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

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| **In the Matter of CRISTINA QUAZZO,** | : | |
| **Petitioner,** | : | |
| **-against-** | : | **Index No. 652282/2010** **Part 60** |
| **9 CHARLTON STREET CORPORATION, et al.,** | : | |
| **Respondents.** | : | |
| **CRISTINA QUAZZO, both individually and derivatively on behalf of 9 CHARLTON STREET CORPORATION, PEARLBUD REALTY CORPORATION, and ORBIS INTERNATIONAL CORPORATION,** | : | **Index No. 652002/2011** **Part 60** |
| **Plaintiff,** | : | |
| **-against-** | : | |
| **9 CHARLTON STREET CORPORATION, et al.,** | : | |
| **Defendants.** | : | |

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER/PLAINTIFF'S MOTION TO STRIKE RESPONDENTS/DEFENDANTS' JURY DEMAND**

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Petitioner/plaintiff Cristina Quazzo ("Petitioner/Plaintiff"), by and through her undersigned counsel, respectfully submits this Memorandum of Law, together with the Affirmation of Mark A. Berube, Esq., dated December 16, 2019, and the exhibits thereto ("Berube Affirmation"), in support of her motion ("Motion") to strike the jury demands of respondents/defendants 9 Charlton Street Corporation ("9 Charlton"), Pearlbud Realty Corporation ("Pearlbud"), Orbis International Corporation ("Orbis") (individually a "Corporation" and collectively the "Corporations"), Ugo Quazzo, and Stephen Quazzo (collectively with the Corporations, "Respondents/Defendants"). For the reasons set forth herein, Petitioner/Plaintiff respectfully requests that the Court grant the Motion in its entirety.

## PRELIMINARY STATEMENT

Respondents/Defendants Ugo Quazzo and the Corporations have made demands for a jury trial in both the Special Proceeding (Index No. 652282/2010) and the Action (Index No. 652002/2011). Respondent/Defendant Stephen Quazzo has made such a demand in the Action. All of these demands are improper and unfounded, because, as the authority below establishes, each and every one of Petitioner/Plaintiff's causes of action sounds in equity and most seek equitable relief. Respondents/Defendants have no right to a jury trial on any of them.

Moreover, should this Court find that certain issues can appropriately be tried to a jury, the Court should first determine any nonjury issues in a bench trial, given the preference for such a procedure embodied in Section 202.40 of the Uniform Rules for the Supreme Court and County Court. Finally, Respondents/Defendants' assertion of equitable defenses in both the Special Proceeding and Action amounts to their concession that Petitioner/Plaintiff's claims sound in equity, as such equitable defenses cannot be lodged against claims at law. In any event, the Court must try these equitable defenses, pursuant to the unequivocal dictates of CPLR § 4101.

## STATEMENT OF FACTS

The Amended Petition ("Am. Pet.") in the Special Proceeding sets forth four causes of action/requests for relief: (i) dissolution of the Corporations pursuant to N.Y. Bus. Corp. Law §§ 1104-a(a)(1) and (2) and the common law; (ii) access to books and records pursuant to N.Y. Bus. Corp. Law §§ 1104-a, 624(b) and (e) and the common law; (iii) appointment of a receiver pursuant to N.Y. Bus. Corp. Law §§ 1113, 1202(a)(1) and 1203(a); and (iv) injunctive relief. *See* Am. Pet. ¶¶ 56-70 and Request for Relief, a true and correct copy of which is annexed to the Berube Affirmation as Exhibit 1. Each of these claims is quintessentially equitable in nature and seeks equitable relief; indeed, none seeks monetary relief.

Likewise, the claims in the Action: (i) individual causes of action for breach of fiduciary duty; and (ii) derivative claims brought on behalf of the Corporations, are also on their face equitable in nature. A true and correct copy of the Complaint in the Action ("Compl.") is annexed to the Berube Affirmation as Exhibit 2. Moreover, the vast majority of the remaining claims[1] in the Action seek some form of equitable relief -- some exclusively so: (i) First Derivative Request for Relief/Seventh Cause of Action, seeking an accounting (Compl. ¶ 132); appointment of a receiver and injunction (Compl. ¶ 133); (ii) Second Derivative Request for Relief/Eighth Cause of Action, seeking an injunction (Compl. ¶ 143); (iii) Fourth Derivative Request for Relief/Tenth Cause of Action, seeking an injunction (Compl. ¶ 164); (iv) Sixth Derivative Request for Relief/Twelfth Cause of Action, seeking an accounting (Compl. ¶ 181); (v) Seventh Derivative Request for Relief/Thirteenth Cause of Action, seeking an accounting (Compl. ¶ 188) and injunction (Compl. ¶ 191); (vi) Eighth Derivative Request for Relief/Fourteenth Cause of Action, seeking an injunction (Compl. ¶ 202); (vii) Tenth Derivative

[1] Certain claims were dismissed by the Honorable Bernard J. Fried in a July 16, 2012 decision (*see* 652002/2011, NYSCEF Doc. No. 55), and certain defendants/claims were voluntarily dismissed.

Request for Relief/Sixteenth Cause of Action, seeking an accounting (Compl. ¶ 220); (viii) Eleventh Derivative Request for Relief/Seventeenth Cause of Action, seeking removal of directors pursuant to N.Y. Bus. Corp. Law § 706 (Compl. ¶ 227); (ix) Twelfth Derivative Request for Relief/Eighteenth Cause of Action, seeking removal of officers pursuant to N.Y. Bus. Corp. Law § 716 (Compl. ¶ 232); (x) Fourteenth Derivative Request for Relief/Twentieth Cause of Action, seeking an accounting (Compl. ¶ 249) and the setting aside of unlawful conveyances (Compl. ¶ 250); and (xi) Fifteenth Derivative Request for Relief/Twenty-First Cause of Action, seeking an accounting (Compl. ¶¶ 254-257).

Nevertheless, the Corporations and Ugo Quazzo made jury demands in both the Special Proceeding and the Action, stating that "[t]rial by jury is demanded of all issues." True and correct copies of these jury demands are annexed to the Berube Affirmation as Exhibit 3. Stephen Quazzo, in the Action, demanded "a trial by jury as to all causes of action, affirmative defenses and counterclaims in the action so triable."[2] A true and correct copy of this jury demand is annexed to the Berube Affirmation as Exhibit 4.

On March 5, 2019, the undersigned sent an email to all counsel setting forth authority establishing that all remaining causes of action propounded by Petitioner/Plaintiff in the Special Proceeding and Action are properly triable to the Court, and that a jury trial on those claims is not warranted. A true and correct copy of this email is annexed to the Berube Affirmation as Exhibit 5.

In communications between counsel in response to the undersigned's request to meet-and-confer, counsel to Stephen Quazzo advised that they did not oppose a bench trial on all claims. A true and correct copy of a March 12, 2019 email reflecting this position is annexed to the Berube

[2] While this demand references "counterclaims," no counterclaims have ever been filed.

Affirmation as Exhibit 6. Then-counsel to Ugo Quazzo and the Corporations declined to take a position on the propriety of a bench trial, given their pending application to withdraw as counsel. A true and correct copy of a March 19, 2019 email reflecting this position is annexed to the Berube Affirmation as Exhibit 7. The undersigned communicated the parties' positions to the Court in a March 20, 2019 letter and requested that the Court address the issue at the then-scheduled March 26, 2019 Pretrial Conference. A true and correct copy of this March 20, 2019 letter is annexed to the Berube Affirmation as Exhibit 8.

The March 26, 2019 Pretrial Conference was adjourned in light of then-counsel to Ugo Quazzo and the Corporations' application to withdraw. Thereafter, during preparation for the rescheduled August 8, 2019 Pretrial Conference and in subsequent correspondence, counsel to Stephen Quazzo entirely reversed stance and contended that a jury trial *was* appropriate on all claims, albeit in an advisory capacity on certain points. Further, new counsel to Ugo Quazzo and the Corporations adopted this same position. Despite their meet-and-confer efforts, the parties were unable to reach a resolution as to the propriety of a jury trial, necessitating the instant Motion.

## ARGUMENT

### I

### RESPONDENTS/DEFENDANTS ARE NOT ENTITLED TO A JURY TRIAL ON ANY CAUSES OF ACTION, REQUESTS FOR RELIEF, OR ISSUES IN THE SPECIAL PROCEEDING.

As noted above, each and every one of the four causes of action/requests for relief in the Special Proceeding sounds in equity and seeks nothing other than equitable relief. As such, none is amenable to a jury trial. During the parties meet-and-confer process, Respondents/Defendants failed to tender a single case demonstrating that any of these causes of action/requests for relief and/or issues related thereto is ripe for final determination by jury.

The first cause of action/request for relief in the Special Proceeding seeks dissolution of the Corporations pursuant to N.Y. Bus. Corp. Law §§ 1104-a(a)(1) and (2) and the common law. This cause and all issues related thereto are left solely to the Court for determination. *See* NY Bus. Corp. Law § 1109, which governs the hearing in a Special Proceeding for dissolution ("At the time and place specified in the order to show cause, or at any other time and place to which the hearing is adjourned, *the court or the referee shall hear the allegations and proofs of the parties and determine the facts.*") (emphasis supplied); *Matter of Kemp & Beatley, Inc.,* 64 N.Y.2d 63, 73 (1984) ("The appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering the application (*see* Business Corporation Law, § 1111, subd. [a])."); *Hausner v. Mendelow*, 198 A.D.2d 210, 210 (2d Dept. 1993) (upholding striking of jury demand, claims for dissolution and accounting equitable claims).

Petitioner/plaintiff's second cause of action/request for relief in the Special Proceeding seeking books and records is also left wholly to the Court for decision. *Horizon Asset Mgt., LLC v. Duffy*, 106 A.D.3d 594, 595 (1st Dept. 2013) (books and records demand equitable claim precluding jury trial); *Chung v. Kim*, 170 A.D.2d 232, 232 (1st Dept. 1991) (books and records demand equitable claim).

The Special Proceeding's third cause of action/request for relief for appointment of a receiver to manage the affairs of the Corporations pursues quintessentially equitable relief, for which no jury trial is available. *64 B Venture v. Am. Realty Co.,* 194 A.D.2d 504, 504 (1st Dept. 1993) ("Whether to appoint a receiver is a matter confined to the 'sound discretion of the court' .... Finally, the powers and duties of the receiver appointed pursuant to the court's equity powers are formulated as a matter of judicial discretion.") (citations omitted); *Alexander Condo. ex rel. its Bd. of Managers v. AB Funding Corp.,* 54 Misc. 3d 1206(A), *4 (N.Y. Sup. Ct. 2017),

*amended on rearg sub nom. Alexander Condo. v. AB Funding Corp.,* 60 Misc. 3d 1223(A) (N.Y. Sup. Ct. 2018) ("The decision to appoint a receiver is within the court's discretion."); *Zutrau v. Ice Systems, Inc.*, 2012 WL 12521016, 2012 N.Y. Slip Op. 33947[U], *2 (N.Y. Sup Ct. July 16, 2012) (striking jury demand, request for appointment of receiver equitable relief); *Tressler v. Smith*, 1994 WL 16856594, No. 25898-87, *1 (N.Y. Sup Ct. July 21, 1994) (same).

Finally, the fourth cause of action/request for relief in the Special Proceeding requests equitable relief in the form of an injunction, the propriety of which is undoubtedly only for this Court's determination. *Sec. Pac. Nat. Bank v. Evans,* 148 A.D.3d 465, 466 (1st Dept. 2017) ("The motion court properly determined that defendant has no right to a jury trial on the triable issues identified by this Court on a prior appeal. Since both parties sought equitable relief—that is, specific performance of their settlement agreement or *injunctive relief*—defendant is not entitled to a jury trial.") (citations omitted) (emphasis supplied); *Zutrau,* 2012 WL 12521016, *2 (striking jury demand, request for injunctive relief equitable relief).[3]

It is important to note here the plain language of CPLR § 4102 (a) that a party may only demand a jury trial "of any issue of fact triable of right by a jury … ." Given the utter absence of authority establishing a right to a jury determination of anything in the Special Proceeding, Ugo Quazzo and the Corporations' demand for "[t]rial by jury . . . of all issues" in the Special Proceeding was and is entirely unfounded. Consequently, this Court should strike this baseless demand.

[3] With respect to the request for attorneys' fees and costs in the Special Proceeding, such a request is insufficient to warrant a jury trial. *See J.H. Capital LLC v. Core Plumbing & Heating, LLC*, 60 Misc.3d 1213(A), *1 (N.Y. Sup Ct. 2018) (striking defendants' jury demand).

Stephen Quazzo did not make a jury demand in the Special Proceeding. Regardless, he is precluded from doing so -- or even addressing the propriety of a jury in the Special Proceeding -- in the wake of his failure to answer the Amended Petition and join issue.

## II

## RESPONDENTS/DEFENDANTS ARE NOT ENTITLED TO A JURY TRIAL ON ANY CAUSES OF ACTION, REQUESTS FOR RELIEF, OR ISSUES IN THE ACTION.

The remaining claims pleaded in the Action are of two types -- (i) individual claims sounding in breach of fiduciary duty and (ii) derivative claims brought in the names of the Corporations. *See* Compl., First, Second and Third Causes of Action -- individual claims sounding in breach of fiduciary duty; Seventh, Eighth, Tenth, Twelfth, Thirteenth, Fourteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-First and Twenty-Second Causes of Action -- derivative claims brought in the names of the Corporations. Based solely on the nature of these claims, and without even considering the relief requested, there can be no jury trial on them for the following reasons:

> A party's entitlement to demand a jury trial is dependent upon the facts pleaded, not the demand for relief. CPLR 4101(1) provides for a trial by jury in an action where the party 'demands and sets forth facts which would permit a judgment for a sum of money only.' The critical consideration is whether the facts stated show that the action is equitable or legal in nature. The fact that the complaint demands a money judgment does not necessarily establish that there is a right to a jury trial.

*Kaplan v. Long Island University*, 116 A.D.2d 508, 509 (1st Dept. 1986) (citations omitted); *Magill v. Dutchess Bank and Trust Co.*, 150 A.D.2d 531, 531-32 (2nd Dept. 1989) (same, "In each instance it must be determined whether the nature and substance of the claim for relief is in law or in equity. If in law and included among the cases where jury trial is historically mandated by the Constitution or by statute, a jury trial must be had on demand. If the relief demanded is

traditionally cognizable in equity there is no right to trial by jury for none was available at common law.") (internal quotations and citations omitted).

> Despite statutory provisions indicating that a jury trial is guaranteed in actions in which a party demands and sets forth facts that would permit a judgment for a sum of money only, the mere demand for a money judgment does not conclusively establish that the case is one for trial by jury. Generally, whether the right to a jury trial exists is determined not only by the character of the action but also whether it was historically triable by law or in equity. Thus, if the traditional action that most likely would have been used is an action at law, then the plaintiff will be entitled to a jury trial and if the traditional action that would have been presented is equitable, there is no right to a jury trial.

73A N.Y. Jur. 2d Jury § 13.

**A. <u>There Is No Right To A Jury Trial On The Breach Of Fiduciary Duty Claims.</u>**

As to Petitioner/Plaintiffs' individual claims sounding in breach of fiduciary duty, *In re Estate of Rappaport*, 150 A.D.2d 779 (2nd Dept. 1989) is highly instructive. There, petitioner was accused of breaching his fiduciary duty and misappropriating $115,000 from decedent's estate. *Id.* at 780. Acknowledging that the breach of fiduciary duty claim sought damages (as opposed to equitable relief), the Second Department nonetheless concluded that the petitioner had no right to a jury trial in defense of that claim and held that "[t]here is no right to a jury trial where the cause of action is to recover damages for breach of fiduciary duty, which sounds in equity." *Id.* (citation omitted). Petitioner/Plaintiff submits that this authority, on all fours with her individual claims for breach of fiduciary duty, forecloses Respondents/Defendants' contention that they are entitled to a jury determination thereon.

*Clearview Gardens First Corp. v. Weisman*, 206 Misc. 526 (N.Y. Sup. Ct. 1954), which also dealt with breach of fiduciary duty claims averring that defendants engaged in self-dealing which resulted in damages, is likewise informative. *Id.* at 527-28. Again, while recognizing that

those claims sought only damages, the Court, in granting the motion to strike the jury demand, still held as follows:

> Nevertheless, the gravamen of the action is that the corporations were made to pay excess sums. The method by which this was done is alleged to be by defendants' obtaining control and dealing with themselves. By virtue of defendants' dual relationship it is alleged that they were fiduciaries. And it is the breach of their fiduciary duties that grounds the application for recovery. This is a claim cognizable in equity. Plaintiffs do not seriously dispute that this is so. What they claim is that it is also triable at law and that they have the option of the method. What is triable by law or in equity is purely a matter of historical development. This is not materially affected by subdivision 1 of section 425 of the Civil Practice Act, providing that there shall be a jury trial where the complaint demands judgment for a sum of money only. If the right to that sum is equitable only, or in other words, where the form of relief that would be granted by equity in the particular circumstances is a decree for the payment of money, the action remains equitable and is tried in the traditional manner of equity causes. The complaint here reveals a situation where the plaintiff corporations voluntarily entered into contracts, voluntarily assumed obligations and made voluntary payments. Recovery back of these moneys and relief in regard to these obligations could not be had at law. The alleged abuse of the fiduciary relationship which occasioned these payments was a matter for exclusive equity jurisdiction.

*Id.* at 528 (citation omitted).

*Rappaport* and *Clearview Gardens* by no means stand alone. *See HH Princess Zarina Zainal v. America-Europe-Asia Intl. Trade and Management Consultants, Ltd.,* 254 A.D.2d 52, 53 (1st Dept. 1998) (upholding denial of jury demand, "The action cannot be viewed as primarily legal in nature where the main thrust of plaintiff's allegations is that defendants' transfer of franchise rights in a restaurant was a violation of their fiduciary duties to plaintiff in an alleged joint venture to develop the restaurant.") (citations omitted); *Grossman v. Sall*, 244 A.D.2d 159, 159 (1st Dept. 1997) (upholding striking of jury demand where claim involving fiduciary obligations "equitable claim"); *In re Estate of Coyle*, 34 A.D.2d 612, 613 (3rd Dept. 1970) (upholding denial of jury demand, "Their claim is for a breach of fiduciary duty which is an action in equity, and there is no right to a trial by jury in such case under section 2 of article I of

the Constitution.") (citation omitted); *Zutrau,* 2012 WL 12521016, *2 (striking jury demand, holding breach of fiduciary duty claim "equitable claim"); *Cross v. Communications Channels, Inc.*, 112 Misc.2d 1082, 1083 (N.Y. Sup. Ct. 1981) (striking jury demand where "although relief in the form of a money judgment might be granted, this action was essentially an equitable one (breach of fiduciary relationship)."); 7C Carmody-Wait 2d New York Practice with Forms § 49:45 ("There is no right to a jury trial where the cause of action is to recover damages for breach of fiduciary duty, which sounds in equity.").

This authority likewise establishes that Respondents/Defendants are not entitled to a jury trial on the Seventh, Eighth and Tenth Causes of Action in the Action. While, as discussed below, Respondents/Defendants are not entitled to a jury trial on these claims for the independent reason that they are derivative claims, the fact that these claims sound in breach of fiduciary duty is an independent basis for denying a jury trial on them.

**B. There Is No Right To A Jury Trial On The Derivative Claims.**

Turning to Petitioner/Plaintiff's derivative causes, the inapplicability and impropriety of a jury trial is just as compelling. Of particular note is *Moyal v. Sleppin*, 139 A.D.3d 605 (1st Dept. 2016). There, the trial Court found that even though plaintiff's claims were shareholder derivative claims, because they (post modification on appeal) sought only damages, plaintiff was entitled to a jury trial and denied a motion to strike. *See* November 5, 2015 Order, attaching November 2, 2015 record at 7:23-10:3, a true and correct copy of which is annexed to the Berube Affirmation as Exhibit 9. In short, the trial Court focused exclusively on the nature of the relief sought instead of the nature of the cause by and through which that relief was sought.

The First Department reversed and granted the motion to strike. Notwithstanding that plaintiff's remaining, post-appeal derivative causes of action sought only money, that Court held

that "Supreme Court erred in finding that plaintiff in this shareholders' derivative action was entitled to a jury trial, ***since the claims brought in his capacity as a shareholder were 'derivative and therefore equitable in nature.***'" *Moyal,* 139 A.D.3d at 605 (citations omitted) (emphasis supplied). In other words, irrespective of the fact that the relief sought was purely monetary, the derivative nature of the causes of action precluded a jury trial. In sum, this 2016, First Department decision controls here. Indeed, the facts of the instant case are even more compelling, as Petitioner/Plaintiff additionally seeks equitable relief on her equitable derivative claims.

The authority upon which *Moyal* principally relies, the *Horizon* case cited previously, mandates the same conclusion. Respondents/Defendants are simply not entitled to a jury trial on Petitioner/Plaintiff's derivative claims. Again, it is important to first analyze the underlying trial Court Orders before coming to the First Department's decision. Justice Fried of this Court granted defendants/counterclaim plaintiffs summary judgment on their derivative counterclaims for breach of contract and conversion, seeking damages. *Horizon Asset Management, Inc. v. Duffy*, 2011 WL 11166417, No. 602509/08, *12 (N.Y. Sup. Ct. Oct. 14, 2011). Indeed, the Court ordered an immediate hearing on damages as to these two derivative counterclaims before a Special Referee. *Id.*, *13.

Defendants/counterclaim plaintiffs subsequently contended that the amount of their damages on the two derivative claims should be tried to a jury rather than the Special Referee. *Horizon Asset Management, Inc. v. Duffy*, 2012 WL 8703878, 2012 N.Y. Slip Op. 33202[U], *1-2 (N.Y. Sup. Ct. July 2, 2012). The trial Court denied their application to have the damages amounts determined by a jury:

> As to that portion of the motion seeking to have [defendants/counterclaim plaintiffs'] damages tried by a jury, the motion is denied. It is well settled that,

> where a plaintiff asserts equitable causes of action, or asserts both legal and equitable causes of action arising out of the same alleged wrongdoing, or seeks both legal and equitable relief, he waives his right to a jury trial. Here, the breach of contract and conversion claims were asserted derivatively, by [defendants/counterclaim plaintiffs] on behalf of [the company], making them equitable claims. Generally, if a matter was historically cognizable at equity, where there were no juries, no right to a jury exists today. The derivative action originated at common law as an equitable proceeding by which shareholders could assert claims necessary to protect their interest in a corporation.

*Id.*, *2 (internal citations and quotations omitted). Tellingly, the First Department affirmed, finding that "contrary to [defendants/counterclaim plaintiffs'] contention, the counterclaims for breach of contract and conversion, which he asserted derivatively, are not legal claims, since derivative actions have long been recognized in New York as equitable proceedings." *Horizon Asset Mgt., LLC,* 106 A.D.3d at 595 (citations omitted). *See also Koral v. Savory, Inc.,* 276 N.Y. 215, 218 (1937) ("The right of a stockholder of a corporation to bring suit to enforce, for the benefit of the corporation, a cause of action, which belongs to the corporation, is purely equitable."); *Sakow v. 633 Seafood Restaurant, Inc.*, 25 A.D.3d 418, 419 (1st Dept. 2006) ("Plaintiff's claims, brought in her capacity as a 633 shareholder, are derivative and therefore equitable in nature.") (citations omitted); *KNET, Inc. v. Ruocco*, 145 A.D.3d 989, 992 (2nd Dept. 2016) ("shareholder derivative actions … are equitable in nature and do not require a jury trial … .") (citations omitted); *Woo v. Choi*, 2017 WL 2407383, No. 652033/2014, * 1 (N.Y. Sup Ct. 2017) ("The Court hereby grants the defendant's motion, striking plaintiff's jury demand, because as the defendant has argued, plaintiff has waived its right to a jury trial by asserting derivative claims which are equitable in nature."); *Zutrau,* 2012 WL 12521016, *1 (striking jury demand, holding shareholder derivative claims "equitable in nature"); *Tressler,* 1994 WL 16856594, *1 (striking jury demand, "derivative shareholders action [which sought damages] is available only in equity, and therefore Plaintiffs are not entitled to a jury trial as a matter of right."); *Goetz v. Manufacturers'& Traders' Trust Co.*, 154 Misc. 733, 734 (1935) (granting

motion to strike where claim equitable derivative claim for "money only") (citations omitted); 15 N.Y. Jur. 2d Business Relationships § 1202 ("Shareholder's derivative actions are equitable in nature, and thus, a shareholder is not entitled to a jury trial. The derivative action is not solely a creature of statute. Rather, the derivative action originated at common law as an equitable proceeding by which shareholders could assert claims necessary to protect their interest in a corporation, even in the absence of statutory authority to do so.").

Moreover, as in the case of her derivative breach of fiduciary duty claims, certain other of Petitioner/Plaintiff's derivative claims are undeniably triable to the Court, irrespective of and in addition to the fact that they are brought as derivative claims. *See e.g.* N.Y. Bus. Corp. Law §§ 706(d), 716(c) ("[t]he court may bar from re-election … any [director/officer] so removed for a period fixed by the court."), Seventeenth and Eighteenth Causes of Action; N.Y. Bus. Corp. Law § 626(e) ("the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees … ."), Twenty-Second Cause of Action.

**C. <u>The Relief Petitioner/Plaintiff Seeks Also Dictates Striking The Jury Demands.</u>**

As demonstrated above, this Court can and should strike Defendants/Respondents' jury demands owing simply to the nature of the claims pled in the Special Proceeding and Action. Yet, if one looks as well at the relief requested, the case becomes even more compelling. As noted, no claim for monetary relief is made in the Special Proceeding. *See supra* 2. And, as further discussed *supra* at 2-3; 7, the vast majority of Petitioner/Plaintiff's remaining causes in the Action seek some form of equitable relief. Requests that the Court appoint a receiver and grant injunctive relief, two forms of relief sought with respect to many of the remaining claims in the Action, are equitable. *See supra* at 5-6. Petitioner/Plaintiff's request for an accounting in connection with certain claims is likewise equitable and for this Court's consideration and

determination. *See Horizon Asset Mgt., LLC,* 106 A.D.3d at 595 (request for accounting equitable relief); *Zutrau,* 2012 WL 12521016, *2 (same). Finally, Petitioner/Plaintiff seeks no monetary relief as to her Seventeenth, Eighteenth and Twenty-First causes in the Action.

As a result, Petitioner/Plaintiff's claims cannot be satisfied by "a judgment for a sum of money only," nor has she demanded such limited relief. And so, Respondents/Defendants are not entitled to a jury trial pursuant to CPLR § 4101(1), which itself, even if the Court -- Petitioner/Plaintiff respectfully submits incorrectly -- focuses on the nature of the relief sought rather than the nature of the claim, only provides for a jury trial where "a party demands and sets forth facts which would permit a judgment for a sum of money only … ."

**D. If The Court Finds That Certain Issues Can Be Tried To A Jury, The Court Should First Try All Those Not Triable To The Jury.**

Section 202.40 of the Uniform Rules for the Supreme Court and County Court provides that:

> Unless otherwise ordered by the court, whenever a trial by jury is demanded on less than all issues of fact in an action, and such issues as to which a trial by jury is demanded have been specified in the note of issue or in the jury demand, as the case may be, served and filed pursuant to section 202.21 of this Part, the court without a jury first shall try all issues of fact as to which a trial by jury is not demanded. If the determination of these issues by the court does not dispose of the action, a jury shall be empanelled to try the issues as to which a trial by jury is demanded.

22 N.Y.C.R.R. § 202.40. This provision expresses a distinct preference for trying issues triable to the Court first, where certain issues are triable to the Court and others to a jury:[4]

> The sequence of proceedings at a jury trial has been standardized by tradition, but if there are any issues in the case that are not jury triable, whether because not so by their nature or because trial by jury as to them has been waived, the preference

[4] Petitioner/Plaintiff respectfully submits that this is the proper procedure for the Court to employ if the Court deems certain claims/issues ripe for resolution by a jury, as opposed to the jury rendering an advisory verdict on equitable claims/issues, as has been advocated by Respondents/Defendants during the meet-and-confer process.

> of the rules is that they be disposed of before any proceedings involving the jury get under way. Indeed, the stated preference is that a jury not even be impaneled until nonjury issues are decided, especially when the issues may be dispositive of the case.

Seigel, N.Y. Prac. § 393 (6th ed.) (citing to § 202.40). Petitioner/Plaintiff submits that if this Court should conclude that certain claims/issues are properly triable to a jury, the Court should first try and determine the issues not so triable to see, as Section 202.40 provides, whether determination of these nonjury issues disposes of the Special Proceeding and/or Action.[5]

**E. Respondents/Defendants' Affirmative Defenses Concede The Equitable Nature Of Petitioner/Plaintiff's Claims.**

Respondents/Defendants assert equitable affirmative defenses in both the Special Proceeding and Action. *See* Stephen Quazzo's Answer in the Action, dated April 1, 2013, Sixth Affirmative Defense (Unclean Hands), Seventh Affirmative Defense (Bad Faith), Eighth Affirmative Defense (Waiver, Laches, and Estoppel), and Ninth Affirmative Defense (Ratification and Acquiescence); Ugo Quazzo and the Corporations' Amended Answer in the Action, dated October 18, 2012, Fourth Affirmative Defense (Laches), Fifth Affirmative Defense (Unclean Hands), and Ninth Affirmative Defense (Estoppel, Ratification and Acquiescence); Ugo Quazzo and the Corporations' Verified Answer in the Special Proceeding, dated October 11, 2011, Fifth Affirmative Defense (Laches) and Seventh Affirmative Defense (Unclean Hands). True and correct copies of these Answers are annexed to the Berube Affirmation as Exhibit 10. Because equitable defenses can only be maintained as to causes of action sounding in equity, not those sounding in law, Respondents/Defendants, by asserting said defenses, necessarily concede that Petitioner/Plaintiff's causes in the Special Proceeding and Action are equitable in nature. Otherwise, their assertion of equitable defenses would be wholly improper

[5] Petitioner/Plaintiff notes in this regard that the Special Proceeding and Action have not been consolidated pursuant to CPLR 602(a) and no motion to consolidate is pending.

in an action at law. *See e.g. Rad v. IAC/InterActiveCorp*, 176 A.D.3d 635, 636 (1st Dept. 2019) (acquiescence equitable defense); *Continental Casualty Co. v. Employers Ins. Co. of Wausau*, 60 A.D.3d 128, 136 (1st Dept. 2008) (laches, waiver, ratification and estoppel equitable defenses); *In re Liquidation of American Druggists' Ins. Co.*, 15 A.D.3d 268, 268 (1st Dept. 2005) (equitable defense of laches unavailable in action at law); *Republic Ins. Co. v. Real Dev. Co.*, 161 A.D.2d 189, 190 (1st Dept. 1990) (same); *Hasbro Bradley, Inc. v. Coopers & Lybrand,* 128 A.D.2d 218, 220 (1st Dept. 1987) (equitable defense of unclean hands unavailable in action at law); *Rocks & Jeans, Inc. v. Lakeview Auto Sales & Service, Inc.,* 184 A.D.2d 502, 503 (2nd Dept. 1992) (same); *Horvath v. High Peaks Sand, Gravel & Minerals, LLC*, 60 Misc.3d 1223(A), *4 (N.Y. Sup. Ct. 2018) (equitable defenses of waiver, estoppel and unclean hands unavailable in action at law).

Further and in any event, these equitable defenses must be tried to the Court. *See* CPLR § 4101 ("equitable defenses and equitable counterclaims shall be tried by the court"); *Moyal,* 139 A.D.3d at 606 ("pursuant to CPLR 4101, defendants' equitable defenses of estoppel, laches and unclean hands should be tried by the court.") (citations omitted). As to Respondents/Defendants legal defenses, they also do not entitle Respondents/Defendants to a jury trial here. *See Chemical Bank v. Summers*, 67 A.D.2d 856, 856 (1st Dept. 1979) ([defendants] have statutorily waived their right to a jury trial on their separate defenses and counterclaims, as well, by joining equitable defenses and equitable counterclaims with legal defenses and legal counterclaims, all of which arise out of the same acts or transaction.") (citations omitted); *April M's Enterprises, Inc. v. Scott*, 178 A.D.2d 572, 573 (2d Dept. 1991) (striking defendant's jury demand, legal defenses did not entitle defendant to jury trial) (citation omitted).

## CONCLUSION

For the foregoing reasons, Petitioner/Plaintiff respectfully requests that the Court: (i) grant her Motion in its entirety; (ii) strike all of the jury demands filed by Respondents/Defendants; (iii) direct that all claims, defenses, and issues be tried to the Court; (iv) in the alternative, should the Court find that certain claims, defenses, or issues can be tried to a jury, try and determine all nonjury questions before impaneling a jury; and (v) grant her such additional relief as the Court deems just and proper.

Dated: New York, New York
December 16, 2019

Respectfully submitted,

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**CERTIFICATION**

In accordance with Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York, 22 NYCRR 202.70(g), I hereby certify that the attached Memorandum of Law, exclusive of its caption on the Cover Page, tables of contents and authorities, signature block, and date and inclusive of the text in its Pages 1 through 17, contains approximately 5,494 words, according to the Microsoft Word word-processing system at Barton LLP, on which said Memorandum of Law was prepared.

Dated: New York, New York
December 17, 2019

Mark A. Berube