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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DAWN MECCA, INDIVIDUALLY AND AS A SHAREHOLDER OF PAYBACK REPO INC., D/B/A PRI AND, PAYBACK REPO, INC., AND AS A SHAREHOLDER OF RISK MANAGEMENT AND LOSS MITIGATION SERVICES INC., AND RISK MANAGEMENT AND LOSS MITIGATION SERVICES, INC.,

Plaintiff

- against –

SCOTT LENNON, INDIVIDUALLY AND AS PRESIDENT OF PAYBACK REPO, INC. D/B/A PRI AND, PAYBACK REPO INC., AND AS PRESIDENT OF RISK MANAGEMENT AND LOSS MITIGATION SERVICES, INC., AND RISK MANAGEMENT AND LOSS MITIGATION SERIVCES, INC.,

Defendants.

Index No. 2:16-cv-01414-LDW-ARL

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff's complaint should be dismissed on both procedural and substantive grounds. (Complaint dated March 4, 2016 Dkt. No. 6 "the Complaint.") The Complaint was insufficiently served, which, on its own, warrants dismissal. Further, the Complaint fails to state any claim for relief under any possible legal theory. The Complaint confuses direct and derivative shareholder rights and does not make out the elements necessary for any of the causes of action pleaded, under direct or derivative theories. Plaintiff's Complaint must be dismissed.

STATEMENT OF FACTS

This case was removed to this District on March 22, 2016 and assigned to this Court on March 23, 2016. Prior to removal, Plaintiff Dawn Mecca commenced this action by filing a Summons with Notice in Nassau County Supreme Court and serving it on Defendants Scott Lennon ("Lennon") and Payback Repo, Inc. ("Payback Repo") on September 2, 2015. (Declaration of Christine A. Rodriguez in Support of Defendant's Motion to Dismiss ("Rodriguez Decl.") ¶¶ 3-5, 21.) On September 22, 2015 Defendants Lennon and Payback Repo served Plaintiff's counsel with a Demand for a Complaint. (Rodriguez Decl. ¶ 7.) According to New York Civil Procedure Law and Rules which govern service of process and pleadings in Nassau County Supreme Court, Plaintiff was to serve the Complaint within twenty days of receiving Defendant's Demand, in this case by October 12, 2015. (Rodriguez Decl. ¶ 9.) Despite multiple inquiries beginning on October 12 by Defendants' counsel to Plaintiff's counsel regarding service of a complaint, Plaintiff did not serve the Complaint until March 4, 2016, nearly five months

past the deadline set by the Rules. (Rodriguez Decl. ¶¶ 10-16.) Plaintiff did not offer any excuse for the long delay in service, nor did Plaintiff seek an extension of time or consent from the Defendants to serve the complaint five months late. (*Id.*)

In her complaint, Plaintiff Dawn Mecca alleges that she is a minority shareholder and director of the Defendant Corporation Payback Repo and that Defendant Lennon is a majority shareholder in Payback Repo and also its president. Additionally, Plaintiff Mecca alleges that she is the Chief Executive Officer of two fictitious entities, Defendant Risk Management and Loss Mitigation Services Inc., and Defendant PRI Risk Management and Loss Mitigation Services Inc., which are both collectively defined as "PRI" in the Complaint. Plaintiff further alleges that Defendant Lennon is the president and a shareholder of the fictitious entity PRI Risk Management and Loss Mitigation Services Inc. However, a search of the New York State Division of Corporations, State Records and UCC "Corporation and Business Entity Database" reveals that neither "Risk Management and Loss Mitigation Services Inc.," nor "PRI Risk Management and Loss Mitigation Services Inc.," are registered as a corporation in the State of New York, nor does it appear that either of these corporations actually exists. *See* http://www.dos.ny.gov/corps/bus_entity_search.html, last accessed May 4, 2016. (Rodriguez Decl. ¶ 19.) Plaintiff brings this action as a minority shareholder and director of Payback Repo and CEO of the fictitious entity PRI Risk Management and Loss Mitigation Services Inc., and a stockholder of all Defendant Corporations against Defendant Lennon, and Defendant Corporations Payback Repo, and the two previously discussed fictitious entities, collectively defined as PRI, which were likely incorrectly

named by Plaintiff in this action.

The Complaint alleges three separate causes of action, styled as breach of contract, larceny by trick and conversion of corporate funds, and corporate dissolution, which are supported only by a bare recitation of conclusory assertions without any facts. (The Complaint ¶¶ 19, 20, 21, 23, 24, 25, 27, 28, 29, 30.) Plaintiff has failed to state a claim for all three causes of action. The Complaint makes no reference to any contract or material terms of any agreement whatsoever to form the basis of the breach of contract claim, nor does the Plaintiff set forth any dates for the alleged breach nor any facts describing the action(s) and omission(s) that might constitute a breach. Plaintiff merely concludes that "Defendant Lennon and Defendant Corporations have failed to properly remunerate the Plaintiffs of their lawfully earned corporate profits, as agreed," and that she is "unable to support herself and is being deprived of a legally earned and entitled benefit." (The Complaint ¶¶ 19, 20.) In support of the larceny and conversion cause of action, the Complaint states only that "Defendants have used the revenue generated from the operations of business for purposes other than its lawful, business purpose" and that Lennon refused Plaintiff's "demand for payment of dividends" and the "distribution of regular income." (The Complaint ¶¶ 23, 24.) No further information is provided within the Complaint to support Plaintiff's claims.

No cause of action is supported by any information asserted within the four corners of the Complaint. Plaintiff alleges corporate money is being used by Defendant Lennon in a way that "violates company bylaws." (The Complaint ¶¶ 13, 15.) Though notably, the "bylaws" are not referenced further in the Complaint—the Complaint does

not cite to which of the three named Defendant Corporation's bylaws were violated, how the bylaws were violated, when or by whom. The Complaint alleges that Plaintiff Mecca was "unlawfully" and "purposefully" excluded from the daily operations of the Defendant Corporations, but does not provide when or how this was done. (The Complaint ¶¶ 11, 12.) Additionally, Plaintiff claims that she was not allowed to "inspect the corporate books," and that the Defendants "refused and withheld the distribution of the corporate profits and dividends" from her, without advancing any legal basis for her alleged entitlement to corporate profits or dividends and without providing the dates when she was denied access to the books and payment. (The Complaint ¶ 12.) The Complaint states that Plaintiff demanded "payment of her investment dividend" but the Complaint is silent as to whom Plaintiff made her demand, when or how her demand was made, and also does not explain what entitles Plaintiff to make such a demand. (The Complaint ¶ 16.) Plaintiff asserts that Defendant Lennon "purposefully redirected corporate profits in a deliberate attempt to conceal and hide the income generated by the Defendant Corporations from the Plaintiff," and that the "Defendant corporations illegally converted the corporate profits and have used the money in a way that violated the by-laws of the Corporations," but does not provide any further supporting facts. (The Complaint ¶ 15.) This Complaint is nothing more than conclusory assertions and a bare recitation of legal elements without sufficient information to properly put Defendants on notice of the claims against them.

If any of the allegations in the Complaint had merit (which they do not) most of the potential harm caused as a result would have been suffered by the Defendant

Corporations. However, Plaintiff Mecca pleads only that she has been damaged individually in an amount no less than $1 million as a result of each cause of action in the Complaint. In sum, the Complaint does not allege any facts that plausibly make out or support any of the alleged claims. Thus, the Complaint fails to state any claims whatsoever upon which relief can be granted.

STANDARD OF REVIEW

Rule 12(b)(5) of the Federal Rules of Civil Procedure states that a defense of insufficiency of process, if made by motion as opposed to in a pleading, "must be made before pleading if a responsive pleading is allowed." Fed.R.Civ.P. 12(b); *See also Love v. Riverhead Cent. Sch. Dist.*, 823 F. Supp. 2d 193, 197 (E.D.N.Y. 2011).

Additionally, a party may move to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). Under Rule 12(b)(6), a motion to dismiss should be granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). When considering a Rule 12(b)(6) motion, a court must "accept all of plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." To survive a motion to dismiss, a complaint must sufficiently state a claim upon which relief may be granted by setting forth factual allegations, which if accepted as true, state a claim for relief that is "plausible on its face." *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 570 (2007). In

Ashcroft v. Iqbal, the court further clarified the two prong analysis set forth in *Twombly, supra* to determine the plausibility of a claim. The court reasoned that:

> a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 663-4 (2009).

As discussed further below, since Plaintiff's Complaint contains nothing but legal conclusions and threadbare assertions, there are no facts upon which the court can rely, which plausibly make out any of the claims asserted by Plaintiff.

ARGUMENT

I. PLAINTIFF'S COMPLAINT MUST BE DISMISSED UNDER RULE 12(b)(5) FOR INSUFFICIENT SERVICE PRIOR TO REMOVAL AS REQUIRED BY CPLR § 3012(b).

Plaintiff's Complaint should be dismissed because it was insufficiently served under the Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(5) as, prior to removal, service was completed in Nassau County Supreme Court in violation of New York Civil Procedure Law & Rules ("CPLR") § 3012(b). CPLR § 3012(b) provides that if the complaint is not served with the summons, service of the complaint shall be made within 20 days after service of a demand for a complaint. When a complaint is not

served within the twenty days, Defendant may move to dismiss the complaint. *See* New York CPLR § 3012(b). Here, service was completed in Nassau County prior to removal and in violation of the CPLR. Plaintiff did not serve the Complaint until five months after the twenty-day deadline allowed by CPLR § 3012(b). Applying the CPLR, Plaintiff's Complaint should be dismissed.

A. New York CPLR § 3012(b) Applies To This Case Since Service Was Completed in New York State Court Prior To Removal.

CPLR § 3012(b) applies here since service was completed in Nassau County Supreme Court prior to removal. This District has held that state court procedure law governs *prior* to removal. *See G.G.G. Pizza, Inc. v. Domino's Pizza, Inc.* 67 F. Supp. 2d 99, 103 (E.D.N.Y. 1999) (citing to *Marshall v. Warwick,* 155 F.3d 1027, 1033 (8th Cir.1998) ("state law governs the sufficiency of service of process before removal.")). Subsequent holdings in the Southern and Western Districts, consistent with this District's holding in *G.G.G Pizza*, also apply state laws of procedure prior to removal, and the Federal Rules of Civil Procedure once removal has taken place. See e.g. *Yaman v. D'Angelo*, 206 F. Supp. 2d 394, 398 (W.D.N.Y. 2002) (applying CPLR § 3012(b) analysis to service completed prior to removal). *See. e.g. Fed. Ins. Co. v. Tyco Int'l Ltd.,* 422 F. Supp. 2d 357, 383 (S.D.N.Y. 2006) (noting that there is a body of "authority that stands for the proposition that the federal courts are to apply the state law regarding proper service in state actions *before they are removed.*" (citing to *Norsyn, Inc. v. Desai,* 351 F.3d 825, 829 (8th Cir. 2003). "Since [service] occurred prior to removal, we must determine whether it constituted sufficient service in accordance with the law of the jurisdiction in which the

action was filed.")). The CPLR applies to sufficiency of service of the Complaint in this case, since service was completed prior to removal.

Plaintiff completed service in Nassau County Supreme Court. Plaintiff served and filed her Complaint on March 4, 2016, which is three weeks prior to the removal date. (Rodriguez Decl. ¶¶ 3, 16.) This case was removed to this District on March 22, 2016 after service was already completed, by Defendants' filing notices of removal with Nassau County Supreme Court and this District. (Notice of Removal Dated Mar. 22 2016, Dkt. No. 1, 1-2.) On March 23, this case was assigned to this Court. Therefore, CPRL § 3012(b) applies to sufficiency of service in this case.

B. Plaintiff's Lengthy Delay in Serving the Complaint After Defendants' Made a Demand for the Complaint is Grounds for Dismissal Pursuant to New York CPLR § 3012(b).

Plaintiff's five month delay in serving the Complaint after a demand was made is grounds for dismissal pursuant to CPLR § 3012(b). Although there is no set rule by statute, New York courts have applied the statute where the delay in service approaches one month past the statute's twenty-day deadline. Once the delay approaches one month past the deadline, the burden is on the plaintiff to demonstrate a reasonable excuse for the delay and a meritorious cause of action, in order to avoid dismissal for failure to timely serve a complaint. *See e.g. J L Collier Corp. v. Wells Fargo Bank, Nat. Ass'n*, 127 A.D.3d 1026 (3d Dept. 2015); *Leibowitz v. Glickman*, 50 A.D.3d 643 (2d Dept. 2008); *Aquilar v. Nassau Health Care Corp.*, 40 A.D.3d 788 (2d Dept. 2007). Plaintiff Mecca served the Complaint five months past the deadline set by CPLR § 3012(b), which triggers application of the statute.

Plaintiff Mecca commenced this action by filing a Summons with Notice in Nassau County Supreme Court and then serving Defendants with it on September 2, 2015. In response, Defendants Payback Repo and Lennon, through their counsel, served Plaintiff's counsel with a Demand for a Complaint on September 22, 2015. Significantly, Plaintiff Mecca was required to serve a complaint by or before October 12, 2015, to be in compliance with the deadline set forth in the CPLR. Instead, Plaintiff served the Complaint on March 4, 2016, nearly five months past the twenty day deadline. Plaintiff's lengthy delay in serving the Complaint, nearly five months past the deadline, is grounds for dismissal unless Plaintiff can establish a reasonable excuse for the delay and a meritorious action, which Plaintiff Mecca cannot.

Plaintiff Mecca has no reasonable excuse for her delay in serving the Complaint. Once there has been a lengthy delay in serving the complaint the burden is on the plaintiff to provide a reasonable excuse for the delay and meritorious cause of action. *See e.g. J L Collier Corp. v. Wells Fargo Bank, Nat. Ass'n*, 127 A.D.3d 1026 (3d Dept. 2015). If the plaintiff fails to proffer a reasonable excuse for their failure to timely serve a complaint after a demand, the complaint is properly dismissed. *See e.g. J L Collier Corp. v. Wells Fargo Bank, Nat. Ass'n*, 127 A.D.3d 1026 (3d Dept. 2015). It is within the court's discretion to determine what constitutes a reasonable excuse for delay. *See Aquilar v. Nassau Health Care Corp.*, 40 A.D.3d 788, 789 (2d Dept. 2007). When exercising its discretion in this regard, a court should consider all relevant factors including the extent of the delay, the prejudice to the opposing party, and the lack of intent to abandon the action. *Aquilar v. Nassau Health Care Corp.*, 40 A.D.3d 788, 789 (2d Dept. 2007). Plaintiff

was required to serve a complaint by October 12, 2015, which is twenty days after Defendants served their demand. Despite multiple inquiries starting on October 12, 2015, from Defendants' counsel to Plaintiff's counsel regarding a complaint, Plaintiff did not file her Complaint until March 4, 2016, nearly five months later. (Rodriguez Decl. ¶¶ 10-16; *see* Exhibit D.) Within that time, Plaintiff did not ask Defendants to consent to more time by stipulation nor did Plaintiff provide Defendants with a time frame for when Defendants could expect a complaint. (*Id*.) Rather, Plaintiff kept Defendants in the dark for five months, leading Defendants to reasonably conclude that Plaintiff had abandoned the action. In light of the multiple inquiries made by Defendants regarding service of the Complaint and Plaintiff's multiple failures to take any meaningful steps to ask for an extension of time to serve, Plaintiff cannot provide this Court with a reasonable excuse for her delay. Plaintiff's Complaint must be dismissed.

Even if Plaintiff could proffer a reasonable excuse for her delay (which she cannot), Plaintiff cannot demonstrate that any of her claims have merit. In addition to providing a reasonable excuse for delay, to survive a motion to dismiss pursuant to CPLR § 3012(b), "a plaintiff must also demonstrate a meritorious cause of action." *See Roberts v. Northington,* 128 A.D.3d 1487, 1488 (4th Dept. 2015); *Leibowitz v. Glickman* 50 A.D.3d 643 (2d Dept. 2008). In order to meet this burden a plaintiff must provide an "affidavit of merit containing evidentiary facts sufficient to establish a prima facie case" or a verified complaint. *See Roberts v. Northington,* 128 A.D.3d 1487, 1488 (4th Dept. 2015). Plaintiff's Complaint is verified, however the factual allegations in the Complaint

are conclusory and do not fully make out the elements of any claim under any possible legal theory. The Complaint alleges breach of contract, larceny by trick and conversion of corporate funds, and corporate dissolution, though fails to cite to any contract in existence between the Parties and does not explain which corporate bylaws are being violated or how. Plaintiff's Complaint fails to state a meritorious cause of action and Plaintiff cannot demonstrate that one exists. The Complaint should be dismissed pursuant to the CPLR. Additionally, as described further below, Plaintiff's Complaint should be dismissed for failure to state a claim pursuant to FRCP Rule 12(b)(6) and any attempt by Plaintiff to amend the Complaint would be futile.

II. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UNDER RULE 12(b)(6)

A. Plaintiff's Complaint Confuses Direct and Derivative Shareholder Rights and Must be Dismissed for Lack of Standing.

Plaintiff does not have standing to bring this Complaint individually, despite Plaintiff's attempt to fashion the pleadings for her own benefit, the allegations set forth in Plaintiff's Complaint confuse shareholder direct and derivative rights and must be dismissed. "It is well-settled that shareholders lack standing to assert individual claims based on injury to the corporation." *Baltus-Michaelson v. Credit Suisse First Boston, LLC*, 116 F. App'x 308, 309 (2d Cir. 2004); *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1101 (2d Cir.1988). A shareholder may, however, "bring a direct suit to redress injury that is separate and distinct from injury sustained by the corporation . . . "*See Baltus-Michaelson v. Credit Suisse First Boston, LLC*, 116 F. App'x 308, 309-10 (2d Cir. 2004). In the case of a New York corporation, the Second Circuit uses the test adopted by New York's

Appellate Division in the First Department to distinguish whether shareholder claims are direct or derivative. *See Yudell v. Gilbert* 949 99 A.D.3d 108, 114-115 (1st Dept. 2012); *See also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). Under this test, known as the *Tooley* test, for the Delaware Supreme Court case in which it was first articulated, the court determines whether an action is direct or derivative by examining who suffered the alleged harm (the corporation or the individual shareholder) and who would receive the benefit of any recovery or other remedy. *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004); *see also Yudell v. Gilbert* 949 99 A.D.3d 108, 114 (1st Dept. 2012). Applying the *Tooley* test to the Complaint here shows that Plaintiff herself did not suffer any harm separate and distinct from the corporation and also that Plaintiff would not receive the benefit of any remedy. Therefore, Plaintiff has only derivative standing to bring this action based on her relationship with the Defendant Corporations, as a shareholder, though the Complaint attempts to assert direct claims.

The Complaint must be dismissed since it confuses direct and derivative shareholder rights, and Plaintiff Mecca lacks the individual standing to assert all of the claims in the Complaint. In *Yudell*, the First Department adopted Delaware's *Tooley* test described above and further held that ". . . even if some of plaintiffs' claims were direct, [a] complaint the allegations of which confuse a shareholder's derivative and individual rights will ... be dismissed." *Yudell v. Gilbert,* 99 A.D.3d 108, 115 (1st Dept. 2012) (citing to *Abrams v. Donati,* 66 N.Y.2d 951, 953 (1985)) (internal quotations omitted). The Complaint hints at allegations that may have caused direct harm to Plaintiff but mostly, the

Complaint makes threadbare assertions of harm to the Defendant Corporations and seeks only individual recovery for Plaintiff Mecca herself, not the corporations. (The Complaint ¶¶¶¶¶ 1, 2, 21, 25, 30.) Overall, under *Yudell* Plaintiff's Complaint must be dismissed for confusing shareholder derivative and individual rights.

Plaintiff's cause of action for larceny by trick and conversion of corporate funds is improperly pleaded as a direct claim but is actually a derivative claim. In the corporate context, an "individual shareholder has no right to bring an action in his own name and in his own behalf for a wrong committed against the corporation, even though the particular wrong may have resulted in a deprecation or destruction of the value of his corporate stock." *See Anwar v. Fairfield Greenwich Ltd.*, 676 F. Supp. 2d 285, 297 (S.D.N.Y. 2009) (quoting *Solutia Inc. v. FMC Corp.*, 385 F.Supp.2d 324, 331 (S.D.N.Y.2005) (citations omitted); *accord Bank of Am. Corp. v. Lemgruber*, 385 F.Supp.2d 200, 224 (S.D.N.Y.2005)). As one of three total causes of action in the Complaint,[1] Plaintiff alleges larceny by trick and conversion of corporate funds, pleading that Defendants have "used the revenue generated from the operations of business for purposes other than its lawful purposes." (The Complaint ¶¶ 23, 24.) As a result, Plaintiff claims to be left without the ability to "support herself" and "has suffered individual damages in an amount no less than $1 million." (The Complaint ¶¶ 20, 25.) Even if these allegations of corporate conversion were true (which they are not), Plaintiff Mecca would not be the injured party. The Defendant Corporations would

[1] "Corporate Dissolution," alleged in the Complaint as the "third cause of action" is for enforcement of an equitable remedy. *See e.g.* BCL 1104-a; *see also Di Bona v. Gen. Rayfin Ltd.*, 45 A.D.2d 696, 696 (1st Dept. 1974).

have suffered the harm resulting from conversion of their revenues, and only the Defendant Corporations would be entitled to recover those funds. Any harm suffered by Plaintiff would be a consequence to her relationship with the Defendant Corporations as a shareholder in the Corporations. Therefore, the Complaint should be dismissed since it confuses shareholder derivative and direct rights by seeking individual recovery of corporate revenues, which Plaintiff Mecca does not have individual standing to do.

Plaintiff also does not have a direct claim for failure to pay dividends and fails to state a claim for equitable distribution of a dividend. If a corporation has declared a dividend, a shareholder has a direct right to payment of that dividend. *See e.g. Gordon v. Elliman*, 306 N.Y. 456, 459-460 (1954). Where a corporation has not declared a dividend, a minority shareholder may bring a derivative suit in equity to compel declaration of a dividend upon a showing that the corporate officers acted in bad faith, fraudulently or clearly abused their discretion in failing to declare a dividend. *See e.g. Gordon v. Elliman*, 306 N.Y. 456, 459-460 (1954) (citing to *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N.Y. 185 (1919)). Further, as a condition precedent to the maintenance of an action to compel declaration of dividends "a minority stockholder . . . must show that a demand was made upon a corporation to sue the directors, or proof that such a demand would be futile." *See Gordon v. Elliman,* 306 N.Y. 456, 461 (1954). The Complaint makes only a conclusory allegation that Defendant Lennon and the Defendant Corporations "refused and withheld the distribution of the corporate profits and dividends from Plaintiff" and that Plaintiff "has demanded payment of her investment dividend." (Complaint ¶¶ 12,

16.) The Complaint does not allege that a dividend was declared, nor does the Complaint set forth any particular facts tending to show that Defendant Lennon or any corporate officers acted fraudulently, in bad faith or clearly abused their discretion in not declaring a dividend. The Complaint fails to establish a direct claim for payment of dividends and does not establish a claim in equity to compel declaration of a dividend. The Complaint should be dismissed since Plaintiff has not made out a direct claim, and has failed to plead demand futility which is a required condition precedent for any derivative action, as described further below.

B. Any Purported Derivative Claims Must Be Dismissed Since Plaintiff Did Not and Cannot Plead Demand Futility, a Required Condition Precedent to Bring Derivative Claims under New York Business Corporation Law § 626.

Any direct claims Plaintiff may have alleged for breach of contract[2] or being denied access to inspect the corporate books are embedded within derivative claims for corporate conversion and equitable declaration of corporate dividends and must be dismissed for failure to plead demand futility with requisite particularity. Under New York Business Corporation Law ("New York BCL") which governs shareholder derivative actions for New York corporations, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort. *See* N.Y. Bus. Corp. Law § 626(c). *See also Marx v. Akers* 88 N.Y. 2d 189 (1996). The New York Court of Appeals has explained

[2] Plaintiff's first cause of action for breach of contract does not point to the existence of any contract or agreement between Plaintiff and any of the Defendants, as further discussed § II(C) of this Memorandum.

that pursuant to BCL § 626(c) "demand 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 Marx v. Akers* 88 N.Y. 2d 189, 200 (1996). Plaintiff fails to plead demand or demand futility with any particularity.

Plaintiff's Complaint makes only bare assertions regarding demand or demand futility and must be dismissed. In *Yudell,* the First Department applied the New York Court of Appeals holding in *Marx* to rule that "to the extent, if any, that plaintiffs have asserted direct claims, they are embedded in an otherwise derivative claim . . . Accordingly, the motion court correctly determined that plaintiffs' causes of action are derivative and properly dismissed them because the complaint fails to plead demand futility with the requisite particularity." *See Yudell v. Gilbert,* 99 A.D.3d 108, 115, (1st Dept. 2012). The Complaint makes no mention of a demand by Mecca to initiate action, except to say that Mecca "demanded her investment dividend." (The Complaint ¶ 16.) Alternatively, the Complaint does not plead demand futility since Plaintiff does not set forth any facts to suggest control by a self-interested director with sufficient particularity, except to allege that Defendant Lennon is "51% owner of Defendant Payback Repo, Inc."(The Complaint ¶ 6.) Without more than these naked assertions, the Complaint fails to plead demand or demand futility as required to bring a shareholder derivative suit or compel declaration of dividend in equity in New York, and must be dismissed.

C. Each Cause of Action Alleged in Plaintiff's Complaint, Fails.

1. The Complaint Fails to State a Claim for Breach of Contract Under Direct and Derivative Theories.

The Complaint does not properly plead a breach of contract claim. In order to make out a prima facie claim for breach of contract, a plaintiff must allege facts which plausibly make out: (1) the existence of a valid contract; (2) adequate performance of the contract by plaintiff; (3) breach of the contract by defendant, and (4) damages suffered by plaintiff as a result of the breach. *See e.g. Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir.2004). The bylaws of a corporation act as a contract between shareholders and the corporation. *See Rabbani v. Enzo Biochem, Inc.*, 682 F. Supp. 2d 400, 413 (S.D.N.Y. 2010). Plaintiff's Complaint does not set forth any separate contract between herself and the Defendants or specify any corporate bylaw on which she can predicate a contract claim, and must be dismissed.

The Complaint fails to plead all of the elements necessary for a breach of contract claim. Plaintiff Mecca claims to be CEO of Defendant Corporation PRI, and a minority shareholder and stockholder of all of the defendant corporations. The Complaint alleges that "Defendant Lennon and Defendant Corporations" have "failed to properly remunerate" Plaintiff Mecca of "lawfully earned corporate profits, as agreed." (Complaint ¶ 19.) There is no mention of any contract or agreement between the Parties regarding executive compensation or profit sharing, though there are conclusory allegations that "Defendants have collectively violated the by-laws" and that corporate profits were used in a way that "violated the by-laws of the Corporations." (Complaint

¶¶ 13, 15). Even if it were plausible that the corporate bylaws required executive compensation and profit sharing, the Complaint does not allege this and does not even reference which Defendant Corporation's bylaws were violated, does not cite to a specific bylaws, and does not give any information about how the violation occurred. The Complaint is also silent as to whether Plaintiff Mecca performed her duties under any contract allegedly breached by Defendants. Instead, the Complaint merely states "Because of their actions, Defendant Lennon and Corporate Defendants' breach of contract, Plaintiff is unable to support herself and is being deprived of a legally earned and entitled benefit." (Complaint ¶20.) The Complaint should be dismissed since it fails to point to a contract which has been breached and also fails to provide facts which show how Plaintiff performed under this action, without satisfying these elements Plaintiff has failed to state a claim.

2. Larceny by Trick is not a Valid Cause of Action and both Direct and Derivative Causes of Action for Conversion, Fail.

Larceny by trick is a crime in New York State that cannot be brought as a civil cause of action and must be dismissed with prejudice from this civil action. Under New York law, "larceny (including larceny by trick) and embezzlement are crimes defined by New York Penal Law § 155.05. New York law does not provide civil causes of action for either of these offenses." *See Bryant v. Comm'r of Soc. Sec.*, No. 14CV5764-LTS-JCF, 2015 WL 6758094, at *6 (S.D.N.Y. Nov. 5, 2015)); See also *Cohain v. Klimley,* No. 08 CV 5047, 2011 WL 3896095, at *4 (S.D.N.Y. Aug. 31, 2011). Plaintiff alleges larceny by trick, but this cause of action is not available to her in this civil action. (Complaint, "Second Cause

of Action" ¶¶ 23, 24.) Therefore, Plaintiff's claim for larceny by trick must be dismissed with prejudice.

Plaintiff's Complaint also fails to state any claim for conversion of corporate funds and should be dismissed. To plead a prima facie claim for conversion of corporate funds that will survive a motion to dismiss, a plaintiff must allege facts that show: "(1) a corporate officer used corporate funds for personal expenditures or expenditures otherwise not authorized by the business and (2) that the corporation did not authorize it." *See Quintal v. Kellner*, 264 N.Y. 32, 36 (N.Y. Ct. App. 1934). In other words, if the person or persons in control of a corporation authorize payment of personal expenditures with corporate money, by at least a majority vote, there is no conversion of corporate funds. *See e.g. Field v. Lew* 184 F. Supp 23 (E.D.N.Y. 1960) *aff'd sub nom. Field v. Bankers Trust Co.*, 296 F.2d 109 (2d Cir. 1961). Any expenditure becomes a corporate expenditure if it is authorized by the person or persons in control of the corporation, and thus authorized by the corporation. *See e.g. Field v. Lew* 184 F. Supp 23 (E.D.N.Y. 1960) *aff'd sub nom. Field v. Bankers Trust Co.*, 296 F.2d 109 (2d Cir. 1961); *See generally Garner v. First Nat. City Bank*, 465 F. Supp. 372 (S.D.N.Y. 1979). In this case, the pleading is conclusory and confusing. The Complaint alleges that Defendant Lennon is a majority owner and president of the Defendant Corporation Payback Repo., and that the Defendant Corporations used corporate funds "illegally" for "purposes other than lawful business purposes" and didn't "pay Plaintiff a salary or dividends." (The Complaint ¶¶ 6, 15, 23-24.) There are no facts in the Complaint that plausibly suggest or affirmatively state in any way that Defendant Lennon, as majority owner, did not have

the authority to independently authorize expenditures on behalf of Defendant Payback Repo., without Plaintiff Mecca's approval. The pleading doesn't allege any facts to show that any use of corporate money wasn't authorized by the persons in control of the company, and it cannot. Therefore, if Defendant Lennon had authority to approve corporate expenditures and ratify those expenditures as the majority shareholder, it follows that expenditures authorized by Defendant Lennon cannot be characterized as conversion. Thus, Plaintiff has not established any cause of action for conversion of corporate funds.

3. Corporate Dissolution is Not a Valid Cause of Action in This Case.

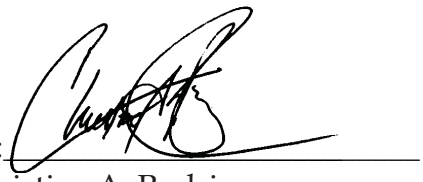
Plaintiff Mecca has failed to show grounds for judicial dissolution. Under BCL § 1104-a, a minority shareholder in a closely held corporation may bring an action for judicial dissolution on one or more of the following grounds: (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; or (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation. *See* N.Y. Bus. Corp. Law § 1104-a. Under the BCL, "the court, in determining whether to proceed with involuntary dissolution pursuant to this section, shall take into account: (1) whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and (2) whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners." *See* N.Y. Bus. Corp. Law § 1104-a. In

application, New York courts have required a particularized showing that the corporation is "insolvent" or that the "assets are being diverted or wasted" to warrant the "drastic remedy" of receivership, and Court's deny "conclusory averments by plaintiffs of threats to corporate assets." *See Di Bona v. Gen. Rayfin Ltd.*, 45 A.D.2d 696, 696 (1st Dept. 1974); *See also In re Harrison Realty Corp.*, 295 A.D.2d 220, 220 (1st Dept. 2002). Plaintiff, as minority shareholder, fails to set forth any facts to support a claim for judicial dissolution of Defendant Corporation Payback Repo., under BCL § 1104-a. Instead, the Complaint only makes conclusory allegations such as "Defendant Corporations and their officers and directors engaged in conduct which is violative [sic] of their fiduciary duty to shareholders" but does not identify what duty was violated or how and what damage was done. In place of supporting facts, the Complaint merely states "Defendant Lennon . . . has wrongfully diverted assets and used said assets for his own benefit to the exclusion of Plaintiff." Plaintiff has failed to establish any ground for judicial dissolution and cannot provide any grounds. The Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff's complaint should be dismissed for insufficient service of process or failure to state a claim.

Dated: New York, New York
May 5, 2016



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