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

PF2 SECURITIES EVALUATIONS, INC.,	Index No. 151776/2014
Plaintiff,	
-against-	
GUILLAUME FILLEBEEN and LEVEL 3 CONSULTANTS, LLC,	
Defendants.	
GUILLAUME FILLEBEEN and LEVEL 3 CONSULTANTS, LLC,	
Counterclaim-Plaintiffs	
-against-	
GENE PHILLIPS and ROBIN PHILLIPS	
Additional Counterclaim-Defendants:	

MEMORANDUM OF LAW IN OPPOSITION TO ADDITIONAL COUNTERCLAIM DEFENDANT, GENE PHILLIP'S MOTION TO DISMISS

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-against-	:	
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Counterclaim-Plaintiffs	:	
-against-	:	
GENE PHILLIPS and ROBIN PHILLIPS	:	
Additional Counterclaim-Defendants:		

INTRODUCTION

Defendants/Counterclaim-Plaintiffs Guillaume Fillebeen (hereinafter "Fillebeen") and Level 3 Consultants ("L3C" hereinafter collectively referred to with Fillebeen as "Defendants") submit this memorandum of law in opposition to Additional Counterclaim Defendant Gene Phillips's (hereinafter referred to as "GP") motion to dismiss the Fourth through Ninth counterclaims set forth in Defendants/Counterclaim-Plaintiffs Amended Answer and Counterclaims (hereinafter the "Amended Answer") pursuant to CPLR 3211(a)(7), or in the alternative, for leave to replead the Amended Answer pursuant to CPLR §3211(e).

FACTS

The Court is respectfully directed to the accompanying affidavit of Guillaume Fillebeen, sworn to the 28th day of August, 2014, (the "Fillebeen Affidavit") for a full and complete recitation of the facts and circumstances underlying this matter.

ARGUMENT

I

GP'S MOTION TO DISMISS SHOULD BE DENIED

A. The Standard For Review On Motion To Dismiss

"[O]n a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether, accepting as true the factual averments of the complaint and according the the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated" Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester, 282 AD2d 561, 562, 724 N.Y.S.2d 422 [2d Dept 2001].

The standard under CPLR §3211(7) to dismiss a complaint for failure to state a cause of action is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182(1977). *citing* Foley v. D'Agostino, 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

The pleading must be liberally construed in favor of the non-moving party. Leon v. Martinez, 84 N.Y.2d 83 (1994). The court must consider all of the facts plead as true and must give the pleader

the benefit of every favorable inference which can be drawn from the facts. Id. Facts alleged in the pleading are to be accepted as true, and the non-moving party accorded the benefit of every possible favorable inference. Decker, Decker & Associates, Inc., v. Association of National Advertisers, 2007 WL 1053881 (N.Y.Sup.), 2007 N.Y. Slip Op. 50737(U), *citing* 511 West 232nd Owners Corp. v. Jennifer Realty Corp., 98 N.Y.2d 144, 151-152 [2002]; Richbell Info. Servs., Inc. v. Jupiter Partners, L.P., 309 A.D.2d 288, 289 (1st Dep't, 2003).

In this action, each and every factual assertions made by GP in his motion to dismiss are based solely upon the assertions in the complaint. GP's motion to dismiss, does not contain any affidavit submitted by any of the parties with knowledge of the facts and circumstances underlying this matter. Moreover, the complaint was not verified, and therefore all allegations made in GP's motion are without probative value. GP must submit evidentiary proofs in probative form, and an attorney's affirmation is considered insufficient. Zuckerman v. City of New York, 49 N.Y.2d 557, 600, 427 N.Y.S.2d 595, 404 N.E.2d 718; Ruiz v. City of New York, 98 A.D.2d 645, 469 N.Y.S.2d 714. In the event GP attempts to rectify this error by inserting additional factual affidavits in their reply papers, such statements should be rejected as an improper sur-reply.

GP's allegations therefore solely consist of bare legal assumptions and unsupported factual claims, which are either inherently inconsistent or contradicted by documentary evidence, and as such are not entitled to consideration Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 618 N.Y.S.2d 820 (1st Dept. 1994).

For the foregoing reasons and for the reasons set forth below, it is submitted that GP's

motion fails to comply with the requirements of CPLR 3211(a)(7) and also that Defendants have, as a matter of law, properly pled the claims contained in the First, Fourth and Eighth counterclaims in their the Amended Answer, and accordingly GP's motion should be denied in its entirety.

II

DEFENDANTS HAVE PROPERLY PLED ALL CAUSES OF ACTION AGAINST GP

GP has requested that this Court dismiss Defendants counterclaims numbered Fourth through Ninth, which are, as follows:

A. Fourth Counterclaim for conversion (against PF2, GP and RP);

B. Fifth Counterclaim for waste (against GP and RP);

C. Sixth Counterclaim for Director Misconduct (against GP and RP);

D. Seventh Counterclaim for Breach of Fiduciary Duty (against GP and RP);

E. Eighth Counterclaim for Fraudulent Inducement (against PF2, GP and RP); and

F. Ninth Counterclaim for Fraud (against GP and RP).

Each of these claims shall be reviewed individually in order to demonstrate that Defendants have properly pled each cause of action.

It should first be noted that It is well settled that, in view of the unpredictability of litigation, inconsistency in pleadings, either among claims or defenses, is expressly permitted. Mitchell v. New York Hosp., 61 N.Y.2d 208, 461 N.E.2d 285, 473 N.Y.S.2d 148 (1984); Cohn v. Lionel Corp., 21 N.Y.2d 559, 563, 289 N.Y.S.2d 404, 408, 236 N.E.2d 634, 637 (1968); Felice v. St. Agnes Hospital, 65 A.D.2d 388, 411 N.Y.S.2d 901 (2nd Dep't. 1978). CPLR 3014 states that "[c]auses of action or defenses may be stated alternatively or hypothetically". CPLR 3017(a) states that "relief in the

alternative or of several different types may be demanded". Defendants have pled certain aspects of these counterclaims in the alternative, and GP's motion should be denied to the extent it attempts to prevent Defendant from engaging in an acceptable form of pleading in the alternative.

Finally, as set forth in Section III of this memo, to the extent this Court may find that any claim contained in the Amended Complaint is deficient in any manner, Defendants request leave pursuant to CPLR §3211(e), to re-plead such counterclaim(s).

A. The Fourth Counterclaim for Conversion

Conversion is any unauthorized exercise of dominion or control over property by one who is not owner of the property which interferes with and is in defiance of a superior possessory right of another in the property. "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" Republic of Haiti v. Duvalier, 211 A.D.2d 379, 384, 626 N.Y.S.2d 472 (1st Dep't 1995); Key Bank of New York, v. Grossi, 227 A.D.2d 841, 642 N.Y.S.2d 403 (3rd Dept 1996).

The Court of Appeals has held that confidential and intangible information contained in electronic format can be the subject of a conversion claim. Thyroff v Nationwide Mutual Insurance Co., 8 N.Y.3d 283; 864 N.E.2d 1272; 832 N.Y.S.2d 873 (2007); See also Shmueli v. Corcoran Group, 9 Misc.3d 589, 594, 802 N.Y.S.2d 871, 876 (N.Y.Sup, 2005). In the Amended Answer, Defendants allege that GP has converted Fillebeen's intangible information and intellectual property, which is contained in electronic format. GP has failed to allege that he has any legal right to

ownership of Fillebeen's intellectual property and/or that he has properly compensated Fillebeen for same. PF2 alleges that is it the owner of this information, but have failed to allege they received any oral or written assignment of Fillebeen's rights to ownership and/or to produce any documentary evidence or party affidavit demonstrating that Fillebeen agreed in writing to transfer or sell his intellectual property to PF2. (See Amended Answer at ¶49, 63, 88, 91-99). In fact, paragraph 91 of the Amended Answer specifically identifies the converted property, as follows:

> At all times relevant herein, Fillebeen was the rightful owner of certain assets and property in the possession of PF2, including the CDO Models, certain PF2 trade secrets, Fillebeen's proprietary information regarding the CDO Models, PF2's goodwill, assets, customer lists, and other property which were supplied to PF2 by Fillebeen (the "Fillebeen Property").

Defendant Fillebeen created the CDO Models before the formation of PF2 and never transferred ownership nor licensed the use of the "Fillebeen Property" (as such term is identified in the Amended Answer) to PF2. As also alleged in the Amended Answer, Plaintiff continues to maintain dominion and control over the Fillebeen's Property, some of which is contained in electronic format.

GP, in his capacity as an officer, director and shareholder of PF2 has directly engaged in actions which led to this improper act of conversion and GP has personally benefitted from his intentionally tortious conduct. These acts constitutes a claim for conversion as a matter of law by GP. As a result, Defendants have properly pled a claim for conversion against GP in this action.

B. The Fifth Counterclaim For Waste

According to Bus Law sec 720 only officers and directors of a corporation may be liable to the corporation's creditors for wasting its assets. To prove waste of corporate assets, objecting stockholder must demonstrate that no person of ordinary sound business judgment would say that

corporation received a fair benefit from the challenged transactions; if ordinary businessmen might differ on sufficiency of consideration received by corporation, courts will uphold the transaction. See, Aronoff v Albanese, 85 AD2d 3 [2d Dept 1982].

Furthermore, the claim of waste is presented in the context of a Business Corporation Law § 720 action, which permits the action to be brought in the individual name of a director but limits the right of recovery to the corporation. (Bertoni v Catucci, 117 AD2d 892, 894 [3d Dept 1986]; Conant v Schnall, 33 AD2d 326, 327-328 [3d Dept 1970].) The statute incorporates a negligence standard of care (Rapoport v Schneider, 29 NY2d 396, 400 [1972]), but the business judgment rule nevertheless is applied unless it is alleged with particularity that the corporate decision in question "lacked a legitimate business purpose or w[as] tainted by a conflict of interest, bad faith or fraud." (Amfesco Indus. v Greenblatt, 172{**19 Misc 3d at 718} AD2d 261, 264 [1st Dept 1991].) Thus, under New York law, the Business Corporation Law § 720 standard of negligence is not mutually exclusive with application of the business judgment rule. (Casey v Woodruff, 49 NYS2d 625, 643 [Sup Ct, NY County 1944] ["When courts say that they will not interfere in matters of business judgment, it is presupposed that judgment—reasonable diligence—has in fact been exercised"]; Joel B. Harris and Charles T. Caliendo, Who Says the Business Judgment Rule Does Not Apply to Directors of New York Banks?, 118 Banking LJ 493, 509-510 [2001] [discussing Casey v Woodruff and concluding: "Contrary to the implication of the federal court decisions, in New York, the business judgment rule and an ordinary (or simple) negligence standard are not mutually exclusive"].)

In the case at before this Court it is clear that GP is in violation of the doctrine of waste as

the decisions he made to limit PF2's activities in developing CDO Models lacked a legitimate business purpose and were tainted by GP's conflict of interest, bad faith and/or other fraudulent acts committed against Fillebeen.

As outlined in the accompanying Fillebeen Affidavit, GP made numerous fraudulent, false, and misleading statements to him so that Fillebeen would sell his shares for a significantly reduced amount than fair market value and so that GP could terminate Fillebeen's relationship with PF2; and so that GP would be able to obtain the CDO Models and personally profit from them to the determent of PF2 and Fillebeen, without properly compensating Fillebeen for same.

Clearly there was no legitimate business purpose for GP's actions other than to wrench from Fillebeen the full value of his shares in PF2, to prevent PF2 from engaging in the profitable and legitimate use of the CDO Models and to deny Fillebeen his rights in PF2, to profit from his ownership of PF2 shares and his proprietary interest in the CDO Models.

Fillebeen and the two individual Plaintiff/Counterclaim Defendants are the sole and equal stockholders of a New York corporation, a primary asset of which consists of the CDO Models developed independently by Fillebeen, which was mis-appropriated by PF2 and used to create reports which were eventually sold by PF2 to its clients without proper compensation to Fillebeen (the "PF2 CDO Model"), Fillebeen created the PF2 CDO Model before he was a shareholder of PF2, but at no time did he agreed to transfer his rights to the PF2 CDO Model to PF2. The PF2 CDO Model is essential to PF2's business because it is used and partially modified by PF2 to meet the directives of each client's investment objective. However, the underlying code and basic intellectual

property used to develop the PF2 CDO Model was and remains Fillebeen's property.

It is undisputed that friction has developed between the parties to such an extent as to prevent the effective and proper discharge of their corporate responsibilities and functions. The individual Additional Counterclaim Defendants, which include Robin Phillips, who is an attorney and is GP's brother[1], are acting in concert to the detriment of the property interests of the corporation and other shareholders, and also have wasted corporate opportunities, assets and resources for their personal benefit. They have further denied Fillebeen access to the corporate books and records and is claimed that they have withdrawn the bulk of the corporation's funds from the original depository and redeposited them in another bank whose name and address they refuse to reveal to Defendant. The Fillebeen Affidavit presents many additional factual allegations relating to the claims of waste, dissipation of corporate funds and improper management have factual foundation. As the charges are serious and well presented by sufficient convincing factual averments, it is respectfully submitted that the counterclaim for waste is properly pled. *See* Matter of Jack Martin Auto Sales, 63 N. Y. S. 2d 686.

C. The Sixth Cause of Action for Director Misconduct

According to McKinney's Business Corporation Law § 720 an action may be brought against a director to procure a judgment for the following relief:

> "(1) To compel the defendant to account for his official conduct in the following cases:

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[1] Additional Counterclaim Defendant Robin Phillips ("RP") has been served, Plaintiff's attorneys have indicated that they intend to bring a third motion to dismiss in this action on RP's behalf, and have refused to consolidate RP's claims in an effort to increase Defendants' legal costs.

(A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
(B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.
(2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.

The Amended Answer and Fillebeen Affidavit clearly establish that GP was not acting for any legitimate Corporate purpose but rather for his own greedy self-serving purposes. Therefore the Counterclaim for Director Misconduct is viable and should not be dismisses.

D. The Seventh Counterclaim for Breach of Fiduciary Duty

Elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct See, Rut v Young Adult Inst., Inc., 74 AD3d 776 (2d Dept 2010).

A fiduciary relationship is one founded on trust or confidence reposed by one person in the integrity and fidelity of another. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another Northeast General Corp. v Wellington Advertising, Inc., 82 NY2d 158, 172, 624 N.E.2d 129, 604 N.Y.S.2d 1 (1993); see also Penato v George, 52 AD2d 939, 383 N.Y.S.2d 900 (2d Dept 1976). "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation ." Northeast General Corp. v Wellington Advertising, Inc., 82 NY2d at 172 173. The term is a very broad one. It is said that the relation exists, and that relief is granted in all cases in which influence has been acquired and

abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial.

The Court of Appeals has determined that a fiduciary relationship exists between shareholders of closely held corporations. Fender v Prescott, 64 NY2d 1077, 1079, 479 NE2d 225, 489 NYS2d 880 (1985).. In the Complaint Plaintiff admits that PF2 is a closely held corporation (Complaint at §8), and as a result of this admission, GP was in a fiduciary relationship with Fillebeen regarding the status and information presented regarding PF2. Therefore, Defendants have properly alleged a breach of fiduciary duty by GP, under law, and GP should not be entitled to avoid his well settled fiduciary obligations to Fillebeen given his admissions in the Complaint.

Additionally, it is notable that a fiduciary relationship may result from dealings between close friends '"or even where confidence is based upon prior business dealings.'" See AHA Sales, Inc. v Creative Bath Products, Inc., 58 AD3d at 21, quoting Apple Records, Inc. v. Capitol Records, Inc., 137 AD2d 50, 57, 529 N.Y.S.2d 279 (1st Dept 1988); Doe v Holy See (State of Vatican City), 17 AD3d 793, 793 N.Y.S.2d 565 (3d Dept 2005); Penato v George, 52 AD2d 939, 383 N.Y.S.2d 900, *supra*. In the present case, there is a combination of what is presumed to be a professional and a long-standing personal relationship between Fillebeen, GP and RP. It is conceivable, under the circumstances that the parties' long-standing relationship, coupled with GP's role as the head of PF2, created that "special position of confidence and trust" which created a fiduciary duty. Murphy v Kuhn, 90 NY2d at 270; Kimmell v. Schaefer, 89 NY2d 257, 263, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996).

In Kimmell v Schaefer, *supra*, a case involving a party soliciting investment in a limited partnership, the Court held that the "vast majority of commercial transactions are comprised of ... 'casual' statements and contacts," such that a fiduciary relationship "has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on" the misrepresentation is justified. *Id.*

The Court in Murphy v. Kuhn, *supra*, discussing Kimmell, acknowledged that "[e]xceptional and particularized situations may arise where conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those affixed by common law," but that "whether such additional responsibilities should be recognized and given legal effect is governed by the particular relationship between the parties and is best determined on a case-by-case basis." Murphy v Kuhn, 90 NY2d at 272; see also Philadelphia Indemnity Insurance Co. v Horowitz, Greener & Stengel, LLP, 379 F Supp 2d 442 (SDNY 2005). Finally, since the existence of a fiduciary duty between parties in such circumstances is generally a jury question (Murphy v Kuhn, 90 NY2d 266, 682 N.E.2d 972, 660 N.Y.S.2d 371, *supra*).

Therefore, the Court must find that Defendants have stated a valid cause of action as a matter of law for breach of fiduciary duty by Additional Counterclaim Defendant GP.

E. The Eighth Counterclaim for Fraudulent Inducement

In order to sustain a cause of action for fraudulent inducement, a claimant must show"misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of

the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996); Channel Master Corp. v Aluminum Ltd. Sales, Inc., 4 NY2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958); Century 21, Inc. v F. W. Woolworth Co., 181 AD2d 620, 625, 582 N.Y.S.2d 101 (1st Dept 1992). Such a claim, like any fraud cause of action, must set forth "the circumstances constituting the wrong . . . in detail." CPLR 3016 [b]; Megaris Furs v Gimbel Bros., 172 AD2d 209, 210, 568 N.Y.S.2d 581 (1st Dept 1991).

In the case before this Court Defendants have established, in the Amended Answer and the Fillebeen Affidavit, that GP made certain false and misleading statements to him, to wit: That Fillebeen's CDO Models were not useful to PF2; That the financial condition of PF2 was poor and therefore that Fillebeen should therefore not anticipate receipt of any income necessary to support his basic needs; and that PF2 lacked sufficient capital to pay Fillebeen fair value for his shares of stock.

GP knew that these statements were false at the time they were made and the statements were made solely for the purpose of induce Fillebeen to: (i) sell his shares in PF2 for significantly less than fair value; (ii) to have Fillebeen terminate his relationship with PF2; and (iii) to obtain the CDO Models without properly compensating Fillebeen for same. These allegations are pled with sufficient particularity to support a claim of fraudulent inducement. The Amended Answer alleges that GP knew at the time that they made the statements to Fillebeen that he would rely upon the False Statements and would undertake substantial expenditures and efforts to his detriment in reliance thereon. (Amended Answer at §§ 40 - 52, 64 - 68, 118).

As a result, Fillebeen was induced to entered into a vague, oral agreement to sell his shares of PF2 for a substantially lesser amount than they were worth. In fact, there is no proof of the actual purchaser of Fillebeen's PF2 shares identified in any written document, thereby demonstrating the contractual invalidity of any purported stock sale agreement between Fillebeen and any unidentified third-party.

Based upon the foregoing, Defendants have stated a valid cause of action for fraudulent inducement and GP's motion to dismiss such claim should be denied.

F. The Ninth Counterclaim for Fraud

To state a claim of fraud, a party must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Chung v Wang, 79 AD3d 693, 694-95, 912 N.Y.S.2d 647 (2d Dept 2010). In any claim of fraud, New York law requires that "the circumstances constituting the wrong shall be stated in detail." CPLR 3016 (b). Under this heightened pleading standard, a claim of fraud must be supported by factual allegations that sufficiently detail the allegedly fraudulent conduct and give rise to a reasonable, inference of the alleged fraud. Pludeman v Northern Leasing Systems, Inc., 10 NY3d 486, 492, 890 N.E.2d 184, 860 N.Y.S.2d 422 (2008).

As evidenced by the Amended Answer and the accompanying Fillebeen Affidavit, GP engaged in a wrongful course of conduct in which he knowingly and recklessly made misrepresentations to Fillebeen concerning PF2's financial status, GP's intentions relating to the

future of PF2, PF2's ability to generate income for Fillebeen, and that GP never intended to abide by the terms of any agreement he made with Fillebeen.

This conduct acted as a fraud upon the Defendant/counterclaim Plaintiff, and induced him to continue to provide services to PF2, including, but not limited to developing and modifying the CDO Models for PF2; expend significant effort and personal sums to assist with the expansion of PF2's business; and disclose certain proprietary information relating to the development of CDO Models.

GP knowingly engaged in this fraudulent scheme designed to defraud Fillebeen out of his proprietary knowledge, PF2 shares, personal funds, intellectual property rights to the CDO Models, and Fillebeen's business efforts and goodwill. At the time the representations were made, Fillebeen was unaware of the falsity of these representations and believed them to be true and complete. Fillebeen's reliance upon the statements was justified because GP had a long term personal and professional relationship with Fillebeen, and Fillebeen reasonably believed that GP would act in his best interests as well as PF2 interests, but not for GP's own personal benefit. Therefore, Defendants have properly stated a claim for fraud against GP, and have pled such claim with particularity, as required by CPLR §3016.

III.

IN THE ALTERNATIVE, PLAINTIFF SHOULD BE PERMITTED TO RE-PLEAD

Pursuant to the forgoing, it is submitted that the Amended Answer is sufficient pled and Plaintiff's motion should be denied in its entirety. However, if the Court were to find that the

Amended Answer is unclear, or should the Court determine that one or more of the claims asserted are insufficiently pled, then the Defendants request, pursuant to CPLR 3211(e), leave to re-plead such counterclaims.

CONCLUSION

For the reasons set forth herein, Defendant/Counterclaim Plaintiffs requests that this court deny Plaintiff/Counterclaim Defendants' motion to dismiss in its entirety, or in the event the Court determines otherwise, Defendants/Counterclaim Plaintiffs request that this Court grant them leave to further replead and file a Second Amended Answer and Counterclaims, pursuant to CPLR §3211(e), and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
August 28, 2014

Respectfully submitted,

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