To Be Argued By:
Robert Johnson
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2021-02747

ADAM MAX, ON BEHALF OF HIMSELF AND DERIVATIVELY ON BEHALF OF ALP, INC., A NEW YORK CORPORATION,

Plaintiffs-Appellants,

against

ALP, INC., LIBRA MAX,

Defendants-Respondents,

and

MICHAEL ANDERSON,

Defendant.

LAWRENCE FLYNN,

Non-Party Respondent.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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Appellant[1] Adam Max, on behalf of himself and derivatively on behalf of ALP, respectfully submits this brief in further support of his appeal from the IAS Court's Decision and Order dated June 6, 2021 (R6-23) (the "Decision") granting the motion of Respondents to dismiss Appellant's Amended Verified Complaint.

Preliminary Statement

Appellant, Adam Max, brought the underlying action against Respondents Libra Max and Michael Anderson to enjoin and seek redress for their egregious misconduct and mismanagement of ALP. The IAS Court failed to credit the well-pled allegations contained in Appellant's Complaint, and granted Respondents' motion to dismiss. This appeal ensued. Respondents argue on appeal that the IAS Court's decision was proper. Their arguments should be rejected for the following reasons.

First, Respondents claim that the exculpation clause contained in ALP's Certificate of Incorporation bars Appellant's claims. But Respondents admit that the exculpation clause does not bar liability based on intentional misconduct, bad faith acts or omissions, knowing violations of law, or personal gain of a profit or other advantage to which Respondents were not entitled. Here, Appellant has pled that Respondents, in bad faith and based on personal vendettas, *inter alia*,

[1] Capitalized but undefined terms shall have the meaning set forth in Appellant's opening brief (Dkt. No. 5) (the "Br." or "Brief"). Respondents' brief (Dkt. No. 9) shall be referred to herein as the "Opp."

misappropriated money and artwork from ALP for no consideration, provided false information about ALP and its business to the New York Times to make it appear as if ALP's customers were purchasing counterfeit goods, impeded the collection of hundreds of millions of dollars in insurance proceeds and other claims, caused ALP to breach its contracts, and caused ALP to abandon its business lines and destroy its business relationships such that ALP no longer had any viable customers at all. Drawing all inferences in favor of plaintiff, as the IAS Court was required to do, Appellant's Complaint clearly states claims for non-exculpated conduct. Moreover, ALP's exculpation clause only applies to claims for damages against ALP's directors for actions taken in their capacity as directors of ALP. Appellant states claims for non-monetary relief and claims against Libra for actions taken in her capacity as an officer of ALP. Neither are subject to ALP's exculpation clause. *See* Point I., *infra*.

Second, Respondents assert that the Complaint was properly dismissed because Appellant did not make a demand to ALP's directors to initiate litigation. However, demand was futile because Respondents constituted a majority of ALP's Board and were not capable on making an impartial decision as to whether to bring suit. Respondents were directly accused of the wrongdoing that is the subject of this action, were interested in the challenged transactions, and the challenged transactions were so egregious that they could not have been the product of sound

business judgment. Moreover, Appellant brought both direct and derivative claims. Even if demand was not futile, his direct claims should not have been dismissed. *See* Point II., *infra*.

Third, Respondents cherry-pick portions of Appellant's Complaint to allege that the Complaint failed to state a cause of action. However, looking at the totality of the Complaint, as well as the documents submitted in connection with the motion below, Appellant clearly has, and has stated, valid claims against Respondents for breach of fiduciary duty, negligence, removal of directors and officers, accounting, attorney's fees, and appointment of a receiver. *See* Point III., *infra*.

Thus, for the reasons set forth herein and in Appellant's opening Brief, this Court should reverse the IAS Court's Decision and deny Respondents' motion to dismiss Appellant's well-pled Complaint.

Argument

I

THE IAS COURT IMPROPERLY HELD THAT ALP'S EXCULPATION CLAUSE BARS APPELLANT'S CLAIMS

The IAS Court erred in holding that the exculpation clause contained in ALP's Certificate of Incorporation (the "Exculpation Clause") bars any – much less all – of Appellant's claims.

A. Appellant's Particularized Allegations Trigger Exceptions to ALP's Exculpation Clause

Respondents concede that, even if this Court were to consider the uncertified version of ALP's Certificate of Incorporation or version submitted on reply,[2] ALP's Exculpation Clause does not bar claims based on intentional misconduct, bad faith acts or omissions, knowing violations of law, or personal gain of a financial profit or other advantage to which Respondents were not entitled. (Opp. at 16; R207.) Viewing Appellant's Complaint in the light most favorable to Appellant – as this Court must on a motion to dismiss – Appellant has clearly alleged such an exception to ALP's Exculpation Clause. *See 344 E. 72 Ltd. P'ship v. Dragatt*, 188 A.D.2d 324, 324 (1st Dep't 1992) ("It is axiomatic that on a motion to dismiss the complaint for failure to state a cause of action (CPLR § 3211[a][7]), the court is required to view every allegation of the complaint as true and resolve all inferences in favor of the plaintiff regardless of whether the plaintiff will ultimately prevail on the merits"); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977) ("When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate").

[2] Appellant maintains that those documents were not properly submitted. (*See* Br. at 19-21.)

Respondents assert that the "sum total of Appellant's attempt to plead around the exculpatory language . . . is a conclusory allegation that 'Libra and Anderson have taken such action in bad faith and intentionally with full knowledge that their action constituted misconduct in knowing violation of the law and for the improper purpose of personally gaining financial profits and advantages to which they are not entitled . . .'" (Opp. at 17 (citing R280).) That is blatantly false. Appellant included detailed allegations of non-exculpated conduct.

First, Appellant specifically alleged that Respondents misappropriated money and artwork from ALP without compensation. (R280 ("Respondents "unlawfully and improperly appropriated to their own use sums of money from the Corporation as expenses that were not actually incurred" to "increase their salaries" and other income and Libra "misappropriated paintings and artwork that were the property of the Corporation for her own use without compensating the Corporation").) Respondents do not address these allegations. Certainly, stealing money and artwork from the Corporation constitutes not just one but all grounds for an exception to the Exculpation Clause – bad faith actions, intentional misconduct, knowing violations of law, and a personal gain of a financial profit or other advantage to which Respondents were not entitled.

Second, Appellant pled a significant pattern of conduct that he alleged Respondents undertook "in bad faith," "out of personal spite," for their own

"personal vendetta," "to the prejudice of the Corporation and for their own personal benefit," and in knowing violation of the law. (R267, 268, 275, 277, 280.) This pattern includes the following conduct that Respondents executed in bad faith:

- Libra "allowed a reporter from the New York Times to have access to Peter, provided the Times and its reporter with false information, betraying the Corporation, and portraying Adam and his team in a false light and making it appear that customers of Peter Max art . . . were essentially purchasing counterfeit goods" (R271; *see also* R275);
- Respondents fired necessary employees and then failed to appoint replacement directorial and managerial positions and other essential personnel, leaving important positions vacant or understaffed, including ALP's salesperson, artists, office personnel, and others without whom ALP can no longer function (R273-75; *see also* R311);
- Respondents "imped[ed]" the collection of and failed to obtain $200 million in insurance claims and additional millions of dollars for expense and bad faith claims (R269, 275);
- Respondents caused ALP to make false allegations in meritless and costly litigations, and allowed Libra to recoup from ALP's coffers the funds she incurred during a multi-year period to pay for meritless

actions undertaken to pursue personal vendettas (and not for any legitimate business purpose) (Br. at 22-23; R215, 266-71, 275, 435);[3]

- Respondents caused ALP to "abandon its essential business lines" and "destroy[ed] irreplaceable business relationships," including its relationships with its sale agent and largest customer, such that ALP "no longer has any viable customers" (R270-71, 274; *see also* R311); and
- Respondents "caus[ed] ALP to breach its contractual obligations with its professionals, consultants, salespersons, clients and customers" (R275; *see also* R310).

These allegations do not, as the IAS Court held, merely reflect Respondents' "decisions to distance ALP" from Adam's "course of business." (R15.) Rather, they reflect Respondents' pattern of intentional conduct undertaken based on personal vendettas rather than Respondents' business judgment, including wholesale abandonment of ALP's business model to the point that it no longer has any

[3] This is not, as Respondents claim, an allegation of waste, but rather of intentional misconduct and bad faith. (Opp. at 23-30.) Nor is Appellant's reference to the January 18, 2019 ALP board minutes a new argument that cannot be considered on appeal, but rather evidence of Appellant's as-pled allegations. Moreover, since Respondents submitted documentary evidence in connection with their motion to dismiss, the question is no longer merely whether Appellant has stated a cause of action, but whether he possesses one at all. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d at 275.

customers and intentional misappropriation of corporate assets. This amply pleads an exception to ALP's exculpation clause. *See, e.g.*, *Colucci v. Canastra*, 130 A.D.3d 1268, 1270 (3d Dep't 2015) ("issues of fact as to whether defendant acted in bad faith by using Hillcrest's profits to pay for nearly all clubhouse expenses and keeping profits from concessions for himself" precluded summary judgment based on exculpation clause).

The cases cited by Respondents (Opp. at 17-18) are distinguishable. *See Retirement Plan for General Employees of the City of North Miami v. McGraw*, 2016 WL 7475835, a *6 (N.Y. Sup. Ct. Dec. 21, 2016), *aff'd* 158 A.D.3d 494 (1st Dep't 2018) (even though plaintiff had a "substantial amount of information" concerning the alleged misconduct, "thousands of pages of board materials resulting from their books and records demand," they failed to plead particularized facts against the individual defendants); *City of Tallahassee Retirement System v. Akerson*, 2009 WL 6019489 (N.Y. Sup. Ct. Oct. 16, 2009) (no allegations of bad faith or personal gain); *Teachers' Ret. Sys. of Louisiana v. Welch*, 244 A.D.2d 231 (1st Dep't 1997) (not describing conclusory allegations); *Bildstein v. Atwater*, 222 A.D.2d 545 (2d Dep't 1995) (not describing conclusory allegations); *Gammel v. Immelt*, No. 650780/2018, 2019 WL 2869378 (N.Y. Cnty. Sup. Ct. July 03, 2019) (allegations that directors were "grossly negligent" where they, *inter alia*, "'failed to properly inform

themselves'" and "should have been aware" of information did not plead facts from which the court could infer bad faith).

Since Appellant has amply pled non-exculpated misconduct, the IAS Court erred in holding that the Exculpation Clause barred his claims.

B. Appellant's Claims for Non-Monetary Relief and Against Libra as an Officer of ALP Are Not Subject to the Exculpation Clause

Even if Appellant failed to assert an exception to ALP's Exculpation Clause, that would not bar all of his claims. The Exculpation Clause only limits the "personal liability of directors to the corporation or its shareholders for damages for any breach of fiduciary duty in such capacity." (R207, 306.) Appellant's claims do not solely seek "damages." Appellant also seeks, *inter alia*, appointment of receiver (second cause of action), removal of Libra as an officer and director of ALP and removal of Anderson as a director of ALP (fifth cause of action), and an accounting (sixth cause of action). (R276, 279-80.) *See, e.g.*, *Travelers Ins. Co. v. 633 Third Assocs.*, 973 F.2d 82, 85 (2d Cir. 1992) ("Although the [contractual] exculpation provision bars plaintiff from bringing a tort action seeking money damages for waste of the secured property, however, it does not bar an equitable action to prevent waste"); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 542 (Del. 1996) (while stockholders cannot bring claim for money damages in certain instances due to exculpation clause adopted by corporate charter, "they remain protected by the availability of injunctive relief").

Moreover, the Exculpation Clause only covers claims against directors for damages for breach of fiduciary duty "in such capacity." (R207, 306.) It does not bar claims against individuals as officers of ALP. Here, Appellant brought claims against Libra in both her capacity as an officer and as a director. (R259-84.) *See In re Extended Stay, Inc*., No. 09-13764-JLG, 2020 WL 10762310, at *117 (Bankr. S.D.N.Y. Aug. 8, 2020) (holding, under Delaware law, that where "exculpation clause speaks only to 'a director of this Corporation;' it does not purport to cover corporate officers" and thus "is no bar to the Trust's claims against the Debtors' officers").

Thus, at a minimum, Appellant's second, fifth and sixth causes of action seeking relief other than money damages, and Appellant's claims against Libra in her capacity as an officer, should not have been dismissed pursuant to ALP's Exculpation Clause.

II

THE IAS COURT ERRED IN DISMISSING APPELLANT'S COMPLAINT ON THE GROUNDS THAT HE FAILED TO ALLEGE DEMAND FUTILITY

Respondents do not dispute that demand is futile and excused in the following three circumstances, as "directors are incapable of making an impartial decision as to whether to bring suit": (1) where "a majority of the board of directors is interested in the challenged transaction" (either through "self-interest in the transaction at issue, or a loss of independence because a director with no direct interest in a

transaction is 'controlled' by a self-interested director"), (2) "the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances," and (3) "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors." *Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003) (quotation marks omitted).

Respondents claim that Adam failed to satisfy the first circumstance, above, because "he has not alleged that Libra or [Anderson] have received some sort of benefit from their new business strategy that Adam has not." (Opp. at 41.) But Adam has alleged, among other things, that Libra and Anderson "unlawfully and improperly appropriated to their own use sums of money from the Corporation as expenses that were not actually incurred" to "increase their salaries" and other income and engaged in misconduct "to the prejudice of the Corporation and for their own personal benefit," that Libra "misappropriated paintings and artwork that were the property of the Corporation for her own use without compensating the Corporation," and that Libra nominated Anderson, her acquaintance and bookkeeper with no prior ties to ALP, as a director. (R267-69, 275, 277, 280.) *See also* Point I., *supra*. This is sufficient to allege demand futility. *See, e.g.*, *Javaheri v. Old Cedar Dev. Corp.*, 22 A.D.3d 804, 805 (2d Dep't 2005) (allegations that one defendant "dominated the Board," that another defendant assisted him in manipulating books

and records, and that first defendant "misappropriated corporate funds, were sufficient to excuse the demand as futile and thereby satisfy the statutory requirements").

Moreover, "it is well established that a demand will be excused where the alleged wrongdoers control or comprise a majority of the directors." *Barr v. Wackman*, 36 N.Y.2d 371, 379 (1975); s*ee also MacKay v. Pierce*, 86 A.D.2d 655, 655 (2d Dep't 1982) ("in view of the nature of the action, charging an overwhelming majority of the directors with breach of their fiduciary duties, such a demand was not necessary"). Here, the two alleged wrongdoers constitute the majority of ALP's directors. (R268-69, 272.) And while it is true that bare or conclusory allegations of wrongdoing against directors will not suffice for the purpose of defeating demand futility, Appellant's Complaint makes detailed allegations of Libra's and Anderson's wrongdoing. *See* Point I., *supra*; Point III., *infra*.

Moreover, even if that were not the case, Appellant has alleged that the challenged transactions were "so egregious on [their] face that [they] could not have been the product of sound business judgment of the directors." *Bansbach v. Zinn*, 1 N.Y.3d at 9. These egregious actions include, *inter alia*: (i) misappropriating money and artwork from ALP without compensation (R280); (ii) giving a reporter false information relating to ALP and making it appear to the reporter that ALP's customers were purchasing counterfeit goods (R271, 275); (iii) terminating

necessary employees and then leaving key positions at ALP vacant such that ALP could no longer function (R273-75; *see also* R311); (iv) impeding the collection of over $200 million in insurance and other claims on behalf of ALP (R269, 275); (v) causing ALP to abandon its essential business lines and destroy its business relationships, such that ALP "no longer has any viable customers" (R270-71, 274); and (vi) causing ALP to reimburse Libra for money she spent on meritless actions undertaken to pursue personal vendettas (Br. at 22-23; R266-71, 275, 435). *See, e.g., In re Comverse Tech., Inc.*, 56 A.D.3d 49, 56 (1st Dep't 2008) (demand excused where conduct was "so egregious that it could not have been the product of the sound business judgment of the directors").[4]

[4] The cases cited by Respondents are distinguishable. (Opp. at 41-42 (citing *Walsh v. Wwebnet, Inc.*, 116 A.D.3d 845, 847 (2d Dep't 2014) (alleging personal interest of only one of four directors and making conclusory allegation of "unwarranted salaries"); *Goldstein v. Bass*, 138 A.D.3d 556, 557 (1st Dep't 2016) (no allegations that directors had any interest in the challenged transactions or of bad faith, but merely claiming that directors "rubber-stamped" challenged transactions); *Lewis v. Welch*, 126 A.D.2d 519, 521 (2d Dep't 1987) (employees' criminal acts just did not make demand futile against independent corporate directors); *Alpert v. Nat'l Ass'n of Sec. Dealers, LLC*, 7 Misc. 3d 1010(A) (Sup. Ct. N.Y. Cnty. 2004) (no allegations of bad faith, and complex commercial transaction was not "egregious"); *City of Tallahassee Retirement System v. Akerson*, No. 601535/08, 2009 WL 6019489 (N.Y. Sup. Ct. Oct. 16, 2009) (eleven of twelve board members were outside directors, and allegations that directors "knew, or should have known" of wrongdoing was not sufficient to allege demand futility); *Glatzer v. Grossman*, 47 A.D.3d 676, 677 (2d Dep't 2008) (no discussion of conclusory allegations); *Teachers' Ret. Sys. of Louisiana v. Welch*, 244 A.D.2d 231, 232 (1st Dep't 1997) (same); *Bildstein v. Atwater*, 222 A.D.2d 545, 546 (2d Dep't 1995) (same).

Moreover, even if demand was not excused, that would not bar all of Appellant's claims, but only his derivative claims. Appellant brought the instant action both directly on behalf of himself and derivatively on behalf of ALP. Moreover, Appellant's second cause of action for a receiver under BCL § 1202 and fifth cause of action for removal of directors and officers under BCL §§ 706 and 716 may only be brought by a stockholder such as Adam (or the attorney general), and not by ALP itself. *See* N.Y. Bus. Corp. Law § 706(d) ("An action to procure a judgment removing a director for cause may be brought by the attorney-general or by the holders of ten percent of the outstanding shares, whether or not entitled to vote."); N.Y. Bus. Corp. Law § 716(c) ("An action to procure a judgment removing an officer for cause may be brought by the attorney-general or by ten percent of the votes of the outstanding shares, whether or not entitled to vote"); N.Y. Bus. Corp. Law § 1202(a)(3) (a receiver may be appointed by the court in "[a]n action brought by the attorney-general or by a shareholder to preserve the assets of a corporation, which has no officer within this state qualified to administer them"). Thus, no demand could have been necessary for those claims.

III

THE IAS ERRED IN DISMISSING APPELLANT'S COMPLAINT PURSUANT TO CPLR 3211(a)(1) AND CPLR 3211(a)(7)

A. Appellant Stated Claims for Breach of Fiduciary Duty and Negligence

Respondents argue that Appellant's Complaint failed to plead breach of fiduciary duty with particularity. While CPLR 3016(b) requires particularized pleading, the New York Court of Appeals has "cautioned that section 3016(b) should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.' Thus, where concrete facts 'are peculiarly within the knowledge of the party' charged with the fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491–92 (2008) (citations and quotation marks omitted). *See also Miami Firefighters' Relief & Pension Fund v. Icahn*, 199 A.D.3d 524, 526 (1st Dep't 2021) ("Although the complaint does not state how the Icahn defendants allegedly misappropriated the confidential information, the facts that would support the breach of fiduciary duty and breach of contract claims are peculiarly within the Icahn defendants' knowledge. Thus, the appropriate course of action is to order discovery.").[5]

[5] Appellant did not, as Respondents claim, raise Appellant's books and records demand as an independent basis for his claims or to "concede that, without further

Here, Respondents ignore Appellant's clear allegations of wrongdoing, including his allegations that Respondents misappropriated money and artwork from ALP without compensation (R280), impeded the collection of over $200 million in insurance and other claims on behalf of ALP (R269, 275), caused ALP to abandon its essential business lines and destroy its business relationships such that ALP "no longer has any viable customers" (R270-71, 274), and caused ALP to reimburse Libra for money she spent on meritless actions undertaken to pursue personal vendettas (Br. at 22-23; R266-71, 275, 435). These allegations – as well as each of the other allegations of wrongdoing that Respondents claim are not sufficiently detailed – plainly state causes of action for breach of fiduciary duty. *See, e.g.*, *Miami Firefighters' Relief & Pension Fund v. Icahn*, 199 A.D.3d at 526 (allegations that defendants misappropriated and used confidential information stated a claim for breach of fiduciary duty, and noting that additional facts were within defendants' knowledge, so discovery was warranted). Respondents' cases that purportedly provide otherwise are inapposite. (*See* Opp. at 38-39 (citing *Hyman v. New York*

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information from ALP, [Appellant] could not allege sufficient facts to withstand the motion to dismiss." (Opp. at 32.) Rather, the demand, and Respondents' refusal to produce information in response thereto, is relevant because it shows that additional information regarding Respondents' wrongdoing lies within Respondents' possession, and it would work an injustice to dismiss a case this stage where any claimed pleading deficiency could be cured later. *See Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d at 491–92; *Miami Firefighters' Relief & Pension Fund v. Icahn*, 199 A.D.3d at 526.

Stock Exch., Inc., 46 A.D.3d 335 (1st Dep't 2007) (bare allegations relating to statement by defendant was insufficient where two of plaintiffs were present during statements and should have been able to provide more specificity); *DeRaffele v. 210-220-230 Owners Corp.*, 33 A.D.3d 752 (2d Dep't 2006) (conclusory allegations of emotional distress, harassment and humiliation not sufficient); *Black Car & Livery Ins., Inc. v. H & W Brokerage, Inc.*, 28 A.D.3d 595 (2d Dep't 2006) (stating that allegations lacked sufficient detail without discussing allegations)).)

Respondents also claim that the Complaint's allegations that Libra provided false information regarding ALP and Peter Max's art to the New York Times was insufficient to state a claim. Appellant specifically alleged that Libra "allowed a reporter from the New York Times to have access to Peter, provided the Times and its reporter with false information, betraying the Corporation, and portraying Adam and his team in a false light and making it appear that customers of Peter Max art . . . were essentially purchasing counterfeit goods." (R271; *see also* R275.) Respondents claims that Appellant did not identify the false information or "when" it was provided. That is false. As the IAS Court correctly held, Adam alleged that the false information "relat[ed] to a purported scheme by Adam to sell counterfeit Peter Max artwork, damaging ALP's business," which was sufficient to state a claim for breach of fiduciary duty. (R20.) Respondents do not deny that Libra's

correspondence with the New York Times was followed by a published article, dated May 28, 2019. (R452.)[6]

Respondents also argue that Justice Bannon correctly held that the article refutes Appellant's claims because there is only one specific mention of Libra and the article does not come to a conclusion on whether Adam engaged in counterfeiting. (Opp. at 36.) But whether or not Libra is referenced in every portion of the article does not establish whether or not she provided false information. Moreover, even if the article does not come to a "conclusion" on counterfeiting (which is false), it certainly paints a poor picture of the art created after, allegedly, "dementia stopped Peter Max from painting." (R452-57.)[7]

Appellant also has stated a claim for negligence for, inter alia, Respondents' failure to discharge their duties by exercising the degree of diligence, care or skill that an ordinarily prudent business person would exercise, and by failing to prudently invest and manage ALP's business and assets. (R281.) Respondents

[6] The cases cited by Respondents merely stand for basic principles of law requiring particularized pleading, or relate to other claims such as defamation, and thus are inapposite. (*See* Opp. at 33-34 (citing cases).) Likewise, Respondents' claim of "group pleading" fails. (*See* Opp. at 35.) While Appellant's Complaint does allege that Libra "conspir[ed] with Mary [Max] and others," it specifically alleges that it was Libra who "provided the Times and its reporter with false information." (R271.)

[7] Respondents' claim that the allegations are not "credible" because they make no business sense also lacks merit. (Opp. at 35-36.) Appellant has alleged that Libra was motivated by personal animosity, not improving or maintaining ALP's business.

mistakenly claim that Appellant's negligence claim is duplicative. However, those claims assert distinct facts and standards of wrongdoing. (Compare R273-76 with R281-82.)

Thus, for the reasons set forth herein and in Appellant's Opening Brief, Appellant has adequately stated claims for breach of fiduciary duty and negligence.

B. The Business Judgment Rule Does Not Bar Appellant's Breach of Fiduciary Duty and Negligence Claims

Respondents do not dispute that "pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith." *Lemle v. Lemle*, 92 A.D.3d 494, 497 (1st Dep't 2012). Instead, they repeat their mantra that Appellant failed to allege that Respondents acted in bad faith. As detailed above, that argument has no merit. *See* Point I., *supra*.

According to Respondents, Appellant merely "disagree[s] with the Board's decisions," and his "allegations that 'another course of action might have been more advantageous [are] insufficient' to rebut the business judgment rule." (Opp. at 46-47.) But Appellant does not merely allege that Respondents breached their duties by failing to select the most profitable path for ALP. He alleges, among other things, that Respondents misappropriated funds and art from ALP for no consideration, and entirely destroyed ALP's business by leaving it with no customers at all and leaving key positions vacant so that ALP was no longer able to function. (R270-71, 274,

280.) Appellant's Complaint clearly alleges that those decisions (and others) "lacked a legitimate business purpose or were tainted by a conflict of interest, bad faith or fraud" so "the business judgment rule may not be invoked to insulate the directors." *Amfesco Indus., Inc. v. Greenblatt*, 172 A.D.2d 261, 264 (1st Dep't 1991).

C. Appellant Stated Claims for Removal of Directors and Officers, Accounting, and Attorney's Fees

Respondents' entire argument that Appellant's claims for removal of directors and officers, accounting and attorney's fees fail boils down to its assertion that Appellate has not stated a claim for breach of fiduciary duty or negligence. (Opp. at 49.) But that argument fails because Appellant has, in fact, stated such a claim. *See* Point III.A., *supra*. Moreover, even if Appellant's breach of fiduciary duty or negligence claims were barred by ALP's Certificate of Incorporation and/or failure to allege demand futility (which they are not), that would not bar Appellant's claim for removal of directors and officers. Such a claim does not seek money damages so it is not impacted by ALP's Exculpation Clause. Moreover, it can only be brought by a stockholder, and cannot be brought by the Corporation itself, so it is not brought derivatively. *See* Points I. and II., *supra*; BCL §§ 706(d), 716(c).

D. Appellant Stated a Claim for the Appointment of a Receiver

Appellant has also stated a claim for appointment of a receiver under BCL § 1202(a)(3). BCL § 1202(a)(3) permits the court to appoint a receiver in, inter alia,

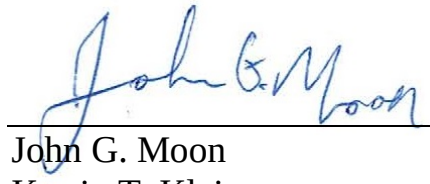
"[a]n action brought . . . by a shareholder to preserve the assets of the corporation, which has no officer within the state qualified to administer them." Respondents claim that they are "within this state." (Opp. at 53-54.) But the Complaint alleges that Respondents are not within the state because they reside in California. (R259-60, 268.) The papers submitted in the record below further show that Libra conducts any business relating to ALP from California, and not New York. (*See, e.g.*, R316-17.) Nor are Respondents qualified to administer the assets of ALP. (*See* R214, 229, 259-84; Points III.A. and III.C., *supra*.)

Conclusion

For the foregoing reasons, and those set forth in Appellant's opening Brief, Appellant respectfully submits that the IAS Court's decision granting Respondents' motion to dismiss should be reversed in its entirety, with costs awarded to Appellant.

Dated: New York, New York
January 14, 2022

OLSHAN FROME WOLOSKY LLP

By: 

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