To be Argued by:
JOLÈNE F. LAVIGNE-ALBERT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

ADAM MAX, on behalf of himself and derivatively on behalf of ALP, Inc., a New York Corporation,

Plaintiffs-Appellants,

Appellate Case No.: 2021-02747

– against –

ALP, INC. and LIBRA MAX,

Defendants-Respondents,

– and –

MICHAEL ANDERSON,

Defendant.

LAWRENCE FLYNN,

Non-Party Respondent.

BRIEF FOR DEFENDANTS-RESPONDENTS AND NON-PARTY RESPONDENT

SCHLAM STONE & DOLAN LLP
Attorneys for Defendants-Respondents and Non-Party Respondent
26 Broadway
New York, New York 10004
(212) 344-5400
jlavignealbert@schlamstone.com

New York County Clerk's Index No. 650618/19

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED 1

PRELIMINARY STATEMENT 3

BACKGROUND 4

A. Adam's Desperate and Unrelenting Attempts to Cling to Power. 4

B. The Amended Complaint. 8

C. Justice Bannon's Order Dismissing the Amended Complaint. 12

ARGUMENT 16

I. APPELLANT'S CLAIMS FOR BREACH OF FIDUCIARY DUTY AND NEGLIGENCE WERE PROPERLY DIMISSED. 16

A. The Exculpatory Clause in ALP's Certificate of Incorporation Bars Appellant's Claims. 16

B. ALP's Certificate of Incorporation Is Properly Considered Pursuant to CPLR 3211(a)(1). 19

C. Adam's Allegations About Legal Fees Paid to Libra Max Fail to State Unexculpated Conduct And Are Precluded by the Business Judgment Rule. .23

D. Adam's Remaining Arguments Regarding the Exculpatory Clause Fail. 30

E. The Allegations Regarding the New York Times Article Fail To State A Breach of Fiduciary Duty Claim. 33

F. Any Remaining Allegations of Breach of Fiduciary Duty Fails to Meet the Particularity Required by CPLR § 3016(b). 37

II. APPELLANT'S ALLEGATIONS DO NOT MEET THE EXACTING STANDARD FOR EXCUSING PRE-SUIT DEMAND. 39

III. THE AMENDED COMPLAINT DOES NOT PleAd Facts Sufficient to Overcome the Powerful Presumption of New York's Business Judgment Rule. 43

IV. THE NEGLIGENCE CLAIM IS DUPLICATIVE OF THE BREACH OF FIDUCIARY DUTY CLAIM. 47

V. THE CLAIMS FOR AN ACCOUNTING, ATTORNEY'S FEES, AND FOR THE REMOVAL OF DIRECTORS AND OFFICERS FAIL BECAUSE THE UNDERLYING CLAIMS FAIL, AND ADAM'S REMAINING ARGUMENTS LACK MERIT. 48

VI. THE AMENDED COMPLAINT DOES NOT STATE A CLAIM FOR THE APPOINTMENT OF A RECEIVER UNDER CPLR § 6401 OR BCL § 1202.. 52
CONCLUSION 54

TABLE OF AUTHORITIES

Cases **Page(s)**

Alizio v. Perpignano,
225 A.D.2d 723 (2d Dept. 1996) 52

Alpert v. Nat'l Assoc. of Sec. Dealers, LLC,
7 Misc.3d 1010(A), at *10 (N.Y. Sup. Ct. 2004) 42

Amfesco Indus., Inc. *v. Greenblatt*,
172 A.D.2d 261 (1st Dept. 1991) 46

Arnold v. Society for Sav. Bancorp, Inc.,
650 A.2d 1270 (Del. 1994) 30

Associated Gen. Contractors of Am., New York State Chapter, Inc. v. Lapardo Bros. Excavating Contractors,
43 Misc. 2d 825 (N.Y. Sup. Ct. 1964) 20

Auerbach v. Bennett,
47 N.Y.2d 619 (1979)..... 43, 44

Bansbach v. Zinn,
1 N.Y.3d 1 (2003) 14, 15, 43

Barone v. Sowers,
128 A.D.3d 484 (1st Dept. 2015) 42

Benedict v. Whitman Bereed Abbot & Morgan,
110 A.D.3d 935 (2d Dept. 2013) 49

Bildstein v. Atwater,
222 A.D.2d 545 (2d Dept. 1995) 17

Black Car & Livery Ins., Inc. v. H & W Brokerage, Inc.,
28 A.D.3d 595 (2nd Dep't 2006)..... 38

Board of Managers of 28 Cliff Street Condominium v. Maguire,
191 A.D.3d 25 (1st Dept. 2020) 28, 49

Board of Managers of Soho North 267 West 124th Street Condominium v. NW 124 LLC,
116 A.D.3d 506 (1st Dept. 2014) 25

Burry v. Madison Park Owner LLC,
84 AD3d 699 (1st Dept. 2011) 33

Central Mortg. Co. v. Jahnsen,
150 A.D.3d 661 (2d Dept. 2017) 21

Chambers v. Time Warner, Inc.,
282 F.3d 147 (2d Cir. 2002) 22

City of Tallahassee Retirement System v Akerson,
2009 WL 6019489 (N.Y. Sup. Ct. Oct. 16, 2009) 18

Cohen v. Cocoline Prod.,
309 N.Y. 119 (1955) 27

Colucci v. Canastra,
130 A.D.3d 1268 (3rd Dept. 2015) 18, 50

Conforti v. County of Nassau,
2013 WL 6333552 (N.Y. Sup. Ct. 2013) 21

Conit v. Dunne,
337 F.Supp.2d 344 (S.D.N.Y. 2004) 37

Consumers Union of U.S., Inc. v. State,
5 N.Y.3d 327 (2005) 43

Deblinger v. Sani-Pine Prod. Co.,
107 A.D.3d 659 (2nd Dep't 2013) 37

Dennis v. Buffalo Fine Arts Acad.,
15 Misc. 3d 1106(A) (Sup. Ct. 2007) 47

DeRaffele v. 210-220-230 Owners Corp.,
33 A.D.3d 752 (2d Dep't 2006) 38, 44

Dillon v. City of New York,
261 A.D.2d 34 (1st Dept. 1999) 34

Eastman Kodak Co. v. Roopak Enterprises, Ltd.,
202 A.D.2d 220 (1st Dept. 1994) 35

Edelman v. Goodman,
47 Misc.2d 8 (N.Y. Sup. Ct. 1965) 28

Ehret v. George Ringler & Co.,
144 App. Div. 480 (1st Dept. 1911) 54

Emmrich v. Technology for Information Management, Inc.,
91 A.D.2d 777 (3rd Dept. 1982) 32

Fenton v. Consolidated Edison Co.,
165 A.D.2d 121 (1st Dept. 1991) 34

Galpern v. Air Chiefs, L.L.C.,
180 A.D.3d 501 (1st Dept. 2020) 51

Gamiel v. Curtis & Reiss-Curtis, P.C.,
16 A.D.3d 140 (1st Dept. 2005) 51

Gemmel v. Immelt,
2019 NY Slip Op 32005(U), ¶ 16, 2019 N.Y. Misc. LEXIS 3812*20 (N.Y. Sup. Ct. 2019)
..... 18-19, 24

Gibbs v. Kings Auto Show Inc.,
47 Misc.3d 1203(A), 2015 WL 1442374 (N.Y. Sup. Ct. 2015) 52

Glatzer v. Grossman,
47 A.D.3d 676 (2d Dept. 2008) 18, 42

Goldman v. Barret,
No. 15 cv 9223, 2017 WL 4334011 (S.D.N.Y. Sep. 25, 2017) 37

Goldstein v. Bass,
138 A.D.3d 556 (1st Dept. 2016) 40, 41, 42

Grace v. Grace Institute,
19 N.Y.2d 307 (1967) 50

Grogan v. O'Neil,
292 F. Supp.2d 1282 (D. Kan. 2003) 22

HF Lexington KY LLC v. Wildcat Synergy Manager LLC,
35 Misc. 3d 1210(A) (N.Y. Sup. Ct. 2012) 46

Hyman v. New York Stock Exchange,
46 A.D.3d 335 (1st Dep't 2007) 38

In re Kenneth Cole Productions, Inc.,
27 N.Y.3d 268 (2016) 44

In re Merrill Lynch & Co., Inv. Securities, Derivative & ERISA Litig.,
773 F. Supp.2d 330 *(*S.D.N.Y. 2011*)*..... 25

In re Midway Jewish Ctr.,
16 Misc. 3d 607 (N.Y. Sup. Ct. 2007) 47

In re Omni-com Grp. Inc. Shareholder Deriv. Litig.,
43 A.D.3d 766 (1st Dept. 2007) 40

In re Oracle Corp. Derivative Litig.,
2021 WL 2530961 (Del. Ch. June 21, 2021) 30

In re Verestar,
343 B.R. 444 *(*Bankr. S.D.N.Y. 2006)..... 30

International Painters & Allied Trades Industry Pension Fund v. Cantor Fitzgerald, L.P.,
41 Misc.3d 770 (N.Y. Sup. Ct. 2013) 20

JAS Family Trust v. Oceana Holding Corp.,
109 A.D.3d 639 (2d Dept. 2013) 32

Kalisch v. Jarcho, Inc. v. City of *New York*,
58 N.Y.2d 377 (1983) 18

Kamin v. Am.Exp. Co.,
86 Misc. 2d 809 (N.Y. Sup. Ct. 1976), aff'd 54 A.D.2d 654 (1st Dept. 1976) 47

Kimeldorf v. First Union Real Estate Equity & Mortg. Invs.,
309 A.D.2d 151 (1st Dept. 2003) 44

Lapsley v. Sorfin Intenrational, Ltd.,
43 A.D.3d 1113 (2d Dept. 2007) 25

Leary v. Bendow,
161 A.D.3d 420 (1st Dept. 2018) 7

Lemle v. Lemle,
92 A.D.3d 494 (1st Dept. 2012) 45, 53

Lewis v. Riklis,
82 A.D.2d 789 (1st Dept. 1981) 24, 32

Lewis v. Welch,
126 A.D.2d 519 (2d Dept. 1987) 42

Llanos v. T-Mobile USA, Inc.,
132 A.D.3d 823 (2d Dept. 2015) 48

Long Island Pine Barrens Society, Inc. v. County of Suffolk,
122 A.D.3d 688 (2d Dept. 2014) 53

Luckow v. RGB Design-Build, Inc.,
156 A.D.3d 1289 (3rd Dept. 2017) 34

M&E 73-75, LLC v. 57 Fusion LLC,
189 A.D.3d 1 (1st Dept. 2020) 35

M&M Country Stro, Inc. v. Kelly,
159 A.D.3d 1102 (3rd Dept. 2018) 18

Marx v. Akers,
88 N.Y.2d 189 (1996) 39, 40, 41

Matapos Technology Ltd. v. Compania Andina De Comercio LTDA,
68 A.D.3d 672 (1st Dept. 2009) 21

Matter of *Khatibi v. Weill*,
8 A.D.3d 485 (2d Dept. 2004) 7

Murray, Hollander, Sullivan & Bass v. HEM Research, Inc.,
111 A.D.2d 63 (1st Dept. 1985) 34

NYAHSA Services, Inc. v. People Care Inc.,
167 A.D.3d 1305 (3rd Dept. 2018) 48

Orloff v. Weinstein Enterprises, Inc.,
247 A.D.2d 63 (1st Dept. 1998) 32

Palazzo v. Palazzo,
121 A.D.2d 261 (1st Dep't 1986) 49

Palmetto Partners, L.P. v. AJW Qualified Partners, LLC,
83 A.D.3d 804 (2nd Dept. 2011) 33, 37

Parker Waichman LLP v. Squier, Knapp & Dunn Communications, Inc.,
138 A.D.3d 570 (1st Dept. 2016) 33

People v. Kines,
37 A.D.3d 1 (1st Dept. 2006) 36

Perez v. Beach Concerts, Inc.,
154 A.D.3d 602 (1st Dept. 2017) 21

Phillips v. Taco Bell Corp.,
152 A.D.2d 806 (2d Dept. 2007) 20

Pomerance v. McGrath,
124 A.D.3d 481 (1st Dept. 2015) 47

Postiglione v. Castro,
119 A.D.3d 920 (2d Dept. 2014) 48

Principia Partners LLC v. Swap Financial Group, LLC,
194 A.D.3d 584 (1st Dept. 2021) 35

Retirement Plan for General Employees of the City of North Miami Beach v McGraw,
2016 WL 7475835 (N.Y. Sup. Ct. Dec. 21, 2016)),
aff'd 158 A.D.3d 494 (1st Dept. 2018) 17, 18, 22, 23

RGH Liquidating Trust v. Deloitte & Touche LLP,
71 A.D.3d 198 (1st Dept. 2009) 7

Sensible Choice Contracting, LLC v. Rogers,
164 A.D.3d 705 (2d Dept. 2018) 52

Shah v. Metro. Life Ins. Co.,
2003 WL 728869 (N.Y. Sup. Ct. Feb. 21, 2003) 37

Shapiro v. Rockville Country Club, Inc.,
2 Misc. 3d 1002(A), at *9 (Sup. Ct. 2004) 44

Simpson v. Berkley Owner's Corp.,
213 A.D.2d 207 (1st Dept. 1995) 44

Skillgames, LLC v. Brody,
1 A.D.3d 247 (1st Dep't 2003) 50

Snacks, Inc. v. Frangioudakis,
129 A.D.3d 636 (1st Dept. 2015) 18

Spizz v. Eluz (In re Ampal-American Isr. Corp.),
543 B.R. 464 (Bankr. S.D.N.Y. 2016) 27

Start Elevator, LLC v. Macombs Place, LLC,
60 Misc.3d 1225(A), 2018 WL 4000423 (N.Y. Civ. Ct. 2018) 52

Studio A Showroom, LLC v. Yoon,
99 A.D.3d 632 (1st Dept. 2013) 51

Swartz v. Swartz,
145 A.D.3d 818 (2nd Dept. 2016) 33

Teachers' Ret. Sys. of Louisiana v. Welch,
244 A.D.2d 231, 231-232 (1st Dept. 1997) 18, 19, 42

Tsatskin v. Kordonsky,
189 A.D.3d 1296 (2d Dept. 2020) 34

United States Small Business Administration v. Feinson,
347 F. Supp.3d 147 (E.D.N.Y. 2018) 18

Walsh v. Webnet, Inc.,
116 A.D.3d 845 (2d Dept. 2014) 41

Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,
10 A.D.3d 267 (1st Dept. 2004) 47

West Valley KB Venture, LLC v. ILKB LLC,
No. 20 cv 3278, 2021 WL 417918 (E.D.N.Y. Sep. 13, 2021) 20

Wyatt v. Inner City Broad. Corp.,
118 A.D.3d 517 (1st Dept. 2014) 42

Statutes

BCL § 402 ..... *passim*
BCL § 603 ..... 5, 6, 27
BCL § 624 32
BCL § 626 ..... 15, 39, 49
BCL § 706 ..... 15, 49, 50
BCL § 716 49
BCL § 720 16

BCL § 1202 ..... *passim*
Delaware Law of Corp. & Business Org.§ 4.19 30
CPLR § 2001 51
CPLR § 3211 ..... 19, 20, 22
CPLR § 6401 53
CPLR § 2001 52
CPLR § 3016 ..... *passim*
CPLR § 3211 ..... 5, 21
CPLR § 5704 7
CPLR § 6401 ..... 2, 15, 53
NYBCL § 605 ..... 6, 7

Rules

Federal Rule of Civil Procedure 12 22

Defendant-Respondents ALP, Inc. ("ALP"), Libra Max ("Libra") and Non-Party Respondent Michael Anderson ("Michael") (collectively "Respondents") submit this brief in opposition to the appeal of Adam Max ("Adam"), on behalf of himself and derivatively on behalf of ALP, of a June 6, 2021 order of the Supreme Court, New York County (Bannon, J.) (the "Order") dismissing the Amended Verified Complaint (the "Amended Complaint" or the "Complaint"). For the reasons that follow, this Court should affirm the Order.

QUESTIONS PRESENTED

1. Did the Motion Court correctly dismiss claims of breach of fiduciary duty, negligence, and the Amended Complaint's related causes of action where ALP's certificate of incorporation contained an exculpatory clause that tracks the language of BCL § 402(b), and the Amended Complaint fails to plead bad faith, intentional misconduct, knowing violation of law, or unentitled personal financial profit? Answer: Yes.

2. Did the Motion Court correctly dismiss the claims for failure to allege pre-suit demand futility? Answer: Yes.

3. Did the Motion Court correctly dismiss the cause of action for breach of fiduciary duty where the Amended Complaint contained only non-particularized conclusory allegations, contrary to the requirement of CPLR § 3016? Answer: Yes.

4. Did the Motion Court correctly find that the Amended Complaint did not plead facts sufficient to overcome the powerful presumption of New York's business judgment rule, thus warranting dismissal of the Amended Complaint? Answer: Yes.

5. Did the Motion Court correctly dismiss the Amended Complaint's cause of action for negligence for the additional reason that it is duplicative of the breach of fiduciary duty cause of action? Answer: Yes.

6. Did the Motion Court correctly dismiss the Amended Complaint's causes of action for an accounting, attorney's fees and the removal of directors and officers because those claims rise and fall with the breach of fiduciary duty and negligence claims, which were properly dismissed? Answer: Yes.

7. Did the Motion Court properly dismiss the Amended Complaint's claim for the appointment of a receiver under CPLR § 6401 and BCL § 1202 because (a) appointment of a receiver under CPLR § 6401(a) is not a form of ultimate relief that can be awarded in a plenary action; and (b) contrary to the requirement of BCL § 1202(a)(3) that appointment of a receiver is only permissible when there is no officer within New York qualified to administer the corporation's assets, the Amended Complaint specifically alleged that Libra regularly transacted business in New York state by, among other things, acting as an officer and director of ALP? Answer: Yes.

PRELIMINARY STATEMENT

This action is related to three Special Proceedings,[1] and two plenary actions (the "Park West Action" and the "Moskowitz Action")[2]—all of which have been presided by the Honorable Nancy M. Bannon and relate to the management and control of ALP, a company created by iconic artist Peter Max ("Peter") for himself and his two children, Libra and Adam, to commercialize his artwork. As detailed below, the Special Proceedings relate to a years-long battle for control of ALP between Adam and his sister, Libra, which Libra ultimately won when a new Board was elected on December 10, 2018 (consisting of Adam, Libra, and Michael), following which Libra was appointed Chairwoman of the Board on December 17, 2018, and elected as President and CEO on January 11, 2019. On January 30, 2019, Adam commenced the action that underlies the instant appeal and on August 1, 2019 Adam filed the Amended Complaint whose sufficiency is at issue on this appeal.

On June 6, 2021, Justice Bannon granted Respondents' motion to dismiss the Amended Complaint on numerous grounds, the most salient of which are that (1) the claims against the Respondents are barred by the exculpation clause in

[1] *Libra Max v. ALP, Inc. and Adam Max,* N.Y. Sup. Ct. Index No. 156641/2017, *ALP, Inc. v. Libra Max and Lawrence Flynn,* N.Y. Sup.Ct. Index No. 161352/2018, and *ALP, Inc. and Libra Max v. Adam Max,* N.Y. Sup. Ct. Index No. 651181/2019.

[2] *ALP, Inc. v. Park West Galleries, Inc. et al*, N.Y. Sup. Ct. Index No. 153949/2019 ("Park West Action"), and *ALP, Inc. v. Lawrence Moskowitz et al,* N.Y. Sup. Ct. Index No. 652326/2019 ("Moskowitz Action").

ALP's certificate of incorporation because the Amended Complaint fails to plead bad faith or intentional misconduct; (2) the claims, which Adam brings derivatively, are barred because of Adam's failure to make a pre-suit demand on ALP's board or to properly allege demand futility; and (3) the claims against Respondents are also barred under the business judgment rule. For the reasons discussed below, the Order should be affirmed.

BACKGROUND

A. Adam's Desperate and Unrelenting Attempts to Cling to Power.

In the very first Special Proceeding, commenced by Libra in 2017, Libra sought an order that Adam produce certain of ALP's books and records, and also sought an order that he issue a notice of shareholders meeting, as authorized by ALP's bylaws. R27-R28, ¶ 4.[3] ALP's bylaws, upon which Libra relied, provide that the default number of directors is three. R176, Article III, Section 1. In opposition, notwithstanding multiple documents signed by Adam and prepared by his lawyers attesting to the original bylaws' existence and efficacy, Adam contended that the bylaws had never been adopted. R216-R220, ¶¶ 14-24. Although contesting the efficacy of ALP's bylaws, Adam did not contest the existence of ALP's Certificate of Incorporation itself. R217, ¶ 16, R219, ¶ 20. In

[3] References to "R" followed by a number are to the Record on Appeal filed in this case. References to "S.R." followed by a number are to the Supplemental Record on Appeal filed in this case.

reply, Libra refuted Adam's contention that ALP's bylaws were not in effect. R28, ¶ 5.[4]

By order dated May 30, 2018, as amended by further order dated June 28, 2018, Justice Bannon—rejecting Adam's objection that the bylaws were never adopted—ordered Adam to issue a notice of shareholders meeting as authorized by ALP's bylaws. R222-R223. Adam appealed the orders on the grounds that, among other things, Justice Bannon "erred in determining that Libra was entitled to the special meeting of the ALP shareholders" and "erred in making the [former] determination . . . without making a finding that the Form bylaws were adopted in accordance with the NYBCL." (R28, ¶ 8). Adam also filed a motion to stay the Orders pending appeal, which this Court granted. (*Id*.).

Rather than await the outcome of the appellate process in a fight over bylaws, ALP's shareholders (Libra and Peter, the latter represented by Lawrence Flynn, Peter Max's property guardian), invoked Section § 603 of the BCL, the provisions of which are independent of a company's bylaws and allow a shareholder holding 10% or more of the company's shares to demand that the corporation's secretary call a shareholder meeting to hold a board election when no election has been held within a statutorily-defined period. To that end, in

[4] Neither this appeal, nor the motion below, required a determination of the efficacy or otherwise of ALP's bylaws during this period. Respondents did not seek to dismiss this action under CPLR § 3211(a)(1) on this basis.

accordance with BCL § 603, on September 25, 2018, Mr. Flynn (as the representative of Peter, who held more than 10% of ALP's shares), demanded a shareholder meeting (the "Demand") (R224), and three days later, on September 28, 2018, Libra (in her capacity as ALP's Secretary), issued a notice of special meeting, scheduled for December 10, 2018 (the "Notice"). R225.

At the proverbial eleventh hour, on December 4, 2018, Adam commenced the second Special Proceeding. R226-R237. In the Petition, Adam admitted that since its inception in 2000, ALP functioned with three directors. R228, ¶ 10. The Petition claimed that the Notice was untimely under NYBCL § 605. R234, ¶ 53. It sought a declaration that the Notice was defective, and that any business transacted at the meeting is null and void, and an order enjoining the meeting. *Id*., ¶ 54. In conjunction with the commencement of the second Special Proceeding, Adam filed an Order to Show Cause with Temporary Restraining Order seeking to enjoin the December 10 meeting. R29, ¶ 12. On December 5, 2019, Justice Bannon denied the TRO. R238-R240.

Immediately after this Court denied Adam's application for a TRO, Adam filed another Petition and an emergency application for a TRO in a related Guardianship proceeding,[5] claiming that Mr. Flynn lacked authority to vote Peter's shares in ALP. R243-R244, ¶ 11. The Guardianship judge denied the TRO

[5] *Matter of Anonymous 3,* N.Y. Sup Ct. Index No. 500198/2015.

application, finding that Adam had failed to establish a prima facie case for the relief requested. *Id*.

On December 7, 2018, in yet a further desperate attempt to stop the shareholders' meeting, Adam filed an emergency application with this Court for a stay pending appeal of Justice Bannon's Court's December 5, 2018 Order denying the TRO. R244, ¶ 12. This Court rejected that application as procedurally improper pursuant to CPLR § 5704. *Id*., ¶ 13.

Adam having failed to obtain a stay of the meeting from Justice Bannon, this Court, or the Guardianship court, the shareholders—*i*ncluding Adam—convened on December 10, 2018. R277, ¶ 84. At the meeting, a majority of ALP's shareholders elected a new Board of Directors, which, again, included Adam. *Id*.

On December 17, 2018, that newly-constituted Board appointed Libra as Chairwoman, and on January 11, 2019, the Board appointed Libra as President and CEO to replace Adam. R277, ¶¶ 85, 86. Adam, however, did not cede actual control of ALP until Justice Bannon forced him to do so in late February 2019, after Libra was forced to commence yet another Special Proceeding. R250-R254.[6]

[6] Both the first and second Special Proceedings were subsequently discontinued with prejudice. R255-R256 (dismissal of first Special Proceeding with prejudice). *See also ALP, Inc. and Adam Max v. Libra Max et al.,* N.Y. Sup. Ct. Index No. 161352/2018, NYSCEF Doc. No. 53 (dismissal of second Special Proceeding with prejudice). *See Matter of Khatibi v. Weill*, 8 A.D.3d 485, 485 (2d Dept. 2004) ("this [C]ourt may take judicial notice of undisputed court records and files"); *Leary v. Bendow*, 161 A.D.3d 420, 421 (1st Dept. 2018) (same); *RGH Liquidating Trust v. Deloitte & Touche LLP*, 71 A.D.3d 198, 207-08 (1st Dept. 2009) (same), *rev'd on other grounds* 17 N.Y.3d 397 (2011).

On January 30, 2019, just weeks after Libra was appointed as President and CEO, Adam commenced this proceeding.

B. The Amended Complaint.

On July 19, 2019, Adam filed the Amended Complaint at issue in this appeal. R259-R285. The Amended Complaint alleges causes of action for Breach of Fiduciary Duties (First Cause of Action), Appointment of Receiver (Second Cause of Action), Declaratory Judgment Voiding the December 10, 2018 Special Meeting (Third Cause of Action), Attorneys Fees (Fourth Cause of Action), Removal of Directors and Officers (Fifth Cause of Action), Accounting (Sixth Cause of Action), and Breach of Duties of Diligence, Care and Skill – Negligence (Seventh Cause of Action). R273-R281. Although Appellant's brief claims generally that "all seven causes of action should survive dismissal" (Appellant Br. at 30), he does not at all address and therefore concedes that his Third Cause of Action seeking a declaratory judgment voiding the December 10, 2018 meeting was correctly dismissed. This Appeal, therefore, concerns the other six causes of action.

The body of the Amended Complaint discusses just six acts since Libra and Michael took control of ALP that apparently breached their fiduciary duties. R268-R271, ¶¶ 45-55. Four of them boil down to a single gripe—that Libra is now running ALP instead of Adam and in doing so, has sued Adam's cronies and is

leading the business in a different direction. R269-R271, ¶¶ 47-54. *See* R269, ¶ 47 ("Libra has flagrantly wasted and expended an untold amount of legal fees in her pursuit in the takeover and ultimate destruction of the Corporation"); *id*., ¶ 49 (Libra and Michael have "t[aken] steps to diminish [Adam's] authority to prevent him from paying expenditures and from continuing with his worthy and successful efforts at the continued rejuvenation of the Corporation and its financial affairs"); R269-R270, ¶¶ 50-51 (Libra and Michael have terminated their relationship with and sued Moskowitz); R270, ¶ 52 (Libra and Michael have terminated their relationship with and sued Frank Sr. and Bender Ciccotto); *id*., ¶ 53 (Libra and Michael have terminated their relationship with and sued Luntz); R270-R271, ¶ 54 (Libra and Michael have terminated their relationship with and sued Park West).

According to Adam, these litigations were commenced "without any thought, reflection or consideration (R269-R270, ¶ 50) and were "wholly unnecessary[.]" R270-R271, ¶ 54. Allegations containing different variations of this theme are also included within the breach of fiduciary count itself. *See id*. – Libra and Michael breached their fiduciary duties by "terminating Adam and his team" (R273-R274, ¶ 67), "directing and/or allowing the Corporation to abandon its essential business lines" (R274, ¶ 68), "destroying irreplaceable business relationships, connections and avenues of sales" (*id*.), "inexplicabl[y] abandon[ing]… a cruise ship related business that was touted as a highly

successful model for the entire art world and community" (*id*.), "destr[oying] [ALP's] business relationship with Park West" (*id*., ¶ 71), "removing Adam and his team" (R275, ¶ 73), "embroiling the Corporation with unnecessary litigation with its consultants, employees, customers and salespersons" (*id*.), "causing ALP to breach its contractual obligations with its professional, consultants, salespersons, clients and customers in a wholly unnecessary and unjustified manner" (*id*.), "terminating valuable business personnel such as Robert, Lawrence and Bender and engaging the same in unnecessary litigation and resulting in expensive fees and costs" (*id*.), and "interfering with or impeding with the continued collection of insurance proceeds claims, expense claims and bad faith claims" (*id*.).

The fifth allegation is that "on or about May 28, 2019, Libra, conspiring with Mary and others, 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 on the cruise ships operated by Park West or otherwise, were essentially purchasing counterfeit goods." R271, ¶ 55. *See also* R275, ¶ 73 (Libra and Michael breached their fiduciary duties by "causing the Corporation and its artwork to be the subject of untrue and scandalous allegations thereby diminishing its value permanently and without recourse").

Adam neither specifically alleges what that "false information" was nor when Libra allegedly told the New York Times reporter that information. Accordingly, this claim does not meet the specificity requirements for breach of fiduciary duty claims. In any event, the New York Times article speaks for itself and makes clear that it was not *Libra* that "ma[de] it appear" that customers … were essentially purchasing counterfeit goods," but rather, the reporter formed her opinions (which did not include that the artworks were "counterfeit") by detailed research, including analysis of public court filings, as well as discussions with, among others, counsel to Adam, Moskowitz, Luntz and Park West. R452-R457.

The sixth allegation relates to Libra's and Michael's qualifications—according to Adam, Libra and Michael possess "absolutely no skill, talent, ability or training in the business of art, sales or art or otherwise." R268-R269, ¶ 45.[7] The pleading does not elaborate on what "skill, talent, ability or training" would be required to successfully fulfill their roles—it simply states that, whatever those

[7] *See* R268-R269, ¶ 45 (Libra is "totally unable both geographically business-wise and otherwise from performing any meaningful function as the other director, the result being that the Board of Directors consisted of Libra with no prior business experience, [Michael] with no prior business experience, and Adam as a powerless figurehead, with a controlling Board of Directors possessing absolutely no skill, talent, ability or training in the business of art, sales or art or otherwise."). *See also* R273-R274, ¶ 67 (Defendants breached their fiduciary duties "by failing to take the necessary steps to appoint certain directorial and managerial positions of the Corporation"); R274, ¶ 68 (Defendants breached their fiduciary duties by "failing to take the necessary steps to insure that the defendants are removed from their positions with the Corporation"); R275, ¶ 73 (Defendants breached their fiduciary duties by "electing a woefully unqualified President and CEO who has no requisite educational background, training or experience that would enable her to successfully run the Corporation.").

unidentified skills are, Libra and Michael do not have them. (*Id.*). As discussed below, such bald allegations do not meet the heightened particularity requirements for breach of fiduciary duty claims.

C. Justice Bannon's Order Dismissing the Amended Complaint.

On June 6, 2021, Justice Bannon granted Respondents' motion to dismiss the Amended Complaint.

Justice Bannon first found that the exculpation clause in ALP's certificate of incorporation precluded Adam's claims against Respondents, and Justice Bannon rejected Adam's claims that the certificate of incorporation should not be considered because "it was not a certified document" and was of "unknown provenance." R13-R14. Justice Bannon held that she could consider the certificate of incorporation because (1) it had been introduced by an attorney affirmation; (2) Adam had failed to make any non-speculative argument that the certificate was not "unambiguous, authentic, and undeniable"; and (3) Respondents had included with their reply papers a certified copy of the certificate of incorporation "which [wa]s identical to their original submission in every material respect." R14 (internal quotation marks omitted).

Justice Bannon next rejected Adam's argument that Respondents' alleged bad faith actions and intentional misconduct rendered the exculpation clause ineffective. R14-R15. Justice Bannon concluded that Adam's allegations of bad

faith and intentional misconduct against were conclusory and, for the most part, simply consisted of assertions that Libra had decided to run the company differently than had Adam. R15. Accordingly, the Motion Court found that the exculpation clause required the dismissal of the Amended Complaint's breach of fiduciary duty claim against Respondents, other than to the extent it alleged that Libra had provided false information to the New York Times, which Justice Bannon dismissed as flatly contradicted by the New York Times article itself. R15. *See* R. 20 (". . . the subject New York Times 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.'").

Justice Bannon next ruled that the Amended Complaint, which contained claims brought derivatively, required dismissal because Adam had failed to make a demand upon ALP's board of directors to take action on his claims. R16-R17.

Justice Bannon held that the Amended Complaint's conclusory statement that a demand to ALP's Board "would [have] be[en] futile due to a majority of directors being interested in the alleged violations of the law therein" was "insufficient to demonstrate demand futility." R17. The Court pointed out that the Amended Complaint "does not plead any specific transaction Libra or [Michael] entered into that has resulted in a financial benefit to them separate from the benefit of all shareholders. . . . Rather the Complaint attacks decisions 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 [Michael], as opposed to ALP's shareholders broadly." R17. Finally, the Court ruled that Adam's conclusory claim that a demand on the Board would have been futile because Libra and Michael constitute a majority of the Board was insufficient under well-established case law. R18 (citing *Bansbach v. Zinn*, 1 N.Y.3d 1, 11 (2003)).

Holding that the Amended Complaint simply alleged that the Respondents decided to run ALP differently than had Adam and that it did not allege misconduct by the Respondents that would constitute a breach of fiduciary duty R19-R20, Justice Bannon further dismissed Adam's claims for breach of fiduciary duty pursuant to the business judgment rule. *Id.* Justice Bannon correctly described that rule as prohibiting "[j]udicial 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. . . ." *Id.*

The Court next dismissed Adam's claims sounding in negligence — which were based upon the same allegations as the breach of fiduciary duty claim and sought the same relief — for the same reasons the Court dismissed the breach of fiduciary duty claim. R21.

The Court dismissed Adam's claim seeking attorney's fees for his derivative claims pursuant to BCL § 626(e), the removal of ALP's directors and officers pursuant to BCL §§ 706(d), 716(c), and an accounting, because Adam failed "to allege an underlying cause of action for breach of fiduciary duty or any other cognizable claim." R22.

Finally, Justice Bannon dismissed Adam's request for appointment of a receiver because the appointment of a receiver under CPLR §§ 6401(a) is not a form of ultimate relief that can be awarded in a plenary action, but is limited to a provisional remedy or as an aid in post-judgment enforcement, respectively. The Court also denied Adam's request for the appointment of a receiver under BCL § 1202(3) because that statute "relates solely to an action to preserve corporate assets where there is no officer within the state to administer corporate affairs" and Adam had made no such allegation in the Amended Complaint. R22-R23.

ARGUMENT

I. APPELLANT'S CLAIMS FOR BREACH OF FIDUCIARY DUTY AND NEGLIGENCE WERE PROPERLY DIMISSED.

A. The Exculpatory Clause in ALP's Certificate of Incorporation Bars Appellant's Claims.

In New York, a shareholder's right to bring a derivative action against directors for breach of duty is expressly "[s]ubject to any provision of the certificate of incorporation authorized pursuant to paragraph (b) of section 402." BCL § 720(a)(1). Section 402(b) of the BCL expressly permits shareholders to adopt provisions precluding director and shareholder liability under most circumstances:

> The certificate of incorporation may set forth a provision eliminating or limiting the personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity, provided that no such provision shall eliminate or limit: (1) the liability of any director if a judgment or other final adjudication adverse to him 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....

BCL § 402(b). ALP's Certificate of Incorporation tracks the language of BCL § 402(b), and thus eliminates all personal liability of Libra and Anderson for anything other than "acts or omission [taken] in bad faith or [that] involve[] intentional misconduct or a knowing violation of law or [in which they] personally gained in fact a financial profit or other advantage to which [they were] not legally entitled." R207.

Here, the Amended Complaint fails to allege any of the exceptions in New York BCL § 402(b)(1) or ALP's Certificate of Incorporation. The sum total of Adam's attempt to plead around the exculpatory language in ALP's Certificate of Incorporation 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, such that the business judgment rule does not apply." R280, ¶ 100. The law is clear that such conclusory allegations are insufficient to overcome the protections of an exculpatory provision in a company's charter. *Bildstein v. Atwater*, 222 A.D.2d 545, 546 (2d Dept. 1995) (rejecting "conclusory allegations" that the directors' action "rose to the level of intentional misconduct, bad faith, or a knowing violation of the law.").

As such, Justice Bannon properly dismissed the breach of fiduciary duty and negligence claims against Libra and Michael. *See Retirement Plan for General Employees of the City of North Miami Beach v McGraw*, 2016 WL 7475835, at *6 (N.Y. Sup. Ct. Dec. 21, 2016) (granting motion to dismiss complaint on basis of exculpatory clause in certificate of incorporation where plaintiff failed to plead that defendants had acted in bad faith, or involved intentional misconduct or a knowing violation of law), *aff'd* 158 A.D.3d 494 (1st Dept. 2018); *City of Tallahassee*

Retirement System v Akerson, 2009 WL 6019489 (N.Y. Sup. Ct. Oct. 16, 2009) (Bransten, J.) ("Exculpatory provisions such as this one, which are adapted from BCL § 402 (b), are enforceable.") (citing *Glatzer v. Grossman*, 47 A.D.3d 676, 677 (2d Dept. 2008)); *Teachers' Ret. Sys. of Louisiana v. Welch*, 244 A.D.2d 231, 231-232 (1st Dept. 1997) (affirming dismissal of derivative suit where corporation had an exculpatory charter provision eliminating personal liability for directors).[8]

Adam's reliance on *Kalisch v. Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377 (1983) (Appellant Br. at 21) is completely misplaced, as that case involved a contractual exculpatory clause, not the exculpatory clause of BCL §402. Like plaintiffs in *Gemmel v. Immelt*, 2019 NY Slip Op 32005(U), ¶ 16, 2019 N.Y. Misc. LEXIS 3812, * 20 (N.Y. Sup. Ct. 2019), Adam here "appear[s] to equate the exculpatory clause in [ALP's] certificate of incorporation to limitation of liability clauses contained in contracts, which are unenforceable as a matter of public policy

[8] Adam's reliance on *Snacks, Inc. v. Frangioudakis*, 129 A.D.3d 636 (1st Dept. 2015) for the contrary is misplaced because in that case, unlike here, there was no question as to whether the plaintiff had alleged with sufficient particularity that the defendants had made improper payments to themselves. *Id.* at 637. Similarly, in *United States Small Business Administration v. Feinson*, 347 F. Supp.3d 147 (E.D.N.Y. 2018), also relied on by Adam, there was no question that the plaintiff had alleged breach of fiduciary duty claims against the defendants with sufficient particularity. *Id.* at 161-65. The same is true of *Colucci v. Canastra*, 130 A.D.3d 1268 (3rd Dept. 2015), which did not concern pleadings at all, but rather denied the defendant *summary judgment* because there existed *issues of fact* concerning whether the defendants acted in bad faith, thereby precluding the defendant's reliance on an exculpation clause in a certificate of incorporation. *Id.* at 1270. Finally, *M&M Country Stro, Inc. v. Kelly*, 159 A.D.3d 1102 (3rd Dept. 2018) is inapposite because it concerned a motion to set aside a verdict after a trial — not the sufficiency of a complaint — and the court found that the trial record contained more than enough specific evidence to support the verdict that the defendants breached their fiduciary duties. *Id.* at 1103-04.

if the clause insulates a party from gross negligence. However, an exculpatory clause in a corporation's charter is distinguishable because it is a statutory creation." *See also Teachers' Ret. Sys. v. Welch*, 244 A.D.2d 231, 231-32 (1st Dept. 1997) ("Section 6 of GE's certificate of incorporation, adopted pursuant to Business Corporation Law § 402 (b), shields GE's directors for negligent acts or omissions occurring in their capacity as directors, with certain exceptions (intentional misconduct, bad faith, knowing violation of law) that are inapplicable under the conclusory allegations of the complaint").

B. ALP's Certificate of Incorporation Is Properly Considered Pursuant to CPLR 3211(a)(1).

Adam argues that ALP's Certificate of Incorporation that Respondents submitted with their motion's opening papers cannot be considered because it was not certified, and that the later-submitted certified Certificate cannot be considered because "it was submitted in reply for the first time." (Appellant Br. at 19-20.) Those arguments are meritless. As the Motion Court found, it is appropriate to consider a certificate of incorporation on a CPLR 3211(a)(1) motion introduced by an attorney's affirmation where the non-moving party "fails to make any non-speculative argument that [the certificate of incorporation] is not 'unambiguous, authentic and undeniable.'" R14 (*quoting Phillips v. Taco Bell Corp.*, 152 A.D.2d

806, 807 (2d Dept. 2007). That is sufficient to permit consideration of the certificate of incorporation under CPLR 3211(a)(1).[9]

Even if Adam had tried to dispute the authenticity of the Certificate of Incorporation—which he did not—his argument would have failed, because a certificate of incorporation is an indisputable public record. *See, e.g.*, BCL § 402(a) (certificates of incorporation are filed with the New York Department of State and are public records); *Associated Gen. Contractors of Am., New York State Chapter, Inc. v. Lapardo Bros. Excavating Contractors*, 43 Misc. 2d 825, 826 (N.Y. Sup. Ct. 1964) (referring to the "public records of the Secretary of State" as "indisputable."); *International Painters & Allied Trades Industry Pension Fund v. Cantor Fitzgerald, L.P.*, 41 Misc.3d 770, 777 n.3 (N.Y. Sup. Ct. 2013) (taking judicial notice of certificate of incorporation because it was a "matter of public record"); *West Valley KB Venture, LLC v. ILKB LLC*, No. 20 cv 3278, 2021 WL 417918, at *5 n.4 (E.D.N.Y. Sep. 13, 2021) (same).

In any event, Respondents submitted a certified copy of the certificate of incorporation in reply. R302-R307. Contrary to what Adam argues, it was

[9] In addition, Adam's complaint about the certificate of incorporation is disingenuous because Adam himself heavily relied on the uncertified version of the Certificate in papers he filed with this Court on December 26, 2018. *See* R357 n.3, R358 n.5, R372 n. 10, R373 and R374 (relying on ALP's Certificate of Incorporation); R405-R409 (copy of ALP's Certificate of Incorporation submitted by Adam to this Court, which is identical to the Certificate of Incorporation attached to ALP's moving papers on Respondents' motion to dismiss, R204-R211).

appropriate for the Motion Court to consider the certified certificate—which was identical to the previously submitted uncertified certificate (R204-R209) — because Respondents "submitted that document in response to an argument made in opposition to th[eir] motion [to dismiss]," *i.e.*, that the certificate of incorporation was not certified. *Perez v. Beach Concerts, Inc.*, 154 A.D.3d 602, 602 (1st Dept. 2017) (holding that the court did not in err in considering for the first time on reply a merger agreement showing that showed that defendant was a licensee of the premises "because plaintiff submitted that document in response to an argument made in opposition to the motion."); *Matapos Technology Ltd. v. Compania Andina De Comercio LTDA*, 68 A.D.3d 672, 672 (1st Dept. 2009) (when the plaintiff submitted unendorsed notes with its opening papers and the defendant made an issue of that omission, the court properly considered a copy of the endorsed notes submitted through an affirmation on reply); *Central Mortg. Co. v. Jahnsen*, 150 A.D.3d 661, 664 (2d Dept. 2017) (recognizing that one of the exceptions to considering evidence for the first time on reply is "when the evidence is submitted in response to allegations raised for the first time in the opposition papers. . . ."). *See also Conforti v. County of Nassau*, 2013 WL 6333552, at *12 (N.Y. Sup. Ct. 2013) (on motion to dismiss pursuant to CPLR § 3211(a)(1), considering lease agreements submitted for the first time on reply when the opening papers had referred to those agreements).

Adam relies on a case from a federal court in Kansas[10] for the proposition that an uncertified certificate of incorporation may not be considered in support of a motion to dismiss. But that issue does not arise here: Respondents have submitted a certified copy of ALP's certificate of incorporation. In any event, the federal case is inapposite because it was brought pursuant to Federal Rule of Civil Procedure 12(b)(6), which does not permit the consideration of documentary evidence like CPLR 3211(a)(1) does.[11] The other state cases that Adam cites (Appellant Br. at 20) are inapposite because none of those cases involved a motion to dismiss under CPLR 3211(a)(1), and none involved indisputable public records like a certificate of incorporation.

The case *Retirement Plan for General Employees of the City of North Miami Beach v McGraw*, 2016 WL 7475835 (N.Y. Sup. Ct. Dec. 21, 2016) (Oing J.) is a much better parallel here. There, the Court dismissed a complaint on the basis of an exculpatory clause in a company's certificate of incorporation where, as here, plaintiff failed to sufficiently plead that defendants had acted in bad faith, had engaged in intentional misconduct, or had knowingly violated the law. *Id*. at *6.

[10] Appellant Br. at 20, *citing Grogan v. O'Neil*, 292 F. Supp.2d 1282, 1291-92 (D. Kan. 2003).

[11] *Compare Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)("a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion [under Rule 12(b)(6)]") with the several cases cited at Section I.A, *supra*, where claims were dismissed based on an exculpatory clause in a certificate of incorporation.

The certificate of incorporation in that case was introduced through an attorney's affirmation (R320-R321), as it was here (R14), and the certificate was *not* certified (in fact it was not even signed). R322-R323. This Court affirmed the trial court's dismissal of the complaint in its entirety. *Ret. Plan for Gen. Employees of City of N. Miami Beach v. McGraw*, 158 A.D.3d 494, 496 (1st Dept. 2018) ("[T]he exculpatory provision of the certificate of incorporation, which does not run afoul of Business Corporation Law § 402(b)(1), shields the director defendants from liability.").

C. Adam's Allegations About Legal Fees Paid to Libra Max Fail to State Unexculpated Conduct And Are Precluded by the Business Judgment Rule.

Adam argues that the Amended Complaint "clearly alleges intentional and grossly negligent actions taken in bad faith" with regard to attorney's fees Libra allegedly recouped from ALP. Appellant Br. at 22. That argument fails for several reasons.

First, even if Adam had sufficiently alleged gross negligence—and he does not—that would not state unexculpated conduct. *Teachers' Ret. Sys.*, 244 A.D.2d at 231-32 (BCL § 402(b) shields "directors for negligent acts or omissions occurring in their capacity as directors" except for those involving "intentional misconduct, bad faith, knowing violation of law" which were in that case, as here, "inapplicable under the conclusory allegations of the complaint"); *Gemmel*, 2019

N.Y. Misc. LEXIS 3812 at *20 ("Business Corporation Law § 402(b) does not carve out an exception for gross negligence.").

Nor does Adam state a claim that Libra or Anderson acted in "bad faith" with regard to the payment of legal fees. As he did below, Adam leaves it to this Court to guess what his allegations of bad faith are, as he does not cite to the Complaint. Appellant Br. at 22. The only allegations in the Amended Complaint that allude to legal fees are conclusory allegations of corporate waste, not bad faith. R269, ¶ 47 ("Libra has flagrantly wasted and expended an untold amount of fees in her pursuit in the takeover and ultimate destruction of the Corporation which are being billed and paid for by the Corporation in total breach of her fiduciary duties."); R269, ¶ 48 ("Flynn, acting in concert with Libra and Mary, currently seeks over $108,000 for services allegedly provided by his counsel over a six month period in 2019, with such services being entirely duplicative of the efforts of others, wholly unnecessary, and a complete waste and misuse of funds. . . ."); R275, ¶ 73 (alleging that defendants . . .wast[ed] corporate assets through the payment of unreasonable compensation, stipends unnecessary legal fees and other expenses"). These conclusory allegations do not even state a claim for corporate waste. *Lewis v. Riklis*, 82 A.D.2d 789, 789 (1st Dept. 1981) (in derivative action, complaint that only made conclusory allegations of corporate waste was "a fishing expedition, which courts of this state refuse to countenance."). *See also Lapsley v.*

Sorfin Intenrational, Ltd., 43 A.D.3d 1113, 1114 (2d Dept. 2007) ("[C]onclusory claims of corporate waste are insufficient to justify a limited review of the books and records of a corporation."). And even if they did, corporate waste is not one of the exceptions of BCL § 402(b) for which Libra and Anderson could be liable given the exculpatory clause. BCL § 402(b); *In re Merrill Lynch & Co., Inv. Securities, Derivative & ERISA Litig.*, 773 F. Supp.2d 330, 340-41 (S.D.N.Y. 2011) (holding, under Delaware law, that allegations of corporate waste were properly dismissed pursuant to exculpatory clause).

To the extent that Adam relies on minutes of a January 18, 2019 ALP board meeting to try to save his breach of fiduciary claim (Appellant Br. at 15-16), this fails for several, independently sufficient reasons. As an initial matter, Adam never referred to those minutes or made any argument regarding those minutes in the court below. Rather, these minutes were submitted *by Respondents* in their *reply* papers below, for a completely unrelated purpose. Thus, whether Adam preserved this argument for this appeal is dubious at best. *E.g., Board of Managers of Soho North 267 West 124th Street Condominium v. NW 124 LLC*, 116 A.D.3d 506, 506-507 (1st Dept. 2014) (argument not made in opposition to a motion to dismiss in the trial court is not preserved for appellate review). In any event, the argument is meritless because the Amended Complaint fails to allege one of the exceptions of BCL § 402(b) as to the payment of legal fees.

The legal fees that are referenced in the January 18, 2019 board minutes are those that Libra Max incurred in pursuing special proceedings under Article 78 of the CPLR, described in Background Section A, *supra*. R435. Through those proceedings, Libra obtained, as a director of ALP, production of ALP's books and records, and as a shareholder of ALP, with the support of ALP's third shareholder (Peter Max, whose shares were exercised by Mr. Flynn), she forced a shareholders' meeting to take place, through which she became chair of the Board. Even assuming that legal fees incurred by Libra Max in the special proceedings were reimbursed to her as resolved by the board (the board minutes that Adam refers to do not state as much), Libra and Michael's approval of such reimbursement does not state unexculpated conduct.

Any claim by Adam that the payment of these fees was in "bad faith" fails because, as noted above, bad faith is not even alleged in the Complaint with regard to the payment of legal fees, and is merely argued in conclusory fashion in Appellant's Brief, at page 22. The most generous reading of Adam's brief is that *he* believes that it was not in the best interest of the corporation for Libra to pursue the special proceedings that resulted in Adam losing control of ALP, and therefore, according to Adam, Libra should not have been reimbursed for her legal fees related to those special proceedings. But Adam does not and cannot allege that Libra believed she was acting for an improper purpose in bringing the special

proceedings, or that Libra or Michael believed that they were acting for an improper purpose in approving reimbursement of Libra's fees. *See, e.g.*, *Spizz v. Eluz (In re Ampal-American Isr. Corp.)*, 543 B.R. 464, 475 (Bankr. S.D.N.Y. 2016) (in order to allege bad faith triggering the exception of BCL 402(b), namely that directors acted "with a purpose other than that of advancing the best interests of the corporation," it was not sufficient to allege that directors were motivated by an improper purpose; plaintiff was required to state "what that purpose was, and why it was improper, in terms clear enough to provide notice . . .of the nature of the claim and the grounds on which relief is sought.")

Nor does Adam allege or could allege that the special proceedings, or the approval of the fees incurred in the special proceedings, were a "knowing violation of law." BCL § 402(b). As to the special proceedings themselves, Libra had an "absolute and unqualified right" to demand books and records as a director of ALP, *Cohen v. Cocoline Prod*., 309 N.Y. 119, 123 (1955), and Libra had a statutory right to call a shareholder's meeting pursuant to BCL § 603. Adam does not cite any statute or case that stands for the proposition that a board is prohibited from paying legal fees incurred by a director or shareholder in the types of proceedings at issue in this case, and Respondents are aware of none. All of the cases that Adam relies upon, at pages 22-23 of his brief, show that in those cases, the court refused to grant attorneys' fees to a director or shareholder based on the

facts and statutes involved in those cases, but the cases do not stand for the proposition that a board is prohibited from approving the payment of legal fees to a director or shareholder, and certainly do not stand for the proposition that such approval by a board would amount to bad faith, intentional misconduct or a knowing violation of law by the directors who approved such payment. *Cf. Edelman v. Goodman*, 47 Misc.2d 8, 9 (N.Y. Sup. Ct. 1965), *aff'd*, 24 A.D.2d 557 (2d Dep't 1965) (Appellant Br. at 22) (finding that a director could not "require" the corporation to reimburse his legal fees in bringing books and records proceedings, but silent on the issue of whether a board could agree to such reimbursement, or whether it would be bad faith or a knowing violation of the law for directors to approve such reimbursement).

Further, *Board of Managers of the 28 Cliff St. Condo. v. Maguire*, 2020 NY Slip Op 06844, ¶ 3, 191 A.D.3d 25, 29 (1st Dept. 2020) (Appellant Br. at 23) is inapposite because there the condominium's bylaws expressly precluded the legal fees that the board member sought there. Here, ALP's bylaws are silent on the issue of legal fees. Further, Libra and Michael complied with the requirements of ALP's bylaws with regard to quorum and actions of the board. R178, R445. Adam Max chose not to attend the January 18, 2019 board meeting (R433), and, in any event, per ALP's bylaws, two out of three directors constitute a quorum. R178; R445.

Adam also does not and cannot allege that Libra or Michael "personally gained in fact a financial profit or other advantage to which [they were] not legally entitled" by approving the reimbursement of the legal fees incurred by Libra to pursue the special proceedings. For one, Libra taking control of the company through statutorily authorized proceedings is not an "advantage to which she was not legally entitled." As to the reimbursement of Libra's legal fees, Adam does not, and cannot, claim that Libra "personally gained… a financial profit . . . to which she was not legally entitled" by obtaining reimbursement of her legal fees. For one, a reimbursement is, by definition, a transaction that does not generate "financial profit." Libra is not an attorney; she was not seeking the payment of fees to herself; and she did not personally "profit" from the payment of legal fees – Adam does not and cannot allege otherwise. Nor does Adam allege that Libra received any "direct financial benefit" from the special proceedings or the payment of the related legal fees that was "different from the benefit to shareholders generally." *Walsh v. Webnet, Inc.*, 116 A.D.3d 845, 847 (2d Dept. 2014) (citation omitted). Adam also does not and could not allege that Anderson "personally gained… a financial profit" by approving Libra's request for reimbursement of her legal fees, and Adam's allegation that "Anderson . . . was perfectly content to give away funds that indirectly belong to Adam and Peter" (Appellant Br. at 15) fails to state such a claim.

Thus, the alleged payment of legal fees to Libra does not allege unexculpated conduct. In addition, the payment was properly approved by the board, and therefore is protected by the business judgment rule.

D. Adam's Remaining Arguments Regarding the Exculpatory Clause Fail.

To the extent Adam argues that the exculpatory clause does not shield Libra from liability because she is an officer ALP, Appellant Br. at 23, that argument fails. That Libra is also an officer of ALP does not change the fact that the actions that Libra took in her capacity as director or shareholder of ALP are shielded by the exculpatory clause. *See, e.g., Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1288 (Del. 1994) (where a defendant is a director and officer, only those actions taken solely in the defendant's capacity as an officer are outside the purview of Delaware's equivalent of Business Corporation Law § 402(b)); *In re Oracle Corp. Derivative Litig.*, 2021 WL 2530961, at *2 & n.11 (Del. Ch. June 21, 2021) (same); R. Franklin Balotti & Jesse A. Finkelstein, *Delaware Law of Corp. & Business Org.* § 4.19, at 4-335 (Supp. 1992) (same). To the extent Adam claims that Libra "launched a hostile takeover of the Corporation even though she knew that such a takeover would lead to disaster" (Appellant Br. at 23), those actions are necessarily ones that Libra took in her capacity as shareholder and director. Similarly, Libra and Michael approved the payment of legal fees to Libra in their capacities as directors of ALP. In any event, Adam does not provide authority for

the proposition that the exculpatory clause does not shield Libra here. *See* Appellant Br. at 23. *See, e.g., In re Verestar*, 343 B.R. 444, 475 (Bankr. S.D.N.Y. 2006) (holding that exculpatory clauses apply equally to corporate directors and officers). Even if ALP's exculpatory clause did not apply to some of Libra's actions, the Amended Complaint's claims against Libra would be precluded for all of the reasons discussed below, notably because conduct by an officer is protected by the business judgment rule.

Adam's argument that the "motion seeking dismissal based on documentary evidence should have been denied [because] the Certificate did not resolve all factual issues as a matter of law, or conclusively dispose of the Appellant's claims," Appellant Br. at 21, fails. For one, he does not state what these purported issues of fact are. *Id.* The Motion Court was required to dismiss any claim, or any portion of any claim, that was based on exculpated conduct. *See supra* Section I.A.

Adam claims that ALP's denial of a demand by Adam for ALP's books and records was tantamount to intentional misconduct, bad faith and gross negligence sufficient to withstand a breach of fiduciary duty claim despite the exculpatory clause. Appellant Br. at 23. Adam's claims are baseless. First, there is no allegation in the Amended Complaint regarding a demand for books and records by Adam, or ALP's denial of same. Even if there were, Adam's argument is meritless. To the

extent Adam takes issue with ALP's refusal to supply him with ammunition to support his unfounded claims in this case—ammunition which he has attempted to obtain by serving a books and records demand on ALP pursuant BCL § 624 after he filed this lawsuit. R286. In doing so, he concedes that, without further information from ALP, he could not allege sufficient facts to withstand the motion to dismiss below. In any event, a corporation's denial of access to its books and records to a minority shareholder is not oppressive conduct tantamount to a breach of fiduciary duty where, as here, that shareholder has only presented conclusory allegations as to wrongdoing. *See Orloff v. Weinstein Enterprises, Inc.*, 247 A.D.2d 63, 67 (1st Dept. 1998) (denial of access to corporation's books and records not a breach of fiduciary duty where the plaintiff failed to show or even allege "that there was a violation of any resolution of the corporation."). *See also JAS Family Trust v. Oceana Holding Corp*., 109 A.D.3d 639, 643 (2d Dept. 2013) ("speculative, vague, and conclusory" allegations were "insufficient to establish a proper purpose for the inspection of [books and records of the corporation."); *Lewis v. Riklis*, 82 A.D.2d 789, 789 (1st Dept. 1981) (in derivative action, upholding protective order prohibiting examination of the corporate defendant because complaint that only made conclusory allegations of corporate waste was "a fishing expedition, which courts of this state refuse to countenance."); *Emmrich v. Technology for Information Management, Inc.*, 91 A.D.2d 777, 777-78 (3rd Dept. 1982) (denying pre-action

disclosure request for books and records because the plaintiff's affidavit "was wholly insufficient for this purpose and does no more than state the barest of conjectures.").

E. The Allegations Regarding the New York Times Article Fail To State A Breach of Fiduciary Duty Claim.

The Amended Complaint's allegation that "Libra conspiring with Mary and others, allowed a reporter to have access to Peter, provided the Times and its reporter with false information . . . portraying Adam and his team in a false light and making it appear that customers of Peter Max art on cruise ships. . .were essentially purchasing counterfeit goods[,]" does not plead a breach of fiduciary duty claim against Libra with sufficient particularity.

First, Adam neither specially alleges what the "false information" was nor when Libra allegedly told the New York Times reporter that information. Accordingly, this claim does not meet the specificity requirements for breach of fiduciary duty claims. *Burry v. Madison Park Owner LLC*, 84 AD3d 699 (1st Dept. 2011) (plaintiff had failed to sufficiently plead breach of fiduciary duty where "plaintiffs' allegations of "misconduct" . . . [were] in essence claims of fraud that ha[d] not been pleaded with particularity (*see* CPLR 3016 [b])"); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2nd Dept. 2011) ("A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)"); *Swartz v. Swartz*, 145 A.D.3d

818, 823 (2nd Dept. 2016) (same). *See also Parker Waichman LLP v. Squier, Knapp & Dunn Communications, Inc.*, 138 A.D.3d 570, 570-71 (1st Dept. 2016) ("the complaint's boilerplate allegations that defendants disclosed confidential information, thereby causing harm[,]" were insufficiently particular under CPLR § 3016(d) to state a cause of action for breach of fiduciary duty); *Luckow v. RGB Design-Build, Inc.*, 156 A.D.3d 1289, 1294 (3rd Dept. 2017) ("general statement that [the defendant] misrepresented its degree of expertise and competence with regard to th[e] project" insufficiently particular under CPLR § 3016(d) to state a claim for fraudulent inducement); *Tsatskin v. Kordonsky*, 189 A.D.3d 1296, 1299 (2d Dept. 2020) (to state a claim for defamation the "complaint must set for the particular words allegedly constituting defamation (CPLR § 3016(a)) and it also must allege the time, place and manner of the false statement and specify to whom it was made."); *Dillon v. City of New York*, 261 A.D.2d 34, 38, 39-40 (1st Dept. 1999) (same, and holding that allegation that the defendant had used words "implying that [one of the plaintiffs] was untrustworthy and underhanded" required dismissal because "[t]he particular words giving rise to the implication are not set

forth in any manner that would support a defamation claim, leaving only a vague and conclusory allegation. . . .").[12]

Further, because the allegation lumps together Libra, Mary Max and unnamed others and does not specify the precise conduct in which each of them is supposed to have engaged, the allegation "was an improper group pleading" which fails to satisfy CPLR § 3016. *See Principia Partners LLC v. Swap Financial Group, LLC*, 194 A.D.3d 584, 584 (1st Dept. 2021) (dismissing claim for improper group pleading); *Eastman Kodak Co. v. Roopak Enterprises, Ltd.*, 202 A.D.2d 220, 222 (1st Dept. 1994) (fraud allegations not plead with sufficient particularity when they did not, among other things, specify which employee made the purported misrepresentations).[13]

Not to mention that the allegation that Libra would try to sabotage her own family's company—the company she had just fought for years to gain control of—

[12] Because Respondents argued below that Adam's allegations pertaining to the New York Times article should be dismissed for lack of particularity, (S.R.23, S.R.39 ("Adam does not allege what that 'false information was.'"); S.R.80 n.5 (describing how Adam's allegations with regard to the New York Times article did not meet the particularity requirement of CPLR § 3016(b)), this Court may affirm the dismissal of those claims for lack of particularity notwithstanding the fact that the Motion Court dismissed those claims on other grounds (R20-R21). *Fenton v. Consolidated Edison Co.*, 165 A.D.2d 121, 125 (1st Dept. 1991) ("[a party] is entitled to have [a] determination affirmed on any ground [it] raised before the [trial] court" even if the trial court ruled for the party on other grounds); *Murray, Hollander, Sullivan & Bass v. HEM Research, Inc.*, 111 A.D.2d 63, 66 (1st Dept. 1985) (same).

[13] The Amended Complaint's allegation that Libra breached her fiduciary duty by allegedly "allow[ing]" the New York Times reporter to have access to Peter Max fails because (1) the allegation does not explain how allowing the reporter to have such access would breach any duty Libra owed to ALP; and (2) the Amended Complaint does state with particularity the manner in

by telling the New York Times that the company had engaged in selling counterfeit goods (R. 271, ¶ 55), is inherently incredible and for that reason does not need to be accepted by this Court. *See, e.g.*, M&E 73-75, LLC v. 57 Fusion LLC, 189 A.D.3d 1, 5 (1st Dept. 2020) ("While factual allegations set forth in a complaint should be accorded every favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration."). To the extent Adam relies on the New York Times article itself to back up this allegation, the article provides no support. As Justice Bannon pointed out, "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.'" R21 (quoting New York Times Article). Libra's statement neither mentions Adam or his team nor suggests that they had sold counterfeit paintings.

Justice Bannon further correctly found that the Amended Complaint's breach of fiduciary duty claim against Libra concerning the New York Times article could not stand because the article flatly contradicts the allegations that constitute that claim. R20-R21.

which Libra supposedly "allowed" the New York Times reporter to have that access or whether it was Libra who "allowed" that access as opposed to Mary or unnamed "others."

Adam's citations to cases that hold that newspaper articles are inadmissible hearsay (Appellant Br. at 25) do not help him here. Respondents are not relying on the New York Times article to prove the truth of the matters asserted therein, but rather to show that the article does not support Adam's allegations regarding Libra. *People v. Kines*, 37 A.D.3d 1, 18 (1st Dept. 2006) ("While out-of-court statements are generally not admissible for the truth of the matter asserted, they are not excluded as hearsay when the declaration is relevant for another purpose.") (internal citations omitted); *Conit v. Dunne*, 337 F.Supp.2d 344, 357 (S.D.N.Y. 2004) (court takes into consideration copies of articles printed in a magazine not for the truth of the matters asserted therein, but to aid the court in its determination of whether the plaintiff stated a claim for relief of slander); *Goldman v. Barret*, No. 15 cv 9223, 2017 WL 4334011, at *1 n.4 (S.D.N.Y. Sep. 25, 2017) (same, citing cases). In any event, as noted above, the Amended Complaint's allegations against Libra regarding the New York Times article were properly dismissed for the independently sufficient reason that these allegations do not satisfy the particularity requirements of CPLR §3016.

F. Any Remaining Allegations of Breach of Fiduciary Duty Fails to Meet the Particularity Required by CPLR § 3016(b).

"Breach of fiduciary duty must be pled with the particularity required by CPLR 3016(b)." *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808 (2nd Dep't 2011). *See also Deblinger v. Sani-Pine Prod. Co.*,

107 A.D.3d 659, 660 (2nd Dep't 2013) ("A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b).") (collecting cases). Thus, "the pleadings must contain specific factual allegations as to the conduct that constituted a breach of fiduciary duty, and not be based merely on conclusory allegations." *Shah v. Metro. Life Ins. Co.*, 2003 WL 728869, at *15 (N.Y. Sup. Ct. Feb. 21, 2003). Other than the three issues actually addressed in the body of the Amended Complaint (discussed above), the other smattering of alleged bad acts are contained in a string-cite within the breach of fiduciary count itself, with no elaboration or discussion whatsoever. *See* R273-R275, ¶¶ 67-73.[14] Such allegations are wholly conclusory, and, as such, were properly dismissed. *See Hyman v. New York Stock Exchange*, 46 A.D.3d 335, 337 (1st Dep't 2007) (dismissing breach of fiduciary duty claim for failure to satisfy pleading requirements of § 3016(b)); *DeRaffele v. 210-220-230 Owners Corp.*, 33 A.D.3d 752, 752-53 (2d Dep't 2006) (dismissing breach of fiduciary duty claim because

[14] Defendants alleged to have breached their fiduciary duties by "leaving important positions vacant or otherwise staffing them with inexperienced and incapable personnel" (R273-R274, ¶ 67), "failing to be transparent with financial details of the Corporation" (R274., ¶ 69), "failing to secure or ascertain the current true financial condition of the Corporation" (*id.*), "failing to appoint a new management team to run its day to day operations in line with proper corporate governance" (*id.*), "failing to prevent the further dissipation of the Corporation and its assets" (*id.*), "fail[ing] to disseminate accurate and truthful information to the Corporation, its shareholders and public officials" (*id.*, ¶ 70), "[failing to] obtain essential personnel" (R275, ¶ 72), "causing ALP to breach its contractual obligations with its professional, consultants, salespersons, clients and customers" (*id.*, ¶ 73), and "conspiring with Mary, Flynn and others for their own personal vendetta and agenda" *id.*

plaintiff "failed to allege sufficient specific facts (see CPLR 3016(b)) that the actions... [of the] Board of Directors were undertaken in bad faith"); *Black Car & Livery Ins., Inc. v. H & W Brokerage, Inc.*, 28 A.D.3d 595, 596 (2nd Dep't 2006) ("the claims of fraud and breach of fiduciary duty have not been pleaded with sufficient detail as to the respondent as required by statute") (citing CPLR 3016(b)).

As to the issue of Libra's and Michael's qualifications, those allegations, too, fail for lack of particularly; Adam sheds no light whatsoever on what "skill, talent, ability or training" he believes directors and officers or ALP must have—he simply states that, whatever those traits are, Libra and Michael do not possess them. R.268-269, ¶ 45.

II. APPELLANT'S ALLEGATIONS DO NOT MEET THE EXACTING STANDARD FOR EXCUSING PRE-SUIT DEMAND.

Even if Appellant had alleged a breach of fiduciary claim or negligence claim, dismissal of the Amended Complaint should be affirmed because Appellant has failed to make a pre-suit demand, or to allege its futility.

Shareholder derivative actions "[b]y their very nature...infringe upon the managerial discretion of corporate boards" because "[a]s with other questions of corporate policy and management, the decision whether and to what extent to explore and prosecute such claims lies within the judgment and control of the

corporation's board of directors." *Marx v. Akers*, 88 N.Y.2d 189, 194 (1996) (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 631 (1979)). As such, New York law sets stringent limits on when a shareholder can proceed with a derivative suit on behalf of a corporation; the BCL requires that the "company 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." BCL § 626(c). *See Marx*, 88 N.Y.2d at 193-194. New York courts have observed that "presuit demand is the rule, that excusing demand is the exception, and that the exception should not be permitted to swallow the rule." *In re Omni-com Grp. Inc. Shareholder Deriv. Litig.*, 43 A.D.3d 766, 768 (1st Dept. 2007).

Here, Adam never made a pre-suit demand to the board. The sum total of Adam's allegations regarding demand futility are (a) that "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" (R272, ¶ 62); (b) that "the absolute voting power of Libra due to her alignment with Flynn and representing 60% of the voting rights of the Corporation's shares would make any such demand to the Board futile" (R272-R273, ¶ 63); and (c) that any demand would have been futile because the Board "fail[ed] to take any remedial steps in connection [with the filing of the original Petition/Complaint]" *Id.* These allegations are woefully deficient.

"In New York, to overcome a motion to dismiss for failure to plead demand futility, a plaintiff must have alleged 'with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgement in approving the transaction.'" *Goldstein v. Bass*, 138 A.D.3d 556, 556–57 (1st Dept. 2016) (quoting *Marx*, 88 N.Y.2d at 200-201). To adequately plead self-interest under prong (1), "the complaint must set forth facts alleging that the directors "receive[d] a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Walsh*, 116 A.D.3d at 847 (citation omitted).

Adam has failed to satisfy this standard; he has not alleged that Libra or Michael have received some sort of benefit from their new business strategy that Adam has not. And "[b]ecause the … amended complaint fails to adequately describe the challenged transactions or allege in what manner they were inappropriate, it also fails to 'allege[ ] with particularity that the board of directors did not fully inform themselves about the challenged transaction[s] to the extent reasonably appropriate under the circumstances' or that 'the challenged transaction[s were] so egregious on [their] face that [they] could not have been the product of sound business judgment.'" *Walsh*, 116 A.D.3d at 847–48. *See also Goldstein*, 138 A.D.3d at 556–57 (quoting *Marx*, 88 N.Y.2d at 200-201) (affirming

motion to dismiss derivative suit where plaintiff "did not allege that any member of the board was interested in the various challenged transactions," there were "no particularized allegations as to what the board members should have considered or investigated to properly inform themselves about the challenged transactions," and "[t]he complaint also fail[ed] to allege facts, such as self-dealing, fraud or bad faith, that would establish that the [transaction] could not have been the product of sound business judgment."); *Glatzer*, 47 A.D.3d at 676 (affirming dismissal of derivative suit where plaintiff failed to meet pleading burden); *Teachers' Ret. Sys. of La.*, 244 A.D.2d at 231-32 (same); *Bildstein*, 222 A.D.2d at 546 (same); *Lewis v. Welch*,126 A.D.2d 519, 521 (2d Dept. 1987) (same); *Alpert v. Nat'l Assoc. of Sec. Dealers, LLC*, 7 Misc.3d 1010(A), at *10 (N.Y. Sup. Ct. 2004) (dismissing derivative action where plaintiff failed to meet pleading burden); *City of Tallahassee Ret. Sys.*, 2009 WL 6019489(same) (stating that "[r]isk of personal liability by the majority of a board of directors does not render a demand futile.").[15]

The cases relied on by Adam to the contrary (Appellant Br. at 27-29) are inapposite because they all alleged futility with sufficient particularity or did not address the particularity question. For example, the facts of *Bansbach v. Zinn*, 1

[15] *See also Barone v. Sowers*, 128 A.D.3d 484, 484–85 (1st Dept. 2015) ("alleged concealment of financial information does not warrant a finding that demand was futile, since '[a] corporation's refusal to provide information to its shareholders is not on the [ ] list of circumstances where demand is excused.'") (citation omitted); *Wyatt v. Inner City Broad. Corp.*, 118 A.D.3d 517 (1st Dept. 2014) (a corporation's refusal to provide information to its shareholders is not on the above list of circumstances where demand is excused).

N.Y.3d 1 (2003) were unique and find no parallel here. Appellant Br. at 28. There, the court found as proof of an individual's domination and control of other directors the fact that the board had voted to indemnify that individual for legal costs and expenses associated with that individual's defense, sentencing and incarceration, and all fines assessed against him individually, despite the fact that the individual had pleaded guilty to knowingly violating the law and "in open court admitted to having implicated the corporation in his criminal conduct." *Id*. at 12. The Amended Complaint in the instant case alleges nothing of the kind against Respondents, let alone with the requisite particularity.

III. THE AMENDED COMPLAINT DOES NOT PLEAD FACTS SUFFICIENT TO OVERCOME THE POWERFUL PRESUMPTION OF NEW YORK'S BUSINESS JUDGMENT RULE.

The business judgment rule provides an additional, independent grounds to affirm the dismissal of the breach of fiduciary duty and negligence claims.

It is well-settled that "[t]he business judgment rule 'bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 360 (2005) (quoting *Auerbach*, 47 N.Y.2d at 629). This fundamental rule of New York corporate law "is necessary to avoid judicial second-guessing of corporate decisions and provides protection where a decision is made in good faith and after reasonable

investigation." *Shapiro v. Rockville Country Club, Inc.*, 2 Misc. 3d 1002(A), at *9 (Sup. Ct. 2004). The business judgment rule shields both directors and officers of a corporation. *In re Kenneth Cole Productions, Inc.*, 27 N.Y.3d 268, 274 (2016) ("[W]e have long adhered to the business judgment rule, which provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation's interests, courts will defer to those determinations if they were made in good faith."). The Amended Complaint altogether fails to allege facts sufficient to overcome the "powerful presumptions of the business judgment rule." *Kimeldorf v. First Union Real Estate Equity & Mortg. Invs.*, 309 A.D.2d 151, 155 (1st Dept. 2003).

That is because the presumption of the business judgment rule may be overcome only by pleading particularized facts showing the board or corporate officer failed to act "in good faith and in the exercise of honest judgment." *Auerbach*, 47 N.Y.2d at 629. "Absent evidence of bad faith or fraud... the courts must and properly should respect" a board's decisions. *Id*. at 631. *See also DeRaffele*, 33 A.D.3d at 752-753 (dismissing breach of fiduciary duty claim because plaintiff "failed to allege sufficient specific facts... that the actions... [of the] Board... were undertaken in bad faith"); *Simpson v. Berkley Owner's Corp.*, 213 A.D.2d 207, 207 (1st Dept. 1995) (the business judgment rule "permits judicial inquiry into claims of fraud or self-dealing by board members but only

where such claims have a basis.") (internal citations omitted); *Deblinger*, 107 A.D.3d at 661 (collecting cases and affirming dismissal of breach of fiduciary duty claim grounded on, amongst other things, the "commence[ment] of unnecessary legal proceedings," because "[t]he allegations [were] insufficient to support a finding that [defendant] committed these acts in bad faith, or without exercising her 'honest judgment in the lawful and legitimate furtherance of corporate purposes.'").

Adam's reliance on *Lemle v. Lemle*, 92 A.D.3d 494 (1st Dept. 2012) (Appellant Br. at 40) is misplaced. In *Lemle*, this Court found that the complaint's specific and detailed allegations that defendants had engaged in falsification of documents, bad faith and self-dealing were sufficient to overcome the business judgment rule at the pleading stage. 92 A.D.3d at 497-98 (complaint alleges that (1) the defendants "falsified their corporate loan accounts and other corporate records to eliminate millions of dollars of principal and interest owed by them to the corporation"; (2) the defendants "wrongfully transferred corporate assets to themselves and others by way of excessive compensation and benefits, reimbursement for inappropriate personal expenses, and salaries or bonuses paid to individuals who performed no work for the corporation"; (3) the defendants "made statements suggesting that there was no legitimate basis for inflated compensation"; (4) the defendants objected "when plaintiff proposed an outside

auditor. . . saying that they would be unable to answer questions about what they did for the company to earn their compensation"; and (5) "salary and benefits were paid to individuals who did no work for the corporation."). There are no similar allegations against Respondents here.

While Adam may disagree with the Board's decisions to fire Adam's cronies and sue them for the money they stole from the Company, such "allegations that another course of action might have been more advantageous [are] insufficient" to rebut the business judgment rule. *Shah*, 2003 WL 728869, at *15. *See also HF Lexington KY LLC v. Wildcat Synergy Manager LLC*, 35 Misc. 3d 1210(A) (N.Y. Sup. Ct. 2012) (dismissing complaint for failure to plead bad faith where plaintiff alleged that "[the defendant's principal] was not and is not equipped to manage the [defendant corporation]."); *Fischbein v. Beitzel*, No. 101553/99 (Sup. Ct. N.Y. Co. Oct. 27, 1999) (dismissing complaint on ground that business judgment rule precluded claim alleging directors had approved a transaction without "full and thorough investigation" and "failed to consider other viable and preferable strategic alternatives"), *aff'd*, 281 A.D.2d 167 (1st Dept. 2001); *Amfesco Indus., Inc. v. Greenblatt*, 172 A.D.2d 261, 264 (1st Dept. 1991) ("[A] cause of action [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.") (citing *Kamin v. Am.Exp. Co.*, 86 Misc. 2d 809, 811 (N.Y. Sup. Ct. 1979), *aff'd* 54 A.D.2d

654 (1st Dept. 1976)); *In re Midway Jewish Ctr.*, 16 Misc. 3d 607, 612 (N.Y. Sup. Ct. 2007) (applying business judgment rule in absence of allegation of bad faith where basis of complaint was that defendant "failed to explore other financial alternatives."); *Dennis v. Buffalo Fine Arts Acad.*, 15 Misc. 3d 1106(A) (N.Y. Sup. Ct. 2007) (applying business judgment rule where board believed that "deaccession" of valuable works of art at auction was necessary to promote fine art academy's "focus on maintaining a world-renowned modern and contemporary art museum" and was "necessary for the continued existence and notoriety" of the museum); *Pomerance v. McGrath*, 124 A.D.3d 481, 483 (1st Dept. 2015) (striking cause of action which "allege[d] that the board acted in bad faith and for an improper purpose by wasting the condominium's funds on unnecessary litigation" because "issues of how aggressive the board should be" in litigation, and "whether it should discontinue a lawsuit," "are matters of business judgment.").

IV. THE NEGLIGENCE CLAIM IS DUPLICATIVE OF THE BREACH OF FIDUCIARY DUTY CLAIM.

In addition to being precluded by the exculpatory clause, the failure to allege demand futility, and the business judgment rule, the negligence claim fails for the independent reason that it "is based upon the same allegations as the breach of fiduciary duty claim and seek[s] the same relief. . . ." R21. *See, e.g., NYAHSA Services, Inc. v. People Care Inc.*, 167 A.D.3d 1305, 1309 (3rd Dept. 2018) (negligence claim properly dismissed as duplicative of breach of fiduciary duty

claim because they were both based on the same allegations and sought the same relief).

On appeal, Adam contends in a conclusory fashion that his negligence claim "is not duplicative of the other claims" and that "intentional conduct and grossly negligent conduct are different." Appellant Br. at 30, 39. However, he makes no attempt whatsoever to explain how these assertions make the negligence and breach of fiduciary duty claims in this case non-duplicative. These "arguments" are nothing more than baseless ipse dixit. Moreover, the two cases Adam relies on to support his argument are completely inapposite. *See Postiglione v. Castro,* 119 A.D.3d 920, 922 (2d Dept. 2014) (causes of action for fraud and legal malpractice not duplicative because "the cause of action alleging fraud makes no claim of inadequate or negligent legal representation"); *Llanos v. T-Mobile USA, Inc.*, 132 A.D.3d 823, 824 (2d Dept. 2015) (claim under New York City Human Rights Law not duplicative of claim under New York State Human Rights Law because "the [New York City Human Rights law's] uniquely broad and remedial purposes [] go beyond those of counterpart state or federal civil rights laws.") (internal quotation marks omitted).

V. THE CLAIMS FOR AN ACCOUNTING, ATTORNEY'S FEES, AND FOR THE REMOVAL OF DIRECTORS AND OFFICERS FAIL BECAUSE THE UNDERLYING CLAIMS FAIL, AND ADAM'S REMAINING ARGUMENTS LACK MERIT.

The Motion Court correctly dismissed the claims for an accounting, attorney's fees and for the removal of directors and officers based on Adam's failure to allege an underlying cause of action. R21-R22. *See Palazzo v. Palazzo*, 121 A.D.2d 261, 265 (1st Dep't 1986) (a plaintiff seeking an accounting must properly allege a breach of fiduciary duty by the defendant); R278, ¶ 92 (basis of claim for attorneys' fees is BCL § 626(e), which permits recovery of attorneys' fees by a successful plaintiff in a derivative suit); *Board of Managers of 28 Cliff Street Condominium v. Maguire*, 191 A.D.3d 25, 34 (1st Dept. 2020) (BCL 626(e) "permits legal fees to be paid to an owner who successfully asserts the interest of an entity when the management of the entity fails to protect that interest.") (internal quotation marks omitted); R279, ¶ 95 (claims for removal of directors and officers based on BCL § 706(d) and BCL § 716(c), each of which only permit removal for cause); *Benedict v. Whitman Bereed Abbot & Morgan*, 110 A.D.3d 935, 937-38 (2d Dept. 2013) (holding that to remove a director or officer pursuant to BCL §§ 706(d), 716(c), the plaintiff must prove that the director or officer engaged in "wrongdoing").

The cases Adam relies on for the contrary are inapposite (Appellant Br. at 31) because they do not concern situations where, as here, the plaintiffs' underlying causes of action were dismissed at the pleading stage. *See Colucci v. Canastra*, 130 A.D.3d 1268, 1269-70 (3rd Dept. 2015) (case concerning motion

for summary judgment where the "[p]laintiffs submitted prima facie evidence that there was cause for defendant's removal due to his use of [the corporation's] profits to pay for clubhouse operations that only benefitted him as the sole shareholder of [another corporation]."); *Grace v. Grace Institute*, 19 N.Y.2d 307, 311-14 (1967) (case does not concern pleadings, but rather concerns whether the evidence submitted in an article 78 proceeding justified the plaintiff's removal).

Adam also argues, as he did below, that because Respondents' Notice of Motion does not expressly state that they seek dismissal of the "first, second, third, fourth, fifth, sixth and seventh" claims, but states instead that they seek an order "dismissing the claims against them," "no cause of action may be dismissed if any one of them survives dismissal." (Appellant Br. at 31-32.) This argument is as frivolous as it sounds. *See Skillgames, LLC v. Brody*, 1 A.D.3d 247, 252 (1st Dep't 2003) ("[W]hen, as [is] the case here, the motion particularizes why each claim should be dismissed, the court should treat the motion as applying to each cause of action alleged in the complaint, regardless of how the motion is denominated.") (internal citation omitted); *Gamiel v. Curtis & Reiss-Curtis, P.C.*, 16 A.D.3d 140, 141 (1st Dept. 2005) ("Where a motion to dismiss for failure to state a cause of action particularizes each of the claims in the complaint, even though it is nominally addressed to the complaint as a whole, the court should treat that motion as applying to each individual cause of action alleged.").

Grasping at straws, Adam next argues that the Motion Court should have denied Respondent's motion in its entirety because Respondent had not attached a copy of the Amended Complaint to its motion.[16] Adam's argument is meritless. *Galpern v. Air Chiefs, L.L.C.*, 180 A.D.3d 501, 502 (1st Dept. 2020) ("The motion court providently exercised its discretion under CPLR 2001 to disregard plaintiff's failure to submit the pleadings because the record was 'sufficiently complete' and otherwise available to the court and parties on the NYSCEF docket."); *Studio A Showroom, LLC v. Yoon*, 99 A.D.3d 632, 632 (1st Dept. 2013) ("Although [the defendant] failed to include the pleadings with its motion, the error was properly overlooked, as the pleadings were filed electronically and thus were available to the parties and the court.").

In addition, Adam provided the Motion Court with a copy of the Amended Complaint in his opposition papers below. R257-R258, R259-R285. *See Sensible Choice Contracting, LLC v. Rogers*, 164 A.D.3d 705, 706-07 (2d Dept. 2018) (motion court properly disregarded defendants' failure to attach pleadings to their motion because "the pleadings were not only electronically filed and available to

[16] Respondents intended to file the Amended Complaint with their motion papers, as Exhibit 24 to counsel's affirmation below (*see* R30, ¶ 20), but they inadvertently omitted to e-file what would have been Exhibits 14 through 28 to counsel's affirmation below (*see* R.29-30). In any event, this omission has no impact on this appeal: the documents are not otherwise necessary for the Order below to be affirmed, and to the extent any of those documents are relevant to this appeal, they are cited in this brief as a court record cite, which are documents that this Court may take judicial notice of.

the Supreme Court and the parties, but the answer was submitted by the defendants in opposition to the motion, and the summons and complaint were submitted in reply by the plaintiff."). The cases Adam cites (Appellant Br. at 33) stand for the proposition that a motion to dismiss *may* be denied where either (1) the movant does not attach a copy of the pleadings, the pleadings are actually necessary to decide the motion, and the court otherwise does not have access to a copy of them, *Alizio v. Perpignano*, 225 A.D.2d 723, 724-25 (2d Dept. 1996); *Start Elevator, LLC v. Macombs Place, LLC*, 60 Misc.3d 1225(A), 2018 WL 4000423, *1-2 (N.Y. Civ. Ct. 2018); or (2) the motion court chooses not to exercise its discretion under CPLR § 2001 to overlook the movant's omission. *See Gibbs v. Kings Auto Show Inc.*, 47 Misc.3d 1203(A), 2015 WL 1442374, at *2 (N.Y. Sup. Ct. 2015). Neither of the above is the case here. Moreover, even had the Motion Court here refused to exercise its discretion pursuant CPLR § 2001 to overlook the movant's omission (it did not), this Court would could still exercise its own discretion and overlook that omission. *E.g., Long Island Pine Barrens Society, Inc. v. County of Suffolk*, 122 A.D.3d 688, 691 (2d Dept. 2014) (so doing).

VI. THE AMENDED COMPLAINT DOES NOT STATE A CLAIM FOR THE APPOINTMENT OF A RECEIVER UNDER CPLR § 6401 OR BCL § 1202.

The Motion Court correctly dismissed the Amended Complaint's second cause of action for appointment of a receiver pursuant to CPLR § 6401 and BCL §

1202. Dismissal was proper as to Appellant's request for such appointment under CPLR § 6401 because "[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*, 92 A.D.3d at 498 (affirming dismissal of cause of action seeking appointment of a temporary receiver under CPLR § 6401).

Adam's request for appointment of a receiver pursuant to BCL§ 1202(a)(3) (the only possibly applicable sub-section) also failed as a matter of law because that subsection only permits the appointment of a receiver "to preserve the assets of a corporation which has no officer within this state qualified to administer them." Adam has not alleged that Libra or Michael are not "within the state"; to the contrary, Adam's purported basis for jurisdiction over Libra and Michael are that they "regularly transact[] business within the State of New York, including but not limited to" Libra acting as "as a purported officer and putative director of ALP" and Michael acting as a "purported director of ALP[.]" R259-R260 ¶¶ 2-3). Adam conceded by not opposing this argument below.[17] In any event, the allegations that Libra and Michael reside in California do not properly state a claim

[17] The sum of Adam's argument in opposition of Respondents' motion for dismissal of the receiver claim was that "dismissal of the cause of action for a receiver should not be granted as plaintiff seeks a receiver under the Business Corporate Law, in addition to Article 64 of the CPLR . . ." S.R.60.

that they are not "within the state" in light of the other allegations in the Complaint, discussed above.[18]

CONCLUSION

For the reasons stated above, the Motion Court's order dismissing the Amended Complaint against Respondents should be affirmed.

Dated: New York, New York
December 31, 2021

Respectfully submitted,

SCHLAM STONE & DOLAN LLP

By: 

Jeffrey Eilender
Jolene LaVigne-Albert
26 Broadway
New York, NY 10004
Tel: (212) 344-5400
jeilender@schlamstone.com
jlavignealbert@schlamstone.com

Attorneys for Respondents

[18] Over a century ago, this Court, when interpreting a predecessor statute to BCL § 1202, stated that "[i]n the case of a domestic corporation, it is difficult to see how the subdivision could apply unless upon the sudden physical incapacity or decease of all the directors in office." *Ehret v. George Ringler & Co.*, 144 App. Div. 480, 484 (1st Dept. 1911) (internal quotation marks omitted). The Amended Complaint in this case alleges no such thing and, in fact, makes clear that Libra was administering the assets of ALP in New York.

PRINTING SPECIFICATIONS STATEMENT

The foregoing brief was prepared on a computer (on a word processor). A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14 point (except footnotes at 12 point)
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 13,634.