SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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ADAM MAX,

Plaintiff,

- v -

ALP, INC., LIBRA MAX, and MICHAEL ANDERSON,

Defendants.

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INDEX NO. 650618/2019

MOTION DATE 12/21/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 176, 325

were read on this motion to/for DISMISS.

The motion is decided in accordance with the attached Decision and Order.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

6/8/2021
DATE

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
	X	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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ADAM MAX,

Plaintiff,

DECISION AND ORDER

Index No. 650618/2019

- v -

ALP, INC., LIBRA MAX, and MICHAEL ANDERSON,

MOT SEQ 003

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action arising from a dispute over control of defendant ALP, Inc. (ALP), the defendants, ALP, Libra Max (Libra), and Michael Anderson (Anderson), move pursuant to CPLR 3211(a)(1) and (7) to dismiss the amended complaint. The plaintiff, Adam Max (Adam), opposes the motion. The motion is granted to the extent discussed herein.

II. BACKGROUND

The underlying facts and procedural background of this matter are set forth in this court's decision and order dated November 13, 2020. To summarize, the artist Peter Max formed ALP in 2000 to engage in the production, maintenance, marketing,

licensing and commercialization of his artwork. Adam and Libra, Peter Max's children, each own a 40% interest in ALP with the remaining 20% belonging to Peter. In 2012, Peter Max became ill and ceded the position of ALP's president and chief executive officer to Adam. Thereafter, it is alleged in various related actions before this court, including ALP, Inc. v Larry Moskowitz et al., Index No. 652326/2019, and ALP, Inc. v Park West Galleries et al., Index No. 153949/2019, that Adam and other individuals brought in by Adam began looting company assets by, among other things, generating artworks using "ghost artists" that would be signed by Peter Max as if they were original works, selling Peter Max artwork at fire sale prices, and collecting enormous and unwarranted fees and other payments from ALP.

In contrast, the first amended complaint alleges that prior to Adam assuming control of the company, ALP was in significant debt. Adam claims that by the end of 2012, ALP had recorded a net loss of over $4,000,000. Upon assuming management and control of ALP's daily affairs, Adam avers that he was able to remedy ALP's financial issues and make ALP profitable by 2014. He states that under his management ALP has grown each year, generating profits of over $500,000 in 2014, $1,000,000 in 2015, $4,000,000 in 2016, and $7,000,000 in 2017.

Adam further alleges that Libra had never done any work for or shown any interest in ALP during those years, despite receiving a yearly salary of approximately $700,000. However, in 2017, purportedly due to personal conflicts between Libra, Adam and family, Libra sought to take control of ALP. According to Adam, Libra colluded with Lawrence Flynn, who had been appointed as the property guardian for Peter Max in December 2016, to gain a majority vote within the company and remove Adam as president of ALP.

Following a special proceeding commenced by Libra before this court, entitled Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017, a special meeting of the shareholders of ALP was held on December 10, 2018. At that meeting, a new board of directors was elected. The new board consisted of Libra, Adam, and Anderson, who Adam claims is an acquaintance of Libra's and is wholly unfamiliar with ALP or the business. On January 11, 2019, ALP's board of directors held another meeting, wherein it resolved that Libra would be named as CEO and president, effective immediately.

Adam alleges that after being elected, Libra and Anderson diminished Adam's role in the company and terminated employees that Adam had hired. He also states they spent significant amounts of money on legal fees in an effort to undo Adam's prior

sales of Peter Max's artwork and to recover amounts Adam properly paid to previous ALP employees in two related actions before this court, ALP, Inc. v Park West Galleries et al., Index No. 153949/2019 and ALP, Inc. v Lawrence Moskowitz et al., Index No. 652326/2019. Further, Libra and Anderson abandoned the purportedly profitable business model Adam put in place. Adam avers that Libra and Anderson are both so unskilled in the conducting of ALP's business and the sale of art that they are leading ALP to financial ruin. Adam also alleges that Libra improperly provided a reporter from the New York Times with false information relating to a purported scheme by Adam to use ghost artists to generate artwork that would then be signed by the ailing Peter Max and sold as if they were his own, damaging ALP's business reputation.

Adam brings this action both derivatively, on behalf of ALP, and directly, on behalf of himself. The amended complaint states claims sounding in/seeking (1) breach of fiduciary duty, (2) appointment of a receiver pursuant to CPLR 6401(a) and BCL 1202(3), (3) declaratory judgment voiding the December 10, 2018 special meeting pursuant to BCL § 619, (4) attorneys' fees pursuant to BCL § 626, (5) removal of Libra and Anderson as directors and officers pursuant to BCL § 706(d) and BCL § 716(c), (6) an accounting, and (7) breach of the duties of diligence, care, and skill.

The defendants now move to dismiss the amended complaint in its entirety.

III. LEGAL STANDARDS

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) quoting Fontanetta v John Doe 1, supra.

B. CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a

cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

III. DISCUSSION

A. Third Cause of Action

The defendants correctly argue that the third cause of action seeking a declaration invalidating the December 10, 2018, special meeting and the board election that took place at that meeting is barred by the doctrine of law of the case. "The doctrine of law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined that should be the end of the matter as

far as Judges and courts of co-ordinate jurisdiction are concerned." Martin v City of Cohoes, 37 NY2d 162, 165 (1975). The doctrine "applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision" (Baldasano v Bank of N.Y., 199 AD2d 184 [1st Dept. 1993]; see Gay v Farella, 5 AD3d 540 [2nd Dept. 2004]; D'Amato v Access Mfg., 305 AD2d 447 [2nd Dept. 2003]) "and to the same questions presented in the same case" (RPG Consulting, Inc. v Zormati, 82 AD3d 739 [2nd Dept. 2011] [citing People v Evans, 94 NY2d 499, 502 (2000)]).

When Adam commenced this action, he simultaneously brought a motion seeking a declaration invalidating the December 10, 2018, board meeting pursuant to BCL § 619. By order dated March 21, 2019, this court denied Adam's motion. The amended complaint seeks the same relief previously denied by the court and is therefore subject to the doctrine of law of the case.

In opposition to this motion, Adam does not address the defendants' argument with respect to the applicability of law of the case. Further, in his affidavit submitted in support of his application for a temporary receiver (MOT SEQ 002), Adam avers that "I am not challenging the propriety of the election, as my opposition to ALP's motion to dismiss makes clear."

In light of the foregoing, the third cause of action seeking a declaratory judgment is dismissed pursuant to CPLR 3211(a)(7).

B. Remaining Causes of Action

The defendants aver that the remaining causes of action in the amended complaint must be dismissed because (1) to the extent asserted against Libra and Anderson, they are barred by the exculpation clause in ALP's certificate of incorporation, (2) Adam's derivative claims fail to meet the standards for excusing pre-suit demands under New York law, and (3) all claims otherwise fail as a matter of law. The court will address these arguments in turn.

i. ALP's Exculpation Clause

In support of their motion, the defendants submit, *inter alia*, ALP's certificate of incorporation dated January 31, 2000. Section 6 of the certificate of incorporation provides,

> The personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity is hereby eliminated except that such personal liability shall not be eliminated if a judgment or other final adjudication adverse to such director establishes that his acts or omissions were in bad faith or involved intentional misconduct or a knowing violation of law or that he personally gained in fact a financial profit or other advantage to which he was not legally entitled or that his acts violated Section 719 of the Business Corporation Law.

This language tracks BCL § 402(b), which expressly permits shareholders of a corporation to adopt provisions limiting director liability, subject to certain exceptions. See also BCL § 720(a)(1) (a shareholder's right to bring a derivative suit against directors is subject to any provision of the certificate of incorporation authorized pursuant to BCL § 402).

Initially, the court rejects the plaintiff's contention that it may not consider the certificate of incorporation on a CPLR 3211(a)(1) motion because it is not "a certified document" and is therefore of "unknown provenance." The certificate of incorporation was introduced by an attorney's affirmation and the plaintiff fails to make any non-speculative argument that it is not "unambiguous, authentic, and undeniable." Phillips v Taco Bell Corp., 152 AD3d 806, 807 (2nd Dept. 2017) (citations omitted). Moreover, the defendants have included in their submissions on reply a certified copy of the certificate of incorporation, which is identical to their original submission in every material respect.

The defendants aver that the allegations in the amended complaint are insufficient to trigger any exception to the exculpation clause in ALP's certificate of incorporation. To the extent that Adam fails to plead any bad faith or intentional

misconduct on the part of Libra and Anderson, as discussed in greater detail in Section IV.B.iii herein, the court agrees.

Although Adam states, in conclusory fashion, 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," Adam pleads no facts that would permit such inferences to be drawn. Libra and Anderson's decisions to distance ALP from Adam's prior course of business, even if such decisions made ALP less profitable, do not constitute bad faith or intentional misconduct. Nor, for the reasons described further below, does the New York Times article Libra allegedly contributed to warrant liability under the certificate of incorporation. Finally, Adam's suggestion in his opposition papers that Libra and Anderson's taking control of ALP after they received "warnings" that such a takeover "would lead to disaster" constituted bad faith or intentional misconduct is without basis in law or logic and fails to cure the defects of the amended complaint.

In sum, since the amended complaint fails to plead bad faith or intentional misconduct on the part of Libra or

Anderson, the plaintiff's claims against them are barred by the exculpation clause.

ii. Demand Futility

Under New York law, a shareholder who believes that a wrong deserving legal redress was committed against the corporation must make a demand upon its board of directors for the latter to commence an action. See Eos Partners BSIC, LP ex rel. DDS Partners, LLC v Levine, 42 AD3d 309 (1st Dept. 2007). This demand requirement exists to, *inter alia*, afford "corporate directors reasonable protection from the harassment of litigious dissident shareholders who might otherwise contest decisions on matters clearly within the directors' discretion." Barr v Wackman, 36 NY2d 371, 378 (1975). If a shareholder commences a derivative action himself, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." NY BCL § 626(c).

To sufficiently plead demand futility, the complaint must allege that: 1) a majority of the board of directors are interested in the transaction or transactions at issue; 2) the board of directors failed to inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; or 3) the challenged transaction was so

egregious on its face that it could not have been the product of sound business judgment by the board of directors. See Marx v Akers, 88 NY2d 189 (1996); Goldstein v Bass, 138 Ad3d 556 (1st Dept. 2016). A director is "interested," and therefore unable to act impartially with respect to a pre-suit demand, when he or she either: (1) will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally; or (2) lacks independence because he or she is controlled by an interested director. See Marx v Akers, supra.

In his amended complaint, Adam alleges "[t]hat any demand by Adam to Libra, Anderson or the Board of Directors as a whole would be futile due to a majority of directors being interested in the alleged violations of law contained herein." These allegations are insufficient to demonstrate demand futility. The amended complaint does not plead any specific transaction Libra or Anderson entered into that has resulted in a financial benefit to them separate from the benefit to all shareholders, such as self-dealing or diversion of corporate opportunity. See Marx v Akers, supra. Rather the complaint attacks decisions made by Libra to distance ALP from Adam, his employees, and his previous business model, none of which provides any direct financial benefit to Libra or Anderson, as opposed to ALP's shareholders broadly. Therefore, the amended complaint fails to

allege that Libra or Anderson were interested in any transaction within the meaning of BCL § 626.

Adam's claim that a demand would have been futile simply because Libra and Anderson constitute the majority of ALP's board of directors is likewise insufficient. "Simply naming a majority of the board as defendants with conclusory allegations of wrongdoing or control is insufficient to circumvent the requirement of demand." Bansbach v Zinn, 1 NY3d 1, 11 (2003) (citing Barr v Wackman, supra).

Adam's failure to sufficiently plead demand futility warrants dismissal of his derivative claims. Even if Adam had adequately pleaded demand futility, however, dismissal of these claims would remain warranted because the claims in the amended complaint fail for the independent reasons articulated below.

iii. Breach of Fiduciary Duty and Negligence

To plead a cause of action for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. See Burry v Madison Park Owner LLC, 84 AD3d 699 (1st Dept. 2011); Rut v Young Adult Inst., Inc., 74 AD3d 776 (2nd Dept. 2010). "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016(b)." Swartz v Swartz, 145 AD3d

818, 823 (2nd Dept. 2016); see also Burry v Madison Park Owner LLC, supra.

The amended complaint largely fails to allege any action by the defendants that would constitute misconduct such that a cause of action for breach of fiduciary duty would lie against them. Instead, the amended complaint alleges that the defendants engaged in a series of decisions that deviated from ALP's previous business model. Specifically, the board made determinations to reduce Adam's control of the company, remove employees hired by Adam, and abandon Adam's previous business model of creating and selling artworks on cruise ships. Further, the board attempted to reverse Adam's sale of a significant amount of Peter Max's artworks and recoup payments promised by Adam to employees that were terminated upon Libra's assumption of control of the company.

Judicial inquiry into the actions of corporate directors, which are taken in good faith, in the exercise of honest judgment, and the legitimate furtherance of corporate purposes, is prohibited. See Auerbach v Bennett, 47 NY2d 619 (1979); Barr v Wackman, supra. A cause of action sounding in breach of fiduciary duty does not lie where the complaint merely alleges that a course of action other than that pursued by a board of directors would have been more advantageous. See Amfesco

Indus., Inc. v Greenblatt, 172 AD2d 261 (1st Dept. 1991); Kamin v Am. Exp. Co., 86 Misc 2d 809 (Sup Ct, NY County 1976), aff'd sub nom. 54 AD2d 654 (1st Dept. 1976). Rather, the complaint must sufficiently allege that the corporate decisions of the board of directors lacked a legitimate business purpose or were tainted by a conflict of interest, bad faith, or fraud. See Amfesco Indus., Inc. v Greenblatt, supra. The claims identified above fail to demonstrate anything other than the plaintiff and his associates' displeasure with the direction in which Libra and Anderson have taken ALP.

Adam's allegation that Libra improperly provided a reporter from the New York Times with false information relating to a purported scheme by Adam to sell counterfeit Peter Max artwork, damaging ALP's business, on the other hand, does suffice to state a claim sounding in breach of fiduciary duty. Nonetheless, the subject New York Times article, included in the defendants' submissions and publicly available, flatly contradicts Adam's claims. The article does not come to any conclusion regarding whether Adam engaged in any counterfeiting scheme. Moreover, the article's author states that her work was based upon her own research, including the analysis of public court filings and discussions with Adam himself, previous ALP employees Lawrence Moskowitz and Gene Luntz, and the company that was formerly the primary purchaser of ALP's works, Park

West Galleries, Inc. In fact, the only reference to Libra in the article is as follows: "Libra said that she was pursuing legal action 'against those who continue to harm and exploit [her] father' and that her goal 'is to bring the studio back to [her] father's vision.'"

While it is true that on a motion to dismiss the facts alleged in the complaint are presumed to be true, that presumption is rebutted where the facts are flatly contradicted by documentary evidence. See Herman v Greenberg, 221 AD2d 251 (1st Dept. 1995); Franklin v Winard, 199 AD2d 220 (1st Dept. 1993). Here, the allegation in the amended complaint that Libra provided false information to a New York Times reporter is contradicted by the article itself.

For the foregoing reasons, dismissal of the first cause of action for breach of fiduciary duty is warranted pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1).

As the seventh cause of action sounding in breach of the duties of diligence, care, and skill is based upon the same allegations as the breach of fiduciary duty claim and seek the same relief, that cause of action is likewise dismissed. See Alper v Seavey, 9 AD3d 263 (1st Dept. 2004).

iv. Remaining Claims

Adam's remaining causes of action seeking attorneys' fees

pursuant to BCL § 626(e), removal of ALP's directors and officers pursuant to BCL § 706(d) and BCL § 716(c), and an accounting must be denied as Adam fails to allege an underlying cause of action for breach of fiduciary duty or any other cognizable claim. Attorneys' fees pursuant to BCL § 626(e) are premised on the successful prosecution of a derivative suit. A cause of action seeking the removal of directors pursuant to BCL § 706(d) and BCL § 716(c) requires a showing of wrongdoing on the part of the directors with regard to their fiduciary obligations to the corporation. See Benedict v Whitman Breed Abbott & Morgan, 110 AD3d 935 (2nd Dept. 2013). Finally, a cause of action for an accounting requires a plaintiff to sufficiently allege a breach of fiduciary duty. See Palazzo v Palazzo, 121 AD2d 261 (1st Dept. 1986).

The second cause of action seeking appointment of a receiver must also be dismissed. It is well settled that "[t]he appointment of a receiver is not a form of ultimate relief that can be awarded in a plenary action, but rather, is limited as a provisional remedy (see CPLR 6401[a]) or as an aid in post-judgment enforcement (see CPLR 5228)." Lemle v Lemle, 92 AD3d 494, 498 (1st Dept. 2012). To the extent that the second cause of action seeks the appointment of a receiver pursuant to BCL § 1202(3), relief under that statute is likewise unavailable. BCL § 1202(3) relates solely to an action to preserve corporate

assets where there is no officer within the state to administer corporate affairs. That has not been alleged here.

IV. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted, and the complaint is dismissed as against the defendants in its entirety; and it is further

ORDERED that the defendants' counterclaims are severed and shall continue.

This constitutes the Decision and Order of the court.

Dated: June 6, 2021

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON