SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
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RAQUEL WOLF, as Executrix of the ESTATE OF HIRSCH WOLF,

Plaintiff,

-against-

NATHANIEL SHAPIRO,

Defendant.

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Index No.: 503553/2017

MOTION NO.: 8

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSAL OF THE COMPLAINT

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Defendant Nathaniel Shapiro, Esq. ("Shapiro"), by his attorneys, Winget, Spadafora & Schwartzberg, LLP, respectfully submits this Memorandum of Law in support of Defendant's motion for an order granting summary judgment, pursuant to CPLR 3212, dismissing the summons and complaint ("Complaint"), with prejudice and granting such other and further relief as this Court deems equitable, just and proper ("Motion").

PRELIMINARY STATEMENT

This is an action seeking to hold an attorney liable for aiding and abetting alleged breaches of fiduciary duties owed by their client. This Court must grant the Motion and dismiss the Complaint, with prejudice because Shapiro has met his *prima facie* burden and even after affording Plaintiff every beneficial inference, the is no material question of fact necessitating a trial of this action.

First, there is no question of fact that Shapiro's involvement in the wrongful conduct alleged is limited to actions taken as attorney for non-party Michael Wahba. New York State Courts have long held that actions taken by an attorney within the scope of their engagement cannot sustain the necessary element of "substantial assistance" required for an aiding and abetting breach of fiduciary duty claim. As such, even if this Court finds an underlying breach occurred and that Shapiro had actual knowledge of that breach, this Court must, nonetheless, grant the Motion as the necessary element of substantial assistance is lacking.

Second, the specific wrongful conduct claimed by Plaintiff is that Shapiro knew and failed to disclose that Michael Wahba found a buyer who would purchase the sole asset of non-party Richmond Properties, LLC, at a price that was significantly higher than the proportional amount that Michael Wahba paid for Plaintiff's interest in Richmond Properties. Under New York Law,

however, there can be no aiding and abetting liability based on omissions or failure to disclose absent a direct duty running to the plaintiff. Here, while there is no question of fact that Shapiro previously represented Plaintiff's late husband, Hirsh Wolf, there is also no question of fact that Plaintiff was represented by counsel throughout the subject transaction and that Plaintiff expressly waived any conflict of interest arising from Shapiro's prior representation of the decedent. Indeed, to require Shapiro to act in the manner Plaintiff demands would require an attorney to betray the confidence and trust of his client, in favor of a non-client.

Third, there is no underlying breach of fiduciary duty. The subject transaction was the result of an arm's length negotiation between sophisticated parties. At that time, the business relationship between Plaintiff, her family, Michael Wahba and non-party Sol Wahba had deteriorated to such a degree that it was unreasonable for Plaintiff to rely on Michael Wahba's representations. To this point, Plaintiff's own witness testified that he did not trust Michael Wahba and that Plaintiff's family wished to get out of business with Sol Wahba. Moreover, Plaintiff appears to have engaged in deceptive tactics during the negotiations leading up to the subject transaction, further exemplifying that the trust and reliance forming the foundation of any fiduciary relationship was long absent. As there is no underlying breach of fiduciary duty, there can be no claim for aiding and abetting liability.

Fourth, Michael Wahba was not a signatory to the Operating Agreement of Richmond Properties, LLC, not a member of Richmond Properties, LLC, and therefore, did not owe Plaintiff a fiduciary duty. While Plaintiff claims Michael Wahba's conduct made him a *de facto* member, that conduct was expressly permitted under the Operating Agreement of Richmond Properties, LLC. By itself, this conduct is insufficient to create a fiduciary duty. Nonetheless, should the

Court find that Michael Wahba owed Plaintiff a fiduciary duty, there is no question of fact that Shapiro lacked actual knowledge of such duty, requiring dismissal of Plaintiff's claims. At best, the undisputed facts demonstrate constructive knowledge, which is insufficient.

Fifth, Sol Wahba is insulated from liability by the section 13.1 of the Operating Agreement of Richmond Properties, LLC. The agreement in question set forth the parties' obligation in the event a member wished to accept a third-party purchase offer. There is no question of fact that Sol Wahba did not possess knowledge of the facts necessary to invoke his obligations to disclose a third-party purchaser to Plaintiff. As Plaintiff cannot claim a breach of fiduciary duty in order to sustain a defective breach of contract claim, the limitation of liability in the section 13.1 of the Operating Agreement of Richmond Properties, LLC insulates Sol Wahba from liability for the wrongful acts alleged in this action. Because Sol Wahba did not commit an underlying breach, Shapiro cannot be held liable for aiding and abetting the breach of a person he did not represent.

For the reasons set forth herein, at length, Shapiro respectfully requests that this Court grant his Motion in full and dismiss the Complaint, with prejudice, together with such other and further relief as the Court deems equitable, just and proper.

RELEVANT FACTS[1]

I. Introduction.

Through this action Plaintiff, Raquel Wolf as Executrix of the Estate of Hirsch Wolf ("Plaintiff") seeks to hold Defendant Nathaniel Shapiro ("Shapiro") liable of aiding and abetting

[1] Defendant Shapiro respectfully submits that there is no dispute as to the facts recited herein. These facts are drawn from the affidavit of Defendant Nathaniel Shapiro ("Shapiro Aff."), the affidavit of Plaintiff Raquel Wolf as Executrix of the Estate of Hirsch Wolf ("Wolf Aff."), the religious affirmation of non-party Sol Wahba ("Sol Aff."), the religious affirmation of non-party Michael Wahba ("Michael Aff.") and the supporting affirmation of Alexander A. Truitt Esq. ("Truitt Aff"), including the annexed exhibits.

the alleged breaches of fiduciary duties purportedly owed by non-parties Sol Wahba ("Sol") and Michael Wahba ("Michael"), to her late husband Hirsch Wolf ("Wolf"). *See* Truitt Aff., Ex 10, *passim*. Plaintiff has not sued Sol or Michael in this action, but in a separate action before this Court and commenced approximately a year earlier under the caption: *Raquel Wolf as Executrix of the Estate of Hirsch Wolf v. Sol Wahba, Michael Wahba, and Sigula 1145 Broadway LLC* (Sup. Ct., Kings Ct. Index No.: 500661/2016) ("*Wahba* Action"). *See* Sol Aff., ¶ 1; Michael Aff., ¶ 1. Mr. Shapiro's only connection to the wrongful acts alleged in the *Wahba* Action is that he acted as attorney for Michael. *See* Michael Aff., ¶¶ 40-47, Ex. 9 § 7.9; Shapiro Aff., ¶¶ 56-57. As such, the facts underlying the dispute in the *Wahba* Action, as they relate to Shapiro, are recited as relevant to the instant action.

II. Background.

The events giving rise to this dispute and the *Wahba* Action concern non-party Sigula 1145 Broadway LLC's ("Sigula") purchase of Plaintiff's interest in a limited liability corporation called Richmond Properties, LLC ("Richmond Properties"). *See* Truitt Aff., Ex. 11, *passim*. Michael is the sole owner of Sigula. *See* Michael Aff., ¶ 42. At all times relevant to the transaction in question, Sol and Wolf were the sole members of Richmond Properties. Truitt Aff., Ex. 12, 51:18-53:7; Sol Aff., ¶ 9.; Ex. 1, p. 30.

The purpose of Richmond Properties was to own certain real property located at 1145 Broadway, New York, NY 10001 (the "Property") and act as landlord for the Property. *See* Sol Aff., ¶ 7 Ex. 1, § 5.1. Sol first purchased the Property in or around 1977. *See* Sol Aff., ¶ 5. At some point prior to December 20, 1999, Sol and Wolf entered into a business relationship concerning the Property wherein Wolf had loaned Sol certain sums of money. *See* Sol Aff., Ex. 1,

p. 1; Shapiro Aff., ¶ 11. Eventually, that business relationship matured through the formation of Richmond Properties, with Sol transferring the Property to Richmond Properties and the execution of the Operating Agreement of Richmond Properties ("Operating Agreement"). *See* Sol Aff., Ex. 1., p.1.

During his life, Wolf was a businessman and investor of considerable acumen. *See* Shapiro Aff., ¶ 14. He owned a successful company called Hirsch Wolf & Co., Inc. ("Hirsch Wolf & Co."), which primarily served nursing homes as an insurance broker. *See* Shapiro Aff., ¶¶ 3-4; Truitt Aff., Ex. 12, 23:15-24:6. Shapiro was a salaried employee and counsel to Hirsch Wolf & Co. from 1998 through 2004, at which point, Shapiro left to start his own practice with a focus on real estate transactions.[2] *See id.*, ¶ 3-6, 16. During his time at Hirsch Wolf & Co., Shapiro would work on matters at Mr. Wolf's direction, sometimes with the assistance of outside legal counsel. *See* Shapiro Aff., ¶ 7.

As relevant herein, Shapiro assisted Sol and Wolf prepare the Operating Agreement. *See* Shapiro Aff., ¶ 8. Shapiro recalls his involvement in preparing the Operating Agreement as taking place over a period of weeks or months where he would sit in one room drafting the Operating Agreement as Sol and Wolf negotiated its terms in another room; sometimes coming in to provide instruction or revisions. *See* Shapiro Aff., ¶ 12. The business relationship between Sol and Wolf predated Shapiro's employment at Hirsch Wolf & Co. *See* Shapiro Aff., ¶ 11; *see also* Truitt Aff., Ex. 12, 55:33-56:20.

Pursuant to the Operating Agreement, Sol owned 51% of Richmond Properties and Wolf

[2] While Shapiro was employed at Hirsch Wolf & Co., he came to know Mr. Brian Penn ("Penn") who served as controller for Wolf's private investments, and Michael. Penn's role was that of a controller for Wolf and, later, his family's private investments. Michael worked with Wolf on some prospective, unrelated investments. *See* Shapiro Aff., ¶ 13-15.

owned 49%, but both had equal voting rights. *See* Sol Aff., ¶¶ 9, 10; Exhibit 1, p. 30, § 9.1. Sol was responsible for the day-to-day operations of Richmond Properties, which included collecting rents, maintaining the Property, and finding tenants. *See id.* ¶11, 10; Exhibit 1, Articles V, IX, XI. Pursuant to the Operating Agreement, Michael could assist Sol in these tasks and charge a fee for his services. *See* Sol Aff., ¶ 12; Exhibit 1, § 11.1. Because Sol was of advanced age, Michael assisted with the operations of Richmond Properties, but Michael did not charge a fee for his services.[3] *See* Michael Aff., ¶¶ 11-14; Exhibit 1, p. 30, § 11. Michael was not a party to the Operating Agreement. *See* Michael Aff., ¶¶ 14; *see also* Sol Aff., Exhibit 1.

Richmond Properties would dissolve upon the death of either Sol or Wolf, but the Operating Agreement permitted it to continue until its affairs, including liquidating its sole asset, were wound up. *See* Sol Aff., ¶¶ 12, 13; Exhibit 1, §§ 13.3, 14.2, 14.3. If either Sol or Wolf received a "bona fide offer from a financially responsible third party" and that member wished to sell the Property, they were required to give notice to the other. *See* Sol Aff., Exhibit 1, § 13.1. Such notice was required to state: (1) the name and address of the prospective buyer; (2) information concerning the prospective buyer's financial capacity; and (3) the essential terms of any contract effecting such sale, and stating that the other wished to accept the offer. *See id.*

The Operating Agreement also contains a provision limiting the liability of Sol and Wolf as follows:

> Notwithstanding anything to the contrary stated herein, no Member or Manager, nor employee, agent or permitted successor and assign of a Member, shall be liable, responsible or accountable in damages or otherwise to the other Members or the Company for any errors in judgment, for any act, including any act of negligence performed by such person, or for any omission or failure to act, if the performance of such act or such omission or failure is done in good faith, is within the scope of

[3] Likewise, Penn would also assist Wolf in his capacity as a member of Richmond Properties. *See* Truitt Aff., Exhibit 11, 50:11-51:3.

> the authority conferred upon such person by this Agreement or by law and does not constitute a breach of fiduciary duty, breach of any obligation contained in this Agreement, willful misconduct, gross negligence or reckless disregard of duties. If any part of this Section 15.1 shall, for any reason and to any extent, be invalid or unenforceable, this Section shall be construed to exculpate the foregoing persons to the fullest extent permitted by law.

See Sol Aff., Exhibit 1, § 15.1.

Eventually, issues with the Property arose that affected the business of Richmond Properties. *See* Shapiro Aff., ¶ 23. At some point, tenants in certain portions of the Property were arrested for selling counterfeit goods. *See* Truitt Aff., Exhibit 12, 56:21-:58-24. This led to the city refusing to issue a certificate of occupancy, which prohibited Richmond Properties from renting certain spaces within the Property. *See* Truitt Aff., Exhibit 12, 56:21-:58-24; Shapiro Aff., ¶ 24; Michael Aff., ¶ 15. Along with decreased rental income, the lack of a certificate of occupancy adversely affected the value of the Property. *See* Truitt Aff., Exhibit 12, 60:9-61:16; Shapiro Aff., ¶¶ 25-26; Michael Aff., ¶¶ 16-17.

III. Shapiro Acts as Attorney for Michael's Purchase of Plaintiff's Interest in Richmond Properties.

Wolf passed away in or around June 2011. *See* Truitt Aff., Exhibit 12 53:15-16; Michael Aff., ¶ 18; Sol Aff., ¶ 15. After Wolf passed, his family members obtained an appraisal of the Property for tax purposes, which valued the property at around $2,000,000. *See* Truitt Aff., Exhibit 12 64:9-65:5; Exhibit 14.

Plaintiff, her family members, and Mr. Brian Penn (defined in footnote 2 as "Penn," the family's controller) became more involved with the Property after Wolf's passing. *See* Sol Aff., ¶ 16; Michael Aff., ¶¶ 18-25; Shapiro Aff., ¶¶ 27-28; Truitt Aff., Exhibit 12 68:3-69:25; 73-25-75:19. Along with Penn, and her family, Plaintiff engaged CPAs and attorneys to assist her manage Wolf's

investments. *See* Truitt Aff., Exhibit 12, 80:21-81:14. Shortly after Wolf's death, however, the relationship ship between the two families broke down. Michael Aff., ¶¶ 18-25; Shapiro Aff., ¶¶ 27-28. It appears that Wolf and Sol could resolve conflicts concerning Richmond Properties, but once Wolf passed, the business relationship became strained. Among other things, Penn did not believe that Michael was trustworthy. *See* Truitt Aff., Exhibit 12 97:14-21. Eventually, the relationship between the two families broke down completely. *See* Michael Aff., ¶¶ 18-25; Truitt Aff., Exhibit 12, 73-25-75:19.

Plaintiff and Wolf's family wished to sell the Property as soon as possible and end the business of Richmond Properties. *See* Truitt Aff., Exhibit 12 70:9-71:8; Shapiro Aff., ¶ 28; Michael Aff., ¶ 21-25; Sol Aff. ¶ 18. Sol, however, did not want to sell the Property with the same urgency as Plaintiff. *See* Truitt Aff., Exhibit 12 70:9-71:8; Shapiro Aff., ¶ 28; Michael Aff., ¶ 21-25; Sol Aff. ¶ 18. On August 28, 2013, Plaintiff, through Penn, stated that they wished to market the Property to potential buyers. *See* Michael Aff., ¶ 26, Exhibit 4. Plaintiff continued on this path through a January 28, 2014 Email, wherein Penn informed Michael that he was authorized to act on behalf of Plaintiff and Wolf's family concerning any sale of the Property. *See* Michael Aff., ¶ 27, Exhibit 5. Difficulty in finding a satisfactory buyer arose because Sol wanted a price around $7,000,000 for the Property. *See* Michael Aff., ¶ 28, Exhibit 6.

In or around April 2014, United Equity Investments, an entity where Michael served as managing member offered to buy the Property for $4,500,000. *See* Michael Aff., ¶¶ 29-30, Exhibit 7. Plaintiff and Wolf's family rejected United Equity Investment's offer to purchase the Property as too low.

In or around July 23, 2014, Penn informed Michael that Plaintiff and Wolf's family wished

to have the Property appraised. *See* Michael Aff., ¶ 31, Exhibit 8. Upon the advice of Plaintiff's legal counsel, Plaintiff selected an appraiser, who was different from the appraiser who provided the earlier $2,000,000 valuation. *See* Truitt Aff., Ex. 12 89:6-94:18. By letter dated August 28, 2014, Plaintiff informed Sol that the appraiser concluded the Property was now worth $6,000,000. *See* Sol Aff., ¶ 19-20; Exhibit 2. Through the same letter, Plaintiff disclosed that they obtained an $6,100,000 offer to purchase the Property. *Id.*

The August 28, 2014 letter did not disclose the earlier appraisal valuing the property at $2,000,000. Likewise, the August 28, 2014 letter did not comply with section 15.1 of the Operating Agreement. Significantly, the August 28, 2014 letter did not disclose the identity of the prospective buyer. *See* Sol Aff., ¶ 20; Exhibit 2. During his deposition, Penn claimed to not know who the prospective buyer was, but later confirmed that it was a friend and business partner of Plaintiff's family. *See* Truitt Aff., Exhibit 12 87:10-88:13, 130:4-132:5.

Sol rejected the offer as unsatisfactory. *See* Michael Aff., ¶ 35. As Plaintiff and Wolf's family were impatient, Sol suggested a compromise—that Michael purchase Plaintiff's interest in Richmond Properties, instead of Richmond Properties selling the Property when Plaintiff and Sol had such differing views on what an acceptable price would be. *See* Michael Aff., ¶ 36; Sol Aff., ¶ 21; Shapiro Aff., 28-31. Plaintiff and Wolf's family did not want to wait for another prospective purchaser to appear and so, negotiations concerning Michael's purchase of Wolf's interest in Richmond Properties commenced. *See id.*

At the time, all parties knew that Michael's aim was to either purchase his father's interest in Richmond Properties and then flip the Property to a third-party or remedy the certificate of occupancy issue. *See* Shapiro Aff., ¶ 50; Michael Aff., ¶ 39. Michael initially offered $2,500,000

for Wolf's interest in Richmond Properties. *See* Truitt Aff., Exhibit 12 96:7-24. Plaintiff rejected that as it was less than the value of Wolf's interest based on their second appraised value of the Property. *See* Truitt Aff., Exhibit 12 94:8-97:2. In or around October 1, 2014, and after heated negotiations, Plaintiff lowered their asking price to $2,750,000. *See* Truitt Aff., Exhibit 12 96:7-24; *see also* Sol Aff., Exhibit 3. After being pressured by Sol, Michael accepted this price. *See* Truitt Aff., Exhibit 12 96:25-97:9;

Once the parties to the transaction agreed on a price, Michael engaged Shapiro to represent both parties in closing the transaction. *See* Michael Aff., ¶ 40; Shapiro Aff., ¶ 22. Shapiro informed Michael and Penn, who was continuing to act on behalf of Plaintiff, that he could not represent both parties and that Plaintiff should engage their own counsel. *See* Shapiro Aff., ¶¶ 37-39. As such, Plaintiff engaged Howard Garfinkel of Lauterbach, Garfinkel Damast & Hollander, LLP ("LGDH Firm") to represent their interest. *See* Shapiro Aff. ¶ 40; Michael Aff., ¶ 45; Truitt Aff., Exhibit 12 100:10-101:6. While Plaintiff had engaged the LGDH Firm concerning the earlier appraisal, Shapiro had no prior involvement. *See* Shapiro Aff., ¶¶ 45, 57; Michael Aff., ¶ 47. Significantly, Shapiro was not involved in any discussions concerning the price of Wolf's interest in Richmond Properties. *See* Michael Aff., ¶ 40.

Thereafter, Shapiro and the LGDH Firm worked together to draft the Member Interest Purchase Agreement ("MIPA") for Sigula's purchase of Wolf's Interest in the Property. *See* Shapiro Aff., ¶ 40. Along with drafting the MIPA, Shapiro also worked with the LGDH Firm to calculate and apply adjustments at the closing, and hold certain funds in escrow. *See* Shapiro Aff., ¶¶ 42-43; Michael Aff., ¶ 47. These tasks were not unusual activities for Shapiro to perform in a transaction where real estate is concerned. *See* Shapiro Aff., ¶ 44.

As discussed above, Michael formed Sigula to complete the transaction covered by the MIPA. *See* Shapiro Aff., ¶ 41; Michael Aff., ¶ 42. The MIPA acknowledged that conflicts may exist between the parties. *See* Michael Aff., Ex. 9, § 7.9. To remove any doubt as to whom Shapiro represented, the MIPA contained a complete waiver of all conflicts arising from Shapiro's previous engagements by Wolf as follows:

> Each of the parties hereto acknowledges that Nathaniel Shapiro ("NS"), who has prepared this Agreement, is and/or has previously been counsel to each of them at one time or another, has provided certain legal services to each of them, and that actual and potential conflicts of interest exist or may exist, now or in the future, amount the respective parties hereto, in respect of such legal service or otherwise. In all respect of the matters contemplated by this Agreement, NS is representing and is ONLY representing the interest of [Sigula]. Each of the parties hereto acknowledges that, after consultation with its or his own legal counsel, such party hereby irrevocably waives any and all of NS' conflicts of interest. It is the express intention of the parties hereto that NS shall be deemed t be a beneficiary of the provisions of this Section entitled "Waiver of Conflicts."
>
> *See* Michael Aff., Ex. 9, § 7.9.

The MIPA was executed on December 31, 2014. *See* Michael Aff., Ex. 9. At some point after Michael and Plaintiff agreed to a price for Wolf's interest in Richmond Properties and before the MIPA was fully executed, Michael found a buyer who wished to purchase the Property for approximately $8,900,000. *See* Michael Aff., ¶ 48; Shapiro Aff., ¶ 49. Michael did not inform Sol of any details outside of the purchase price and separately, came to a deal to purchase and sell Sol's interest in the Property through a flip. *See* Sol Aff., ¶¶ 25-28. The crux of Plaintiff's dispute with Michael and Sol is that Michael did not bring the higher offer to Plaintiff and her family after Michael had already agreed to Plaintiff's asking price. Put differently, Plaintiff wanted all of the benefit from the deal to flow to Richmond Properties, which would necessarily require non-member Michael to cut himself out from his own deal.

On this point, Plaintiff fundamentally misrepresents the transaction at issue. Plaintiff claims that one member of Richmond Properties usurped a business opportunity that, pursuant to the Operating Agreement, should have been brought all members and then, bought out the other member with the knowledge that a bona fide third-party purchaser existed who would pay more for that same interest. *See* Truitt Aff., Exhibit 11 ¶ 1; ¶¶ 43-46. What actually happened is that a non-member of Richmond Properties engaged in arm's length negotiations to purchase one member's interest, to put an end to a business relationship that soured past the point of being able to function, and then flipped the property.

At no point did Shapiro act in any other capacity then as attorney for Michael and Sigula. *See* Shapiro Aff., ¶¶56-57. Specifically, Shapiro did not and has not ever represented Sol or Raquel Wolf. *See* Shapiro Aff., ¶¶ 19-20. At no point did anyone ask Shapiro: (1) what Michael intended to do with the Property; (2) whether the price Michael and Penn reached represented fair market value for Wolf's interest in Richmond Properties; (3) or whether Michael received any offers to purchase the Property. Shapiro did not negotiate the price of the MIPA. *See* Shapiro Aff., ¶ 53.

Shapiro was not engaged until after Plaintiff and Michael reached an agreement in principle, which included the price that Plaintiff sought and now claims reflects their measure of their damages. *See* Michael Aff., ¶ 40; Shapiro Aff., ¶ 35. At all times, Shapiro believed that Plaintiff, Penn, and Mr. Wolf's family knew what Michael's intentions with the Property were. *See* Shapiro Aff., ¶¶ 50, 54. Indeed, it appears those goals were both obvious and that Plaintiff's family had tried a similar tactic to no avail. *See* Truitt Aff., Exhibit 12 87:10-88:13, 130:4-132:5. Likewise, Shapiro believes that, in purchasing Mr. Wolf's interest in Richmond Properties, Michael was giving Plaintiff what she and her family wanted because he accepted their asking

price, permitting Plaintiff's family to end their involvement in Richmond Properties. *See* Shapiro Aff., ¶¶ 32-34. Similarly, the subsequent transaction would satisfy Sol's objectives as he wanted a higher price for his interest in Richmond Properties than Plaintiff's valuation. *Id.*

PROCEDURAL HISTORY

Plaintiff commenced this action on February 22, 2017, through the filing of a summons and complaint ("Complaint"). *See* Truitt Aff., Ex. 11. Originally, the Complaint alleged four causes of action as against Shapiro: (1) breach of fiduciary duty; (2) fraud; (3) aiding and abetting breach of fiduciary duty; and (4) violation(s) of an attorney's rules of ethics. The crux of Plaintiff's claim was that Shapiro, as Wolf's former attorney, owed Plaintiff a duty to disclose Michael's subsequent transaction—despite the fact that Plaintiff was represented by her own counsel, the MIPA contained an express acknowledgement that Shapiro only represented Sigula, and all parties waived any conflict of interest concerning the MIPA transaction. *See id.*, ¶¶ 61-83.

As such, Shapiro filed a motion to dismiss, which was granted by order dated June 30, 2017 . *See* Truitt Aff., Ex. 15. Plaintiff moved for re-argument that was also granted by a separate order dated February 16, 2018, wherein the Court revived Plaintiff's claim for aiding and abetting breach of fiduciary duty—but sustained its dismissal of the other causes of action. *See* Truitt Aff., Exhibit 16. The Court found that "[a]ccepting the allegations of the complaint as true and according plaintiff the benefit of every favorable inference" Plaintiff satisfied the notice pleading requirements for their aiding and abetting breach of fiduciary duty cause of action. *See id.,* p. 2.

Thereafter, Shapiro filed his answer with affirmative defenses and the parties began discovery. *See* Truitt Aff., ¶ 10. Plaintiff did not seek any discovery nor take any depositions in this action. *See* Truitt Aff., ¶ 11. Likewise, Plaintiff willfully obstructed Shapiro's proper and

lawful attempts to obtain discovery and take depositions of material witnesses. *See* Truitt Aff., ¶ 12. This obstruction lead to Shapiro filing three motions seeking to compel Plaintiff's compliance with its discovery obligations and to impose sanctions for Plaintiff's willful and contumacious refusal to do so. *See* Truitt Aff., ¶ 13.

In addition, Plaintiff's obstruction caused considerable delays in bringing this action to a merits-based resolution. *See* Truitt Aff., ¶ 14. That process was then complicated by the global health crisis caused by the novel coronaviruses COVID-19. *See* Truitt Aff., ¶ 15. Nonetheless, discovery was substantially completed on or around May 14, 2020, when counsel for Sol and Michael provided their religious affirmations in lieu of their noticed depositions in this action. *See* Truitt Aff., ¶ 16. On this point, Sol and Michael's delay was caused, at least in part, by the fact that Sol contracted the novel coronaviruses COVID-19 and was incapacitated for a period of time, before recovering. *See* Truitt Aff., ¶¶ 17, 18.

On June 1, 2020, counsel for Shapiro and Plaintiff met for a settlement conference before the Honorable Lara J. Genovesi. *See* Truitt Aff., ¶ 19. During the June 1, 2020 settlement conference, the parties agreed that Shapiro's motion for summary judgment would be timely if filed by June 15, 2020.[4] *See* Truitt Aff., ¶ 19. The parties confirmed the same through an email exchange following the conference. *See* Truitt Aff., Ex. 17.

[4] The parties came to that agreement in order avoid the need to burden the Court with briefing on the collateral issue as to whether Shapiro may demonstrate "good cause" sufficient to excuse any delay in filing under CPLR 3212(a). *See Brill v. City of New York*, 2 N.Y.3d 648 (N.Y. 2004). It is respectfully submitted that such good cause is demonstrated herein. Nonetheless, should the Court disagree and find the agreement reached between the parties unsatisfactory, Shapiro respectfully requests leave to supplement this issue through additional briefing.

ARGUMENT

I. Applicable Legal Standards to this Motion

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR §3212(b); *see also Zuckerman v. City of New York*, 49 N.Y.2d 557, 562-563 (N. Y. 1980). A motion for summary judgment may be supported "by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." *See* CPLR § 3212(b). For a defendant to succeed on a motion for summary judgment, they must establish that the Plaintiff cannot establish one of the necessary elements to their cause of action. *See Parklex Assoc. v. Flemming Zulack Williamson Zauderer*, LLP, 118 AD3d 968, 970 (2d Dep't 2014). Once the proponent of a summary judgment motion has met its burden, the burden shifts to the opposing party to produce evidentiary proof in admissible form to rebut the movant's prima facie showing by demonstrating a triable issue of fact. *See Zuckerman*, 49 N.Y.2d 557 (N.Y. 1980).

The necessary elements of an aiding and abetting a breach of fiduciary duty cause of action are: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach. *See Baldeo v. Majeed*, 150 AD3d 942, 946 (2d Dep't 2017); *Kaufman v. Cohen*, 307 AD2d 113, 125 (1st Dep't 2003). Knowing participation requires the defendant's actual knowledge of the underlying breach and facts forming constructive knowledge are not sufficient. *See Baron v. Galasso*, 83 AD3d 626, 629 (2d Dep't 2011); *Glob. Minerals and Metals Corp. v. Holme*, 35 AD3d 93, 101-02 (1st Dep't 2006). In addition, a person only knowingly participates in the underlying

breach when they provide "substantial assistance" to the primary violator by affirmatively assisting, helping conceal or failing to act when required and, thereby enabling the breach to occur. *See Schroeder v. Pinterest Inc*., 133 AD3d 12, 25 (1st Dep't 2015) (*citing Kaufman*, 307 AD2d at 126). Mere inaction is insufficient absent a direct fiduciary duty owed to the plaintiff. *Id.*

II. Plaintiff's Aiding and Abetting Claim Must Be Dismissed Because Shapiro's Actions as Attorney for Michael are Insufficient to Satisfy the Necessary Element of Substantial Assistance.

Even if this Court finds that (1) Michael or Sol owed fiduciary duties to Plaintiff; (2) Michael or Sol breached those duties, and (3) Shapiro had actual knowledge of those breaches—the Court must still grant this Motion as the undisputed facts reveal that Shapiro's actions taken as attorney cannot satisfy the necessary requirement that an aider and abettor provide "substantial assistance" to the primary breach. Indeed, this simple and inescapable conclusion has been repeatedly upheld and affirmed by appellate courts in the State of New York. *See Fulton v. Hankin & Mazel, PLLC*, 132 AD3d 806 (2d Dep't 2015); *Parklex Assoc. v. Flemming Zulack Williamson Zauderer, LLP*, 118 AD3d 968 (2d Dep't 2014); *Binn v. Muchnick, Golieb & Golieb, P.C.*, 180 AD3d 598, 599 (1st Dep't 2020); *Mendoza v. Akerman Senterfitt LLP*, 128 AD3d 480, 483 (1st Dep't 2015); *Learning Annex, L.P. v. Blank Rome LLP*, 106 AD3d 663, 663 (1st Dep't 2013); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 12 (1st Dep't 2008); *Roni LLC v. Arfa*, 72 AD3d 413, 413-14 (1st Dep't 2010), *aff'd*, 15 NY3d 826 (N.Y. 2010); *Art Capital Group, LLC v. Neuhaus*, 70 AD3d 605, 606 (1st Dep't 2010).

In *Fulton v. Hankin & Mazel, PLLC*, the plaintiff alleged that they were harmed because they financed the purchase of a recycling company, but the final contract listed them as guarantor rather than as 45% percent owner, which percentage they alleged entitlement to pursuant to oral

agreements with the buyer. *See Fulton*, 132 AD3d at 806-807. The attorney defendants were found to have drafted the contract that did not include the purported oral agreement, attended to its execution, and served as escrow agent for the plaintiff's funds. *Id.* In dismissing the plaintiff's claims for aiding and abetting liability, the Second Department found that such acts could not satisfy the necessary element of substantial assistance. *Id.*, at 809.

Moreover, in *Roni LLC v. Arfa*, the First Department found that "activities which are part of ordinary real estate lawyering" could not sustain the substantial assistance requirement of an aiding and abetting claim. *See Roni*, 72 A.D. 3d. at 413-414; *see also Dineen v. Wilkens*, 155 AD3d 607, 609 (2d Dep't 2017) (attorney acting in professional capacity in effecting transaction later claimed to be a fraudulent conveyance cannot be held liable for aiding and abetting). Similarly, in *Art Capital Group, LLC v. Neuhaus*, the First Department held that actions "fall[ing] completely within the scope of defendant's duties as an attorney" cannot sustain an aiding and abetting breach of fiduciary duty cause of action. *Art Capital Group, LLC v. Neuhaus*, 70 A.D. 3d at 607-608.

This principle has been repeatedly upheld and applied to circumstances where attorneys have drafted agreements, similar to the MIPA, which form the basis of the alleged primary violation. *See Binn*, 180 AD3d at 599 (drafting that merger documents that harmed plaintiff are merely routine legal services that cannot sustain a claim); *Mendoza*, 128 AD3d at 483 (conducting investigations and drafting amendments to partnership agreement in question are insufficient to sustain a claim). Likewise, providing legal advice that enabled the purported primary breach is also insufficient. *See Learning Annex, L.P.*, 106 AD3d at 663; *Ulico Cas. Co.*, 56 AD3d 1, 12 (1st Dep't 2008).

The public policy supporting these decisions has been has been part of New York's

jurisprudence for over one-hundred and fifty years. In *Ford v. Williams,* the New York Court of Appeals set forth the limits for aiding and abetting liability as follows:

> In general, all who aid and abet the commission of a trespass are liable jointly or severally, at the election of the party entitled to the action. But where one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass he is not liable, though what he does may aid another party in its commission.
>
> *Ford v. Williams,* 13 NY 577, 584 (N.Y. 1856).

As that principal has been applied to attorneys, it has long been held that "(t)he public interest . . . demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients." *Hahn v. Wylie*, 54 AD2d 629, 629 (1st Dep't 1976).

Here, there is no question of material fact that Shapiro only acted within his role as attorney for Michael. It is important to note that Shapiro was only engaged after the parties completed arm's length negotiations and reached a price for Plaintiff's interest in Richmond Properties.[5] Once he was engaged, Shapiro advised Penn and Michael that he could not represent both parties and Plaintiff retained their own counsel to draft the MIPA. Aside from drafting the MIPA with Plaintiff's counsel, Shapiro's activities were limited to applying adjustments and holding amounts in escrow for the closing. These are "activities which are part of ordinary real estate lawyering" and, as such, Plaintiff's summons and complaint must be dismissed, with prejudice. *Roni,* 72 A.D. 3d. at 413-414.

[5] Any substantial assistance provided by Shapiro, therefore, would not have proximately caused Plaintiff's claimed harm. *See Mishan v Sabbagh,* 2018 WL 1709536 (N.Y. Sup Ct, New York County 2018) (attorney who did not perform legal services that caused the harm complained of could not be could not be found to "proximately cause the harm on which the primary liability is predicated and, therefore, does not constitute substantial assistance.")

III. Shapiro had no Obligation to Inform Plaintiff of Michael's Subsequent Transaction as Plaintiff Was Represented by Their Own Counsel and All Conflicts Were Waived.

Plaintiff's claim boils down to the unsupportable belief that New York state law required Shapiro to betray the trust and confidences his client and inform Plaintiff once Shapiro learned that Michael intended to sell the property to a third-party. To this point, Shapiro testified that at no point did anyone ask him: (1) what Michael intended to do with the Property; (2) whether the price Michael and Penn reached represented fair market value; (3) or whether Michael received any offers to purchase the Property. As such, Shapiro did not and could not have made any affirmative misrepresentation.

New York law is clear that where, as here, the alleged wrongful conduct arises from a failure to speak or act of omission, there can be no aiding and abetting liability absent a fiduciary duty owed directly from Shapiro to Plaintiff. *See Kaufman*, 307 AD2d at 126; *see also Sanford/Kissena Owners Corp. v. Daral Properties, LLC*, 84 AD3d 1210, 1211 (2d Dep't 2011). Here, no such relationship existed with respect to the MIPA. Indeed, Plaintiff was represented by their own counsel. Furthermore, in executing the MIPA, Plaintiff expressly acknowledged that: (1) actual conflicts of interest may exist between the parties at the time of the transaction; (2) Shapiro was only representing Sigula with respect to the MIPA; and (3) after receiving the opportunity to consult with its legal counsel, Plaintiff was waiving any conflict of interest arising from Shapiro's earlier representation of Wolf.

Based on the foregoing, there is no question of fact that Shapiro did not owe any duty to inform Plaintiff of Michael's plans and any claim to the contrary has been waived by Plaintiff. To hold otherwise would require attorneys to be the arbiters of fairness for their client's transactions.

If any attorney believed their client obtained an outsized or unfair benefit, that attorney would have betray their client's trust by informing their client's counterparty that a better deal could be obtained or risk personal liability. Such a rule would dramatically alter the nature of commercial transactions and unquestionably chill attorney participation to the detriment of all parties involved. As such, Shapiro respectfully requests that this Court grant the Motion and dismiss the Complaint, finding that he was not required to betray his obligations to his client, in favor of Plaintiff.

IV. The Relationship Between Plaintiff, Michael and Sol had Deteriorated to Such a Point that it Was Not Reasonable for Plaintiff to Assume Any Fiduciary Duty Attached to the MIPA Transaction.

The MIPA was an arm's length transaction negotiated and executed by sophisticated parties to which no fiduciary duty attached. *See Teledata Tech. Sols., Inc. v. Sandton Fund Assignments, LLC*, 172 AD3d 527, 528 (1st Dep't 2019) (citations omitted). Moreover, at the time Michael purchased Plaintiff's interest in Richmond Properties, the business relationship between Plaintiff, her family, Penn, Michael, and Sol had deteriorated to such a degree that it cannot be said the relationship was one of trust or reliance. *See Pappas v. Tzolis*, 20 NY3d 228, 232 (N.Y. 2012). ("[w]here a principal and fiduciary are sophisticated entities and their relationship is not one of trust, the principal cannot reasonably rely on the fiduciary without making additional inquiry").

To this point, Penn testified that he did not trust Michael and Plaintiff's family no longer wanted to be in business with Michael or Sol. Moreover, Plaintiff also appears to have attempted dishonest negotiation tactics with the earlier $6.1 million offer from the undisclosed party who was later revealed to be a business partner of Plaintiff's family and by failing to disclose the earlier appraisal that valued the Property at $2 million, rather than $6 million. Furthermore, the MIPA expressly acknowledged "that actual and potential conflicts of interest exist or may exist, now or

in the future, among the respective parties, in respect of such legal services or otherwise" and that Plaintiff was not relying on any other representation, warranty, covenant, or agreement except as specifically provided by the MIPA. *See* Michael Aff., Ex. 9, §§ 7.1, 7.9.

As such, any reliance Plaintiff placed on purported fiduciary duties owed by Michael or Sol was unreasonable and cannot sustain a claim for breach of fiduciary duty. *See Pappas*, 20 NY3d at 232; *see also Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 279 (N.Y. 2011) (Where a principal and fiduciary are sophisticated parties engaged in negotiations to terminate their relationship, however, the principal cannot blindly trust the fiduciary's assertions. This is particularly true where, as alleged here, the principal has actual knowledge that its fiduciary is not being entirely forthright: "[W]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy") (citations omitted). Because it was unreasonable for Plaintiff to believe that a fiduciary duty attached to the MIPA, there was no underlying breach and this Court must grant the Motion as Shapiro cannot be found to have aided and abetted without establishing such breach.

V. Shapiro Did Not Possess Actual Knowledge of any Fiduciary Duty owed by Michael and, Therefore, Shapiro Cannot be Found to Posses Actual Knowledge of Michael's Purported Breach.

This Court must grant the Motion because Michael, who was not a member of Richmond Properties nor signatory to the Operating Agreement, did not owe Plaintiff any fiduciary duty. Even if it the Court should find that Michael owed Plaintiff a fiduciary duty, it cannot find that Shapiro had actual knowledge of that duty, and therefore, Shapiro cannot be found to have actual knowledge of any breach of such duty.

A fiduciary "relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed." *Penato v. George*, 52 A.D.2d 939, 383 N.Y.S.2d 900, 904 (2d Dep't 1976). On this point, the New York Court of Appeals holds that:

> A fiduciary relationship 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. Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. Generally, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them.

EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19-20 (N.Y. 2005) (internal citations and quotations omitted).

As discussed above, Michael was not a member of Richmond Properties, nor was he a party to the Operating Agreement. Indeed, the Operating Agreement states that it may not be amended except by written instrument duly executed by all parties. *See* Sol. Aff., Exhibit 1, § 22.1. As there is no written agreement that made Michael a member of Richmond Properties, he did not owe Plaintiff a fiduciary duty.

Nonetheless, Plaintiff claims that Michael was a *de facto* member of Richmond Properties due to his conduct in assisting his father in its operations. This relationship, however, was contemplated and specifically permitted under the Operating Agreement and, therefore, insufficient to create a fiduciary duty to Plaintiff. *See EBC I, Inc.*, 5 NY3d at 19-20; *First Keystone Consultants, Inc. v DDR Const. Services*, 74 AD3d 1135, 1137 (2d Dep't 2010); *Frank v. Sobel*, 38 AD3d 229, 230 (1st Dep't 2007); *see also Atkins Nutritionals, Inc. v. Ernst & Young, LLP.*, 301 AD2d 547, 548 (2d Dep't 2003) (lack of a special relationship distinct from and independent of

contract precludes a finding that defendant held heightened duty to disclose).

Even if the Court should disagree, Plaintiff's aiding and abetting breach of fiduciary duty claim must fail because Shapiro did not have actual knowledge of Michael's purported fiduciary duty.[6] *See People v. Coventry First LLC*, 13 N.Y.3d 108, 115 (N.Y. 2009) (aiding and abetting claim fails if defendant did not know of the alleged duty); *Ahrenberg v. Liotard-Vogt*, 2017 N.Y. Slip Op. 30667[U], 17 (N.Y. Sup Ct., New York County 2017), *aff'd*, 2018 N.Y. Slip Op. 07181 (1st Dep't 2018) ("the defendant must have known of the fiduciary duty"). Actual knowledge of the duty is required and constructive knowledge, or claiming that a party should have known, is insufficient. *See Schroeder*, 133 AD3d at 25 (citing *Kaufman*, 307 AD2d at 126).

Here, Shapiro has testified that he did not believe Michael owed Plaintiff any duty because Michael was not a member of Richmond Properties. Additionally, Shapiro has testified that he believed all parties knew that Michael intended to fix the certificate of occupancy issue of flip the Property to a third-party. As such, even if the Court adopts Plaintiff's *de facto* member theory, that finding would reflect a legal conclusion that was not yet established at the time the MIPA was negotiated and executed and, therefore, could not have been known by Shapiro. Even granting Plaintiff every favorable inference, such finding could only establish Shapiro's constructive knowledge of Michael's *de facto* fiduciary duty by virtue of Shapiro's professional knowledge as an attorney. As constructive knowledge is insufficient to sustain an aiding and abetting claim, this Court must grant the Motion and dismiss the Complaint.

VI. Sol is Insulated from Liability by the Operating Agreement.

Shapiro respectfully submits that he did not represent Sol and, therefore, actions taken in

[6] If any duty existed, it would be owed by Michael to Richmond Properties and only concerning his conduct in the execution of duties permitted under the Operating Agreement, not to general fiduciary duty owed directly to Plaintiff.

his capacity as attorney for Michael cannot sustain a claim for aiding and abetting any primary breach by Sol. Be that as it may, there is no question of fact that any claim alleging Shapiro aided and abetted Sol's primary breach must also fail because Sol is insulated from liability by the Operating Agreement. *See* Sol Aff., Exhibit 1, § 15.1.[7]

Contracts intended to exculpate a party from the consequences of their actions, to the extent that do not purport to exempt liability for willful or grossly negligent acts, are enforceable. *See Gross v. Sweet*, 49 NY2d 102, 106 (N.Y. 1979). As discussed above, the Operating Agreement limits the liability of its members "for any errors in judgment, for any act, including any act of negligence performed by such person, or for any omission or failure to act, if the performance of such act or such omission or failure is done in good faith, is within the scope of the authority conferred upon such person by this Agreement or by law and does not constitute a breach of fiduciary duty, breach of any obligation contained in this Agreement, willful misconduct, gross negligence or reckless disregard of duties." *See* Sol Aff., Exhibit 1, § 15.1. As such, the Operating Agreement's limit of liability is enforceable.

Under New York law, "the scope of a [fiduciary] duty can be limited by contract." *Chase Manhattan Bank, N.A. v. Remington Products, Inc.*, 865 F Supp 194, 200 (S.D.N.Y. 1994), *aff'd sub nom. Chase Manhattan Bank v. Remington Products, Inc.*, 71 F3d 407 (2d Cir. 1995) (*citing Riviera Congress Assoc. v. Yassky*, 18 NY2d 540, 548 (N.Y. 1966); *see also Sterling Fifth Assoc. v Carpentille Corp., Inc.*, 9 AD3d 261, 263 (1st Dep't 2004). Likewise, it is well settled that claiming a breach of contract occurred through tortious conduct does not create a legal duty

[7] As with Michael's status as *de facto* member, even if Sol is not insulated from liability, Shapiro did not have actual knowledge of what Sol knew about the subsequent transaction arranged by Michael and whether Sol's knowledge rose to a level requiring his disclosure to Plaintiff. *See* Argument, Section V, *supra.*

independent of the contract. *See Abacus Fed. Sav. Bank v ADT Sec. Services, Inc.*, 18 NY3d 675, 685 (N.Y. 2012) (citations omitted). Consequently, a claim for breach of fiduciary duty will be dismissed where it is duplicative of a breach of contract claim. *See JMF Consulting Group II, Inc. v. Beverage Mktg. USA, Inc.*, 97 AD3d 540, 542 (2d Dep't 2012) (citations omitted).

Pursuant to the Operating Agreement, if Sol or Wolf wished to sell the Property and received a "bona fide offer from a financially responsible third party," they were required to give notice containing: (1) the name and address of the prospective buyer; (2) information concerning the prospective buyer's financial capacity; and (3) the essential terms of any contract effecting such sale, among other things. *See* Sol Aff., Exhibit 1, § 13.1. With respect to Michael's subsequent transaction concerning the Property, Sol has testified that he: (1) was not particularly involved after Michael and Plaintiff reached an agreement in principle; (2) did not know the identity of the subsequent purchaser of the Property; and (3) did not know any material details of the transaction outside of the purchase price. *See* Sol Aff., ¶¶ 25-28. As such, there is no question of fact that Sol lacked knowledge sufficient to trigger his duty to disclose under the Operating Agreement.

As the Operating Agreement covered when a member must disclose and offer from a third-party, Plaintiff cannot claim that Sol owed her a duty greater than what was required under the Operating Agreement. Because there was no breach of contract and no breach of fiduciary duty by Sol, any error in judgment, act of negligence, omission or failure to act on his part is covered by section 13.1 of the Operating Agreement and Sol is insulated from liability arising therefrom. Because there is no primary breach by Sol, Shapiro cannot be held liable for aiding and abetting such breach and the Complaint must be dismissed, with prejudice.

CONCLUSION

For all the reasons set forth above, Defendant Nathaniel Shapiro, respectfully requests that the Court grant this Motion and issue an order granting summary judgment, pursuant to CPLR 3212, dismissing Plaintiff, Raquel Wolf as Executrix of the Estate of Hirsch Wolf's Summons and Complaint, with prejudice, along with such other relief as the Court deems equitable, just and proper.

Dated: New York, New York
June 15, 2020

Respectfully submitted,

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