Supreme Court, New York County, correctly granted summary judgment holding that such party was not a “partner”); D’Esposito v. Gusrae, Kaplan & Bruno PLLC, 44 A.D.3d 512, 844 N.Y.S.2d 214 (1<sup>st</sup> Dept. 2007) (upholding finding in action for determination of plaintiff attorney’s interest in defendant law firm and for an accounting that plaintiff was not partner in firm where, inter alia, he made no capital

investment in firm and had no control over firm, notwithstanding that he was called “partner” on tax return; summary judgment affirmed); Brodsky v. Stadlen, 138 A.D.2d 662, 526 N.Y.S.2d 478 (2d Dept. 1988) (“the failure of a party to contribute capital is strongly indicative that no partnership exists”; a document “calling an organization a partnership does not make it one”); Mazur v. Greenberg, 110 A.D.2d 605, 488 N.Y.S.2d 397 (1<sup>st</sup> Dept. 1985) (where, among other things, attorney shared in profits at fixed 5% of net rate, had made no capital investment, and did not possess any ownership interest, attorney was not partner), aff’d, 66 N.Y.2d 927, 489 N.E.2d 764, 498 N.Y.S.2d 795 (1985); Ramirez v. Goldberg, 82 A.D.2d 850, 439 N.Y.S.2d 959 (2d Dept. 1981) (party claiming existence of partnership has burden of proving such existence, which party failed to do; in determining whether partnership exists, factors to be considered include intent of parties, whether there was joint control or management of business, and whether there was sharing of both profits and losses).

Section 6.8(b) thus cannot even remotely justify Donovan’s refusal to recognize the dissolution of Donovan & Yee and Donovan’s breach of her contractual obligations in light of that dissolution. For this reason as well, summary judgment should be granted in plaintiff’s favor as to Donovan’s liability under the First Cause of Action.

## POINT II

### THE UNDISPUTED FACTS LIKEWISE DEMONSTRATE THAT PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER BREACH OF FIDUCIARY DUTY CLAIM

The undisputed facts likewise demonstrate that Donovan's refusal to recognize the dissolution of Donovan & Yee and cause the Estate to be paid the sum to which it is entitled constitutes a blatant breach of Donovan's fiduciary duty.

It is a fundamental tenet of New York law that partners owe to their fellow partners the highest fiduciary obligations of trust and loyalty, to which their own self-interest is to be subordinated. This duty exists entirely separate and apart from any contractual obligations that a partner may additionally have. E.g., Birnbaum v. Birnbaum, 73 N.Y.2d 461, 539 N.E.2d 574, 541 N.Y.S.2d 746 (1989) (partners have fiduciary duty to each other); Appell v. LAG Corp., 41 A.D.3d 277, 838 N.Y.S.2d 541 (1st Dept. 2007) (defendants, as partners, had fiduciary obligation to plaintiff); Alizio v. Perpignano, 176 A.D.2d 279, 574 N.Y.S.2d 213 (2d Dept. 1991) (all partners are fiduciaries of one another); Mudge Rose Guthrie Alexander & Ferdon v. Pickett, 11 F. Supp. 2d 449 (S.D.N.Y. 1998) (under New York law, limited liability partnership is partnership with same rights and responsibilities between partners as general partnership, including fiduciary duties). A breach of fiduciary duty occurs where, as in the case at bar, a fiduciary relationship exists, the defendant engaged in misconduct, and that misconduct directly caused the plaintiff to suffer damages. E.g., Kurtzman v. Berstol, 40 A.D.3d 588, 835 N.Y.S.2d 644 (2d Dept. 2007) (granting judgment to plaintiff member of limited liability company as matter of law where defendant breached fiduciary duty to plaintiff by placing defendant's personal interests above those of plaintiff); D'Amour v.

Ohrenstein & Brown, LLP, 17 Misc. 3d 1130(A), 851 N.Y.S.2d 68 (N.Y. Co. 2007)

(upholding breach of fiduciary duty claim interposed between law partners).

Donovan baldly violated this legally imposed, non-contractual obligation.

Abusing her control over the assets of Donovan & Yee after Yee's death, and acting out improper self-interest, she refused to recognize the dissolution of the firm and to pay the Estate the monies to which the Estate was entitled given such dissolution. By doing so, Donovan increased by hundreds of thousands of dollars the amount of firm assets available to be distributed to Donovan's own pockets. Such self-interested self-dealing is a classic instance of breach of a partner's fiduciary duty, for which Donovan is indisputably liable.

The undisputed facts therefore demonstrate that Donovan is liable as a matter of law under the Second Cause of Action.

### POINT III

#### GIVEN THE DISSOLUTION OF DONOVAN & YEE, PLAINTIFF IS INARGUABLY ENTITLED TO AN ACCOUNTING

As shown in Points I and II, the settled law of the State of New York and the undisputed facts demonstrate that Donovan & Yee dissolved upon Yee's death on December 1, 2008. Given the dissolution of Donovan & Yee, plaintiff is inarguably entitled to an accounting. E.g., Posner v. Posner, 280 A.D.2d 318, 720 N.Y.S.2d 465 (1<sup>st</sup> Dept. 2001) (partner's right to accounting accrues upon dissolution); Green v. Albert, 199 A.D.2d 465, 605 N.Y.S.2d 395 (2d Dept. 1993) (right to accounting accrues upon

dissolution of partnership, which occurs by operation of law on date of partner's death). The Court should therefore award plaintiff summary judgment on plaintiff's Fourth Cause of Action, for an accounting.

#### POINT IV

GIVEN THE PROVISIONS OF THE PARTNERSHIP AGREEMENT AND THE UNDISPUTED FACTS, PLAINTIFF IS ENTITLED TO A DECLARATION THAT DONOVAN & YEE DISSOLVED UPON YEE'S DEATH

For the same reasons, the Court should also grant plaintiff summary judgment on the Fifth Cause of Action and declare that Donovan & Yee dissolved upon Yee's death on that date. See N.Y. Partnership Law § 62(d) (dissolution is caused by death of partner); N.Y. Partnership Law § 63 (dissolution by decree of court) ; Seligson v. Russo, 16 A.D.3d 253, 792 N.Y.S.2d 34, 35 (1<sup>st</sup> Dept. 2005) (court can dissolve partnership by operation of law).

#### POINT V

THE COURT SHOULD ISSUE AN INJUNCTION PROHIBITING DONOVAN FROM USE OF YEE'S NAME IN CONNECTION WITH DONOVAN'S LAW PRACTICE

Donovan has sought to legitimize her improper continued use of Yee's name in Donovan's ongoing law practice through invocation of § 6.8(b), which, in addition to language quoted above, allows remaining Partners to continue the use of the partnership name following the death of a name Partner. Section 6.8(b) has no applicability to the situation presented here, however, for the reasons demonstrated in Point I. Therefore, Donovan cannot rightfully continue to use Yee's name in connection with or furtherance of Donovan's practice. See, e.g., Klein, Wagner & Morris v. Lawrence A. Klein, P.C.,

186 A.D.2d 631, 588 N.Y.S.2d 424 (2d Dept. 1992) (issuing injunction to prevent the use of a deceased partner's name).

The Court should thus award plaintiff summary judgment on her Sixth Cause of Action and issue an injunction prohibiting Donovan from any continued or further use of Yee's name in furtherance of or connection with Donovan's law practice.

### CONCLUSION

For the reasons set forth above, this Court should grant plaintiff's motion for summary judgment and enter an Order (a) awarding plaintiff summary judgment as to liability on plaintiff's First Cause of Action, for breach of contract; (b) awarding plaintiff summary judgment as to liability on plaintiff's Second Cause of Action, for breach of fiduciary duty; (c) awarding plaintiff summary judgment on plaintiff's Fourth Cause of Action, for an accounting; (d) awarding plaintiff summary judgment on plaintiff's Fifth Cause of Action and declaring that Donovan & Yee dissolved upon Yee's death on December 1, 2008; (e) awarding plaintiff summary judgment on plaintiff's Sixth Cause of Action and issuing an injunction prohibiting Donovan from any continued or further use of Yee's name in furtherance of or in connection with Donovan's law practice; (f) setting this matter down for an inquest as to the damages to be awarded to plaintiff on plaintiff's claims and the amount that defendants must pay over to plaintiff as an accounting; and (g) awarding such other and further relief as this Court deems just and proper.

Dated: New York, New York  
April 5, 2013

Respectfully submitted,

GALLET DREYER & BERKEY, LLP

By: 

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David S. Douglas

~~Adam~~ M. Felsenstein

845 Third Avenue  
New York, NY 10022  
(212) 935-3131

Attorneys for Plaintiff

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