To Be Argued By:
Robert Johnson
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2021-02747

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

Plaintiffs-Appellants,

against

ALP, INC., LIBRA MAX,

Defendants-Respondents,

and

MICHAEL ANDERSON,

Defendant.

LAWRENCE FLYNN,

Non-Party Respondent.

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authoriti

PRELIMINARY STATEMENT

Appellant Adam Max respectfully submits this Appellant's Brief in support of his appeal from an Order of the Supreme Court, County of New York dated June 6, 2021 (Bannon, J.) granting the motion of respondents Libra Max, Michael Anderson and nominal respondent ALP, Inc., dismissing the Amended Verified Complaint.

THE QUESTIONS PRESENTED

I. Whether a cause of action that is well pled and sets forth in detail claims for breach of fiduciary duty and other corporate malfeasance may be dismissed for failure to state a cause of action?

The Lower Court answered this question in the affirmative.

II. Whether a pre-action demand upon officers and directors of a corporation to bring an action against themselves for wrongdoing and malfeasance is required where such officers and directors are the only parties in the transactions complained of?

The Lower Court answered this question in the affirmative.

III. Whether a corporate exculpation clause contained in an uncertified and unverified corporate record submitted without a foundation is a sufficient basis to dismiss such claims against both directors and officers even where such officers are not covered by the exculpation clause?

The Lower Court answered this question in the affirmative.

IV. Whether a motion to dismiss not directed against each individual cause of action, but against all "claims" generally may be utilized to dismiss all claims where one or more claims survives dismissal?

The Lower Court implicitly answered this question in the affirmative.

V. Whether dismissal is warranted where the movant is in possession of vital records that would defeat dismissal and the movant refuses to produce them?

The Lower Court implicitly answered this question in the affirmative.

STATEMENT OF FACTS

A. Nature of the Action and Description of the Parties

The facts, as on any motion to dismiss must be gleaned from the complaint itself. This is a corporate derivative action brought by plaintiff Adam Max ("Adam" or "Appellant") against defendant Libra Max ("Libra" or "Respondent"), as an officer or director of ALP, Inc. ("ALP" or "the Corporation") and defendant Michael Anderson ("Anderson") as a director (R259-284). The Corporation is a nominal respondent.

The Corporation was founded in 2000 by Peter Max ("Peter"), an iconic artist (R260). At all times since its founding, the shares of the Corporation have been owned as follows: Peter 20%, his son Adam 40% and his daughter Libra 40% (R260).

B. The Financial History of the Corporation

From 2000 to 2012, ALP was managed by Peter (R261). In 2012, Peter requested Adam, a New York City resident with prior experience in the business and art world, the holder of a law degree, and an employee of the Corporation for a dozen years, to assume management (R261). The Corporation was in dire financial circumstances (R260). However, once Adam assembled a new management team, including CPA Robert Frank and business and insurance consultant Lawrence Moskowitz, the Corporation's fortunes improved, and its net income rose from negative (-$5,387,071) in 2013 to positive $7,256,724 in 2017 (R262). In 2018 the Corporation had a net profit of $30,392,741 and had projected sales for 2019 in excess of $50,000,000 (R264). This all occurred while Libra resided in California and took no active role in the business (R214).

C. Libra Takes Control of the Board of Directors Under False Pretenses

In 2017, despite the Corporation's financial success, Libra sought to compel Adam to conduct a shareholders meeting for the purpose of electing new directors (R266-267). The meeting was held on December 10, 2018 (R268). On that date, Peter's guardian, Lawrence Flynn, aligned himself with Libra and appointed Michael Anderson ("Anderson") as a third member of the board of directors ("the Board") (R268-269). Since Libra and Adam were the only other directors, and Libra had

proposed Anderson to serve at her behest, this gave Libra control of the Board (R268-269). Anderson was a California resident who had no prior relationship or contact with the Corporation, but was instead an acquaintance and bookkeeper for Libra (R268-269).

D. Damages Caused by the Respondents' Wrongdoing

Upon assuming control of the Board, Libra, acting in concert with Anderson, began to destroy everything that had been accomplished by Adam over the past six years. Because of the obvious wrongdoing and malfeasance that was being perpetrated, Adam commenced the within action and filed an Amended Verified Complaint ("the Complaint") on August 1, 2019 (R259-285). As personally verified by the Appellant, it alleges the following acts of malfeasance and wrongdoing:

> 46. That with the takeover complete, the recipe for disaster that Libra had set in motion came to fruition with results that have been both spectacular in their failures and calamitous in their results.
>
> 47. That amongst other things, Libra has flagrantly wasted and expended an untold amount of legal fees in her pursuit in the takeover and ultimate destruction of the Corporation which are being billed to and paid for by the Corporation in the total breach of her fiduciary duties.
>
> 48. That although the amount of fees can only be guessed at, it is necessary to point out that Flynn, acting in concert with Libra and Mary [Peter's now deceased wife],

currently seeks over $108,000 in legal fees 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 to the detriment of Peter as a 20% shareholder.

49. That upon removing Adam as President, Libra and Anderson took steps to diminish his 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.

50. That to add insult to injury, Libra and Anderson terminated Lawrence [Moskowitz] as a consultant and advisor to the Corporation, took the improper and insupportable position that he should not even have been paid for his efforts, and set the scene for a total disruption and unsuccessful conclusion of the efforts to obtain the remaining $200,000,000 in insurance claims, $15,000,000 in expense receipts and bad faith claims totaling even more, all of which have been seriously jeopardized, if not eliminated by the actions of Libra and Anderson which were made without any thought, reflection or consideration.

51. That on top of that, Libra and Anderson caused the Corporation to become embroiled in what should have been unnecessary litigation with Lawrence, thus resulting in yet another wasteful dissipation of corporate assets through the payment and expenditure of legal fees, including fees owed to Lawrence pursuant to ALP's indemnification obligations, and the disruption and destruction of an invaluable business relationship.

52. That in addition, Libra and Anderson terminated Robert [Frank] and Bender, thereby disrupting

all of their efforts on behalf of the Corporation, replacing them with ineffective and expensive substitute accounting service providers, and embroiling the Corporation in another round of costly litigation, including unnecessary litigation involving fees owed to Bender pursuant to ALP's indemnification obligations and otherwise, while at the same time destroying an equally valuable business relationship that had been continued for years with great success.

53. That to make matters worse, Libra and Anderson terminated Gene [Luntz], a prominent and highly regarded art dealer and broker, terminating yet another valuable and irreplaceable business relationship, thus cutting off the source of virtually all of the Corporation's sales of Peter Max artwork resulting in what is believed to be a catastrophic reduction in sales and business volume, and engaged Gene in yet another set of expensive and totally unnecessary litigation, to the detriment and prejudice of the Corporation.

54. That perhaps the most damaging of all, Libra and Anderson became entangled in a bitter financial dispute with Park West [Galleries], took the improper and legally unsupportable position that a $15,000,000 sale of Peter Max artwork should be canceled, breached the Corporation's obligations with Park West, and involved the Corporation with at least two other expensive lawsuits, both wholly unnecessary, while causing the destruction of the main source of revenue of the Corporation during its renaissance, based upon the false and demonstrably untrue supposition that Adam had sold off all of ALP's saleable inventory to Park West in December 2018, when in truth and in fact, the quantity of inventory of the Corporation by crate was 1,860,321 items prior to that sale; the Park West order consisted of only 21,144 quantity by crate, leaving a quantity by crate of 1,839,177 after the sale, including tens

of thousands of "Peter's Keepers" available for sale but which can no longer be sold, as the Corporation no longer has any viable customers.

55. 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, thus decimating the value, good name and reputation of the artwork created by Peter to the irretrievable detriment of the Corporation, thereby destroying the six year recovery brought by Adam and his team in one fell swoop.

67. That the defendants have breached their fiduciary duties by failing to take the necessary steps to appoint certain directorial and managerial positions of the Corporation by terminating Adam and his team, by leaving important positions vacant or otherwise staffing them with inexperienced and incapable personnel, by allowing Libra to assume unchecked executive functions as the Chairman of the Board, President and CEO of the Corporation, all to the Corporation's detriment.

68. That the defendants have breached their fiduciary duties by directing and/or allowing the Corporation to abandon its essential business lines, destroying irreplaceable business relationships, connections and avenues of sales, by gross mismanagement and the wasting of corporate assets and the inexplicable abandonment of a cruise ship related business that was touted as a highly successful model for the entire art world and community.

69. That the defendants have further breached their fiduciary duties by failing to be transparent with financial details of the Corporation, failing to properly manage the Corporation in many material ways, failing to secure or ascertain the current true financial condition of the Corporation, failing to ensure that the Corporation's assets are preserved, failing to take the necessary steps to insure that the defendants are removed from their positions with the Corporation, and failing to appoint a new management team to run its day to day operations in line with proper corporate governance and experience and failure to restore value to the Corporation and its shareholders as well as failing to prevent the further dissipation of the Corporation and its assets.

70. That the defendants have failed to disseminate accurate and truthful information to the Corporation, its shareholders and public officials.

71. That Libra and Anderson have failed to fulfill their fiduciary obligations by their destruction of their business relationship with Park West, an irreplaceable customer that purchased $94,516,700 of artwork from the Corporation between January 1, 2012 and January 24, 2019, during the period of Adam's tenure, but had only purchased $2,378,803.98 of artwork from January 1, 2006 to December 31, 2011 when Peter ran the Corporation and Libra was residing in California, essentially unemployed and oblivious to the Corporation, its activities or its destiny.

72. That the defendants have further failed to fulfill their fiduciary obligations by their inability to obtain essential personnel, including not just the Corporation's leading salesperson but also artists, office personnel and others without whom the Corporation can no longer function.

73. That the defendants have also violated their fiduciary obligations by removing Adam and his team, who successfully engineered ALP's turnaround and converted it into a highly successful enterprise; 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 and who has a history of misappropriating corporate assets and has announced her intentions to do so again; by causing ALP to breach its contractual obligations with its professionals, consultants, salespersons, clients and customers in a wholly unnecessary and unjustified manner; by wasting corporate assets through the payment of unreasonable compensation, stipends, unnecessary legal fees and other expenses, by threatening the continued occupancy of ALP in its existing corporate offices which face substantial reduction, if not eviction to the diminishment of corporate activities and the threatened failure to pay rent or to continue such occupancy; by embroiling the Corporation with unnecessary litigation with its consultants, employees, customers and salespersons; by causing the Corporation and its artwork to be the subject of untrue and scandalous allegations thereby diminishing its value permanently and without recourse; by interfering with or impeding with the continued collection of insurance proceeds claims, expense claims and bad faith claims, all of which have been placed in jeopardy, if not, termination; by conspiring with Mary, Flynn and others for their own personal vendetta and agenda, all to the prejudice of the Corporation and for their own personal benefit, by terminating valuable business personnel such as Robert, Lawrence and Bender and engaging the same in unnecessary litigation and resulting in expensive fees and costs and by causing the overall destruction of the business of the Corporation.

100. That at various times, Libra and Anderson have unlawfully and improperly appropriated to their own

use sums of money from the Corporation as expenses that were not actually incurred and which were mere devices to increase their salaries, benefits, and receipts of income and property from the Corporation; that at various times Libra has misappropriated paintings and artwork that were the property of the Corporation for her own use without compensating the Corporation for same; that Libra and Anderson have caused the Corporation's business and income to be substantially, if not wholly diminished and eliminated; have ousted the Plaintiff from work and gainful activities on behalf of the Corporation and prevented him from discharging his duties therein; have caused the Corporation to discontinue its lines of business to its detriment; has engaged it in unnecessary and costly litigation; has discharged or permitted the withdrawal of employees who were valuable assets to the Corporation without just cause; have prevented salespersons from taking any orders for the Corporation; have willfully wasted and dissipated the assets of the Corporation; thereby depriving the Corporation of large sums of money and assets that belong to the same, the particular amounts of which Plaintiff does not know; and 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 and that moreover they are not entitled to any indemnification from the Corporation by statute, a Common Law nor by any corporate action.

] 103. That Libra and Anderson at all times relevant herein acted in a grossly negligent manner in preventing Adam and his team from continuing their management of the Corporation and its financial affairs; by failing to discharge their duty to the Corporation of exercising that

> degree of diligence, care or still that an ordinarily prudent business person would exercise in similar circumstances; and by failing to prudently invest and manage the Corporation's business and assets.
>
> 104. That as a direct result and proximate cause of the negligence and breach of duty by Libra and Anderson to properly manage, monitor and invest the Corporation's assets, the assets of the Corporation were wasted, and the Corporation has lost income and incurred other losses in an amount to be determined by the Court but estimated to be not less than $400,000,000. (Emphasis supplied).

E. The Futility of Any Prior Demand

Adam did not precede the action with a prior demand upon Libra and Anderson to sue themselves for obvious reasons, as stated in the Complaint:

> 62. 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.
>
> 63. That moreover, 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; that therefore, the Plaintiff did not make any demand upon the Corporation, the Board, or Libra or Anderson that the said Corporation commence an action against Libra and Anderson for the reason that they control the Board of Directors and are the controlling officers of the Corporation so that it would be futile and useless to demand that they bring an action against themselves; and indeed, the filing of the original Petition/Complaint in this action and their failure to take any remedial steps in

connection therewith, make it incontestible that any pre-action demand would have been utterly futile (R272-273).

F. The Motion to Dismiss

Under Notice of Motion dated September 9, 2019, Libra, Anderson, and the Corporation as a nominal defendant moved for an Order "dismissing the claims against them" (R25). The motion was supported by an affirmation of counsel and numerous exhibits unrelated to the Complaint (R27-256). The Complaint was omitted from the motion despite its obvious necessity (R257-258). Instead, the motion was based on exhibits taken from other actions and proceedings and an uncertified copy of the Certificate of Incorporation for ALP for which no foundation or authentication was laid (R27-256, 204-208).

The Respondents also submitted as an exhibit an affidavit of the Appellant (R212-221) confirming that Libra lived in California since ALP's inception and had never done any significant work for the Corporation (R214); that she had been a purely passive shareholder, officer and director (R214); and that Adam had caused the Corporation to triple its sales, transforming it from a losing proposition to one that made millions of dollars a year (R214). The Respondents also submitted a Verified Petition of Adam (R226-237) demonstrating that under Adam's leadership ALP had quadrupled its sales since 2012 (R228); that he had obtained an insurance award of

$48,000,000, sixteen times the $3,000,000 initially offered by the insurer (R229); that Libra had received more than $4,500,000 in salary and $2,000,000 in dividends from 2012 to 2018 (R229) and that Libra had no experience running any business such that her plans to take control of ALP would lead to disaster (R229).

G. The Appellant Opposes the Motion

The Appellant opposed the motion (R257-299) and pointed out, among other things, that the Complaint had not been submitted in support of the motion, and that the Respondents were in exclusive possession of relevant financial information and documents which would substantiate the evidentiary basis for the claims asserted, but that the Respondents had refused to produce same (R258, 286-299). Respondents refused to comply with the corporate shareholder demand of Appellant even though Libra had commenced this dispute on May 19, 2017 with virtually the same corporate demand (R288, 291-292, 293-294). This Court may and should take judicial notice of the fact that when the same documents were demanded by Appellant in a notice to produce in the Lower Court, the Respondents again took the position that such documents and information, including tax returns for 2018, 2019 and 2020, were not discoverable and would not be produced.

H. The Respondents' Reply

The Respondents replied in further support of the motion (R300-465). For the first time, they submitted a certified copy of the Certificate of Incorporation (R302-307). They also submitted copies of documents submitted by them in opposition to a motion by the Appellant for a receiver, which motion was denied (R410-463). Perhaps inadvertently, Respondents submitted a copy of an affidavit by the Appellant, reaffirming the Respondents' failure to provide any financial documents (R309-310); that the Respondents had broken a lucrative contract resulting in a loss of $12,000,000 in virtually guaranteed revenue (R310); that Libra had admitted that "the money is all gone" (R311) despite the fact that when Appellant had been terminated the Corporation was generating millions of dollars in income per month, and had millions of dollars of cash in the bank and no debt (R311). The affidavit also stated that Libra had fired 40 ALP employees; was unable to afford the rent on a studio it had occupied for twenty years (R311); that ALP's profits for 2018 were $44,814,638 (R313); that in the same year ALP had distributed $13,024,894 to Peter, $706,798 to Libra and $690,205 to Adam as well as additional distributions totaling $26,883,002 to all three shareholders (R313). The affidavit also recounted that Libra had reduced Peter's income from $3,700,000 per year to $800,000 per year, which did not cover his expenses (R314). The affidavit also stated that the guardian and his attorney had

made inquiries about Anderson but had been rebuffed (R314-315). Specifically, the guardian's attorney recounted that "my inquiries about the involvement and input of ALP Director Michael Anderson, as my offer to suggest someone else who might agree to assist in marketing [Peter's] works and licensing his intellectual property, have elicited no meaningful response" (R314-315), thus confirming Anderson's role as a "dummy director" with no independence who serves at Libra's whims.

The Respondents' reply also included an affidavit from Libra submitted in opposition to the receivership motion (R410-426) in which she concedes that she was in the process of closing down the 20,000 square foot office and studio facility maintained by ALP since the 1990's (R411-412). Annexed to that affidavit is a minutes of a Board meeting held on January 18, 2019 (R433-436). At that meeting, Libra helped herself to reimbursement from the Corporation of all of her legal expenses, including legal fees that she had incurred in seeking to obtain corporate books and records, demanding a special meeting of shareholders and constituting a new Board (R435). There is no authority by statute or otherwise for the reimbursement of such fees and expenses, such that this action taken alone is a serious breach of the fiduciary obligations of Libra and Anderson. Anderson supported reimbursement because he is not a shareholder and he was perfectly content to give away funds that indirectly belong to Adam and Peter. Libra, without

any authority, stripped the Corporation of funds to reimburse herself for fees that were personal expenses that she should have paid out of her own pocket.

Libra also submitted a copy of a New York Times article essentially casting Adam, his business associates, and ALP itself in a highly negative light while at the same time confirming its unparalleled financial success under Adam's leadership (R452-457).

Finally, the Respondents submitted an affidavit from Anderson in which he touted his business experience, including his involvement in the management of the Fred Torres Collaborations, which he identified as a gallery located in Manhattan's Chelsea Art District that was run by Fred Torres (R458-463). Specifically, Anderson claimed that "the Fred Torres Collaborations also managed all sales of [David] LaChapelle's works in the fine arts world and the creation of art exhibitions and I was involved in all aspects of those operations" (R459-460). Anderson conspicuously avoided reference to the fact that he was sued by Fred Torres and his gallery for converting confidential financial information, and providing the same to Torres' competitor, together with privileged information and attorney work product, thus breaching his fiduciary duties to Mr. Torres. See LaChapelle v. Torres, 1 F. Supp.3d 163 (S.D.N.Y. 2014). Contrary to his present posturing as a person with vast business experience, Anderson described himself in that action as a "freelance

bookkeeper", and made no reference to his management of sales and art exhibitions. Thus, Anderson is either lying here or he lied to the Federal Court. This disqualifies him from serving as a director of a multi-million dollar corporation.

I. The Order Appealed

By Decision and Order dated June 6, 2021, the Supreme Court, New York County (Bannon, J.) granted the motion and dismissed the Complaint in its entirety (R6-23). The Lower Court stated that the Certificate of Incorporation ("the Certificate") barred any derivative action against Libra and Anderson as directors (R13-16), but did not discuss the claims against Libra as an officer. The Lower Court held that the Certificate was properly introduced in reply by an attorney's affirmation (R14). The Lower Court stated that the Complaint failed to plead bad faith or intentional conduct sufficient to overcome the exculpation clause (R14-15).

The Lower Court also found that a pre-action demand upon Libra and Anderson to sue themselves was required and that its absence mandated dismissal (R16-18). The Lower Court appears in this regard to have focused solely on paragraph 62 of the Complaint (R272) and overlooked paragraph 63 which was far more comprehensive (R272-273).

The Lower Court also found that the termination of employees, breaching of contracts, vast reduction of income, business activities and employment were, in

effect, a mere deviation from the prior business model followed by Adam (R18-19). The Lower Court also recognized that on a motion to dismiss, the facts alleged in the Complaint are presumed to be true (R21). However, it found The New York Times article (R452-457) to be documentary evidence that flatly contradicted that presumption (R21). The cause of action for breach of diligence, care and skill was dismissed as duplicative of the fiduciary duty claim (R21). The causes of action for the removal of Libra and Anderson as officers and directors was dismissed because the Lower Court found no wrongdoing on their part (R22). The cause of action for an accounting was dismissed because the Lower Court stated that a breach of fiduciary duty was not sufficiently pled (R22). The Lower Court made this determination despite the fact that the Complaint that Libra and Anderson owed the Corporation and Adam fiduciary obligations that had been breached (R273-274). The claim for appointment of a receiver was dismissed as the Lower Court considered it merely a provisional remedy (R22). The claim seeking appointment of a receiver because there was no officer within the state to administer corporate affairs (Libra, a California resident, being the only officer) was dismissed because the Lower Court found no such allegation (R22-23). This finding was made despite the fact that the Complaint specifically alleged that Libra and Anderson were California residents (R259-260). This appeal ensued (R2-3).

ARGUMENT

POINT I

RESPONDENTS DID NOT MEET THEIR BURDEN OF PROOF FOR DISMISSAL

A. Respondents Did Not Meet the Requirements of CPLR Rule 3211(a)(1).

To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR Rule 3211(a)(1), the evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Schmidt-Sarosi v. Offices For Fertility and Reproductive Medicine, P.C., 195 A.D.3d 479 (1st Dep't, 2021)(dismissal is warranted only if the documentary evidence conclusively establishes a defense as a matter of law); Whitestone Construction Corp v. F.J. Sciami Construction Co. Inc., 194 A.D.3d 532 (1st Dep't, 2021)(motion denied as the proffered documents did not contain facts that were essentially undeniable and only related to some but not all of plaintiff's claims); Wynkoop v. 622A President Street Owners Corp, 169 A.D.3d 1100 (2d Dep't, 2019)(counterclaims for breach of contract and fiduciary duty not conclusively refuted by any documentary evidence; motion denied).

The Respondents proffer the Certificate as the basis for dismissal, contending that it is documentary evidence. This argument fails for at least four reasons. First,

the certified copy of the Certificate should not have been considered as it was submitted in reply for the first time. Liparulo v. New York City Heath and Hospitals Corporation, 193 A.D.3d 593 (1st Dep't, 2021)(medical affidavit improperly submitted for the first time in reply); Adler v. Suffolk County Water Authority, 306 A.D.2d 229 (2d Dep't, 2003)("the evidence submitted by the CSWA for the first time in its reply was properly disregarded"); Ritt v. Lennox Hill Hospital, 182 A.D.2d 560 (1st Dep't, 1992)("the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant").

In Grogan v. O'Neil, 292 F.Supp.2d 1282 (D. Kansas 2003), the defendants sought to dismiss derivative claims based on a similar exculpatory provision. The Court denied the motion upon the grounds that the copy of the Articles of Incorporation submitted in support of the motion were not certified. The same result should obtain here.

Second, the affirmation of counsel was insufficient to lay a foundation or otherwise authenticate the Certificate. Hefter v. Elderserve Health, Inc., 134 A.D.3d 673 (2d Dep't, 2015); Muhlhahn v. Goldman, 93 A.D.3d 418 (1st Dep't, 2012); Basis Yield Alpha Fund v. Goldman Sachs Group, Inc., 115 A.D.3d 128 (1st Dep't, 2014)(ftn. 4)("on a motion, the only possible way that documentary evidence can be

submitted to the court is by way of affidavit"). Thus, the Certificate was never properly authenticated in the first instance.

Third, a corporate entity such as ALP cannot shelter individuals from responsibility for breaches of duty of care they may independently owe as directors. Giblin v. Murphy, 73 N.Y.2d 769 (1988). As the Court of Appeals stated in Kalisch v. Jarcho, Inc. v. City of New York, 58 N.Y.2d 377 (1983):

> An exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances. Under announced public policy, it will not apply to exemption of willful or grossly negligent acts [citations omitted]. More pointedly, an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This could be explicitly, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit [citation omitted]. (Emphasis supplied).

That branch of the motion seeking dismissal based on documentary evidence should have been denied, as the Certificate did not resolve all factual issues as a matter of law, or conclusively dispose of the Appellant's claims even if its authenticity was unquestionable. Paramount Transportation Systems, Inc. v. Lasertone Corp., 76 A.D.3d 519 (2d Dep't, 2010)(motion to dismiss based upon certificate of incorporation denied as the proffered document did not conclusively

dispose of plaintiff's claims). In Qureshi v. Vital Transportation, Inc., 173 A.D.3d 1076 (2d Dep't, 2019), a motion based upon putative documentary evidence was denied as the attorney affirmation submitted was insufficient, materials were improperly submitted for the first time in reply, and the supposed evidence did not utterly refute the plaintiff's factual allegations. The same result should obtain here. Rabos v. R&R Bagels & Bakery, Inc., 100 A.D.3d 849 (2d Dep't, 2013)(minutes of subject corporation insufficient as documentary evidence to warrant dismissal).

Fourth, the Complaint clearly alleges intentional and grossly negligent actions taken in bad faith such that the Certificate is no defense. As alleged in the Complaint and as demonstrated and documented by the Respondents' own submissions, Libra improperly and without any lawful basis recouped what we believe to be hundreds of thousands of dollars in legal fees by the Corporation in reimbursement for obtaining documents and launching a hostile takeover for her own benefit. This was tantamount to a conversion of corporate assets especially considering that the actions brought by Libra amounted to no more than a controversy between the holder of 40% of the capital stock of a close corporation and the owners of the remaining 60%. First Westchester National Bank v. Olsen, 25 A.D.2d 661 (2d Dep't, 1966). Libra had no right to reimbursement. Edelman v. Goodman, 47 Misc.2d 8 (Sup. Ct., Kings Co., 1965), *aff'd*, 24 A.D.2d 557 (2d Dep't, 1965); Wells v. League of American Theaters

and Producers, Inc., 183 Misc.2d 915 (Sup. Ct., New York Co., 2000); DePrima v. Lark Street Neighborhood, 2012 N.Y. Slip Op. 51999 (Sup. Ct., Albany Co., 2012).

In Pomerance v. McGrath, 104 A.D.3d 440 (1st Dep't, 2013), this very Court held that a shareholder such as Libra could not recover legal fees representing the cost of obtaining the information she sought pursuant to BCL §624, just as Libra did here. There is no authority under the Business Corporation Law or otherwise for Libra to simply help herself to hundreds of thousands of dollars of corporate funds. Board of Managers v. Maguire, 191 A.D.3d 25 (1st Dep't, 2020).

During the period May 2017 to December 2018, the Appellant demonstrated time and again that ALP. had progressed from financial destitution in 2012 when it incurred a loss in excess of $4,000,000 to a period of great success in 2018 when it had a profit of over $30,000,000. This was confirmed by the article upon which the Lower Court relied. Nevertheless, Libra launched a hostile takeover of the Corporation even though she knew that such a takeover would lead to disaster. She now refuses to provide the records necessary to document the extent of that disaster. Thus, her actions were carried out in bad faith, were intentional and grossly negligent, such that they do not deserve the protection of the Certificate. In any event, the Certificate does not protect her from liability from her actions as president as it applies only to any breach of duty as a director (R408).

In summary, the Certificate is legally insufficient to warrant dismissal. Galvan v. 9519 Third Avenue Restaurant Corp., 74 A.D.3d 743 (2d Dep't, 2010)(insurance policy and lease legally insufficient as basis for dismissal under statute).

B. Defendants Have Not Met Their Burden Under CPLR Rule 3211(a)(7).

Respondents also sought dismissal based upon an alleged failure to state a cause of action or "claims", in the words of Respondents' counsel. The Appellant is aided by three rules of decision: (1) give the complaint a liberal construction, (2) accept the allegations as true, and (3) provide the plaintiff with the benefit of every possible favorable inference. Higgitt, Supplementary Practice Commentaries, McKinney's Consolidated Laws of New York, Book 7B, C3211:21, p.6.

In addition, because the Respondents submitted evidence in support of their motion, the question was no longer whether the Appellant *stated* a cause of action, but rather, whether he *possessed* a cause of action. Bokhour v. GTI Retail Holdings, Inc., 94 A.D.3d 682 (2d Dep't, 2012)("a motion to dismiss pursuant to CPLR 3211 (a)(7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it"); Jannetti v. Whelan, 97 A.D.3d 797 (2d Dep't, 2012)("when evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for

summary judgment, the criterion is whether the pleader has a cause of action, not whether it has stated one, and unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate").

Judged by these legal standards, and accepting the allegations of the Complaint as true, the Appellant clearly stated causes of action against the Respondents. The Lower Court concluded, however, that the presumption of truth is rebutted where the facts of the Complaint are flatly contradicted by documentary evidence, and held that The New York Times article referred to in the Order appealed was such evidence. This was reversible error, as statements contained in newspapers articles do not constitute competent evidence. Merkos v. Sharf, 59 A.D.3d 403 (2d Dep't 2009); Young v. Fleary, 226 A.D.2d 454 (2d Dep't, 1996); Borough Hall-Oxford Tobacco Corp v. Central Office Alarm, Co., Inc., 35 A.D.2d 523 (2d Dep't, 1970). Indeed, in Min Mun v. Hong, 109 A.D.3d 732 (1st Dep't, 2013), this very Court held that such a newspaper article was inadmissible as evidence. Thus, the Lower Court's conclusion to the contrary was legal error.

Parenthetically, this writer has read the article word for word and the Lower Court's recitation of the author stating that her work was based upon her own research is nowhere to be found. However, there can be no doubt that by stating her

intentions to sue all of ALP's agents, brokers, customers, vendors, and professionals only gave credence to the allegations raised in the article, thus causing grievous damage to the Corporation in violation of Libra's fiduciary obligations. That branch of the motion claiming that the Complaint fails to state a cause of action should be denied in light of the Complaint's allegations that the Respondents did not act in good faith, denied the Appellant access to books and records, made substantial distributions and other payments to themselves to the exclusion of the other shareholders and misappropriated business assets, among other wrongdoing. Soho Snacks Inc. v. Frangioudakis, 129 A.D.3d 636 (1st Dep't, 2015).

In sum, Libra and Anderson should be held responsible for their breaches of fiduciary duty, negligence and gross negligence. United States Small Business Administration v. Feinsod, 347 F. Supp.3d 147 (E.D.N.Y. 2018). Accepting the allegations of the Complaint as true, Libra and Anderson have crippled and severely injured the Corporation. It is well established that conduct that does so is impermissible and that a director or officer may be liable where he or she fails to provide good and prudent management - - regardless of whether the failure is intentional or negligent. M&M Country Store, Inc. v. Kelly, 159 A.D.3d 1102 (3d Dep't, 2018). In that case the defendants took over control of the corporate business at a point in time when it was vibrant and profitable. Four years later, the corporate

business was in disastrous condition. After the sellers-plaintiffs reassumed management, the corporation sued the director-officer that had caused the damage, just as Adam, on behalf of the Corporation, seeks to hold the Respondents liable. The Court held that extreme mismanagement, lacking any legitimate business purpose and resulting in the waste of corporate assets, rises to the level of a breach of the director-officers' fiduciary duties. The same result should obtain here.

POINT II

ANY PRIOR DEMAND WOULD HAVE BEEN FUTILE

The Lower Court also dismissed the Complaint by finding that a pre-litigation demand was necessary, even though the Appellant would have been requesting Libra and Anderson to sue themselves. This was reversible error. Guzman v. Kordonsky, 177 A.D.3d 708 (2d Dep't, 2019)("demand is futile when the directors are incapable of making an impartial decision as to whether to bring suit"); MacKay v. Pierce, 86 A.D.2d 655 (2d Dep't, 1982)("in view of the nature of the action, charging a majority of the directors with a breach of their fiduciary duties, a prior demand was not necessary").

Since Libra and Anderson were the only other directors, and any request to them to sue themselves would have been futile, no demand was required. Plymouth County Retirement Association v. Schroeder, 576 F. Supp.2d 360 (E.D.N.Y.,

2008)("where the directors and controlling shareholders are antagonistic, adversely interested, or involved in the transaction attacked, a demand on them is presumptively futile and need not be made").

A demand upon a corporate board may be excused when, as here, the directors are incapable of making an impartial decision as to whether to bring suit, which occurs when (a) the board majority is interested in the challenged transactions; (b) the board did not fully inform themselves about the transaction; and (c) the transaction was so egregious on its face that it could not have been the product of sound business judgement of the directors. Bansbach v. Zinn, 1 N.Y.3d 1 (2003).

In the case at bar, Libra and Anderson were clearly incapable of making an impartial decision of whether to sue themselves, since they were interested in all challenged transactions, had not informed themselves fully about the same, and their actions were so egregious on their face that they could not have been the product of sound business judgment. Soho Snacks Inc. v. Frangioudakis, 129 A.D.3d 636 (1st Dep't, 2015)(complaint adequately set forth reasons for not making a demand prior to litigation, as corporation's sole directors were self interested in the challenged conduct); Hu v. Ziming Shen, 57 A.D.3d 616 (2d Dep't, 2008)(demand not required as futile as defendants directly interested in alleged acts of malfeasance); In Re

Converse Technology, Inc., 56 A.D.3d 49 (1st Dep't, 2008)(same); Javaheri v. Old Cedar Development Corp., 22 A.D.3d 804 (2d Dep't, 2005)(same).

In Sorin v. Shahmoon Industries, Inc., 36 Misc. 2d 35 (Sup. Ct., N.Y. Co., 1962), the Court found that no pre-litigation demand was required prior to commencement of the action against the corporation's principal officer for misuse and waste of corporate funds and assets, such as in the case at bar. In Steinberg v. Altschuler, 158 N.Y.S.2d 411 (Sup. Ct., N.Y. Co., 1956), the Court determined that a prior demand was unnecessary, where, as here, the derivative action was brought against directors who composed the entire board, or a majority thereof, since it was obvious that they would not prosecute an action against themselves for their alleged wrongdoing. The same result should obtain here. Mason-Mahon v. Flint, 166 A.D.3d 754 (2d Dep't, 2018).

POINT III

THE COLLATERAL CAUSES OF ACTION WERE IMPROPERLY DISMISSED

In light of the well pleaded allegations of the Complaint and the defective and incomplete nature of the Respondents' motion, we submit that all seven causes of action should survive dismissal.

The cause of action for negligence is not duplicative of the other claims asserted and should not have been dismissed. Postiglione v. Castro, 119 A.D.3d 920 (2d Dep't, 2014)(negligence claim sustained independently of other claims); Llanos v. T-Mobile USA, Inc., 132 A.D. 3d 823 (2d Dep't, 2015)(dismissal denied of claims under the Human Rights Law as independent of other similar claims contained in complaint).

The claims for an accounting, attorneys fees, and removal of directors and officers should also have been sustained as they are sufficiently pled with considerable detail and factual allegations. Kaminsky v. Kahn, 23 A.D.2d 231 (1st Dep't, 1965)("equitable powers of Court were properly exercised to compel accounting for monies received").

For example, in Chan v. Louis, 303 A.D.2d 151 (1st Dep't, 2003), this very Court denied the motion to dismiss a shareholders complaint seeking similar relief,

stating that the allegations of self dealing and corporate waste, if ultimately proven, would justify an accounting, reimbursement, and the appointment of a receiver thereby sustaining the derivative action based upon mismanagement and waste. The same result should be reached here.

The causes of action seeking removal of the Respondents as officers and directors should also be sustained, based upon their conversion of corporate funds to reimburse Libra for her expenses, and other actions that benefitted only Libra and not the other shareholders. Colucci v. Canastra, 130 A.D.3d 1268 (3d Dep't, 2015). Stated differently, the actions of the Respondents were not made in good faith and in any event, were so reckless that the activities of the Corporation have been substantially impaired. Grace v. Grace Institute, 19 N.Y.2d 307 (1967). By the way, the Court in Colucci also held that the certificate of incorporation and exculpatory provision therein did not warrant dismissal or summary judgment, thus supporting the contentions of the Appellant.

It is the Respondents' motion, not the Complaint, that is insufficient in law and defective. Since the motion does not seek independent dismissal of separate causes of action, but instead dismissal of "claims" as a whole, no cause of action may be dismissed if any one of them survives dismissal. Hoch v. Glen Garden Homes, Inc.,

22 A.D.2d 704 (2d Dep't, 1964); Wright v. County of Nassau, 81 A.D.2d 864 (2d Dep't, 1981); Griefer v. Newman, 22 A.D.2d 696 (2d Dep't, 1964).

For example, in Great Northern Associates, Inc. v. Continental Casualty Company, 192 A.D.2d 976 (3d Dep't, 1993), the Court found that two out of thirteen claims were sufficiently stated and thus sustained all thirteen causes of action based upon this principle. Chase v. Town of Camillus, 247 A.D.2d 851 (4th Dep't, 1998)("it is well established that where a motion to dismiss is addressed to the entire complaint, the motion must be denied in its entirety if even one cause of action is legally sufficient"). The same result should eventuate here. Incidentally, the Court in Great Northern also stated that under announced public policy exculpatory covenants are ineffective against intentional, willful or grossly negligent acts such as those at issue here.

In Schwartz v. Marjolet, Inc., 214 App. Div. 530 (1st Dep't, 1925), the notice of motion referred to the complaint and not to specific parts thereof, just as the notice of motion in the case at bar referred only to "claims". This very Court held that such a notice was vague and defective and denied the motion accordingly. The same result should be reached in the instant case.

The Record reveals that the Respondents are in exclusive possession of the financial information detailing the disastrous consequences of their actions, yet they

have refused to provide such documents and information. The motion was therefore defective as premature and should have been denied. Bordan v. North Shore University Hospital, 275 A.D.2d 335 (2d Dep't, 2000) ;Nice v. Combustion Engineering, Inc., 193 A.D.2d 1088 (4th Dep't, 1993); Cantor v. Levine, 115 A.D.2d 453 (2d Dep't, 1985).

In Jeffers v. American University of Antigua, 125 A.D.3d 440 (1st Dep't, 2015), this very Court held that a motion for summary judgment was premature, as the defendants had not been deposed, the record was not fully developed, and the motion stayed discovery. Once again, the same result should obtain here.

Parenthetically, the motion was also defective as it failed to include a copy of the Complaint for which dismissal was sought. This has been held to be a fatal defect mandating that dismissal be denied. Alizio v. Perpignano, 225 A.D.2d 723 (2d Dep't, 1996); Gibbs v. Kings Auto Show Inc., 2015 N.Y. Slip Op. 50426 (Sup. Ct., King Co., 2015); Start Elevator, LLC v. Macombs Place, LLC, 2018 N.Y. Slip Op. 51229 (Civ. Ct., N.Y. Co., 2018). Even if this rule was not mandatory in the electronic age, we submit that it would be inappropriate to dismiss the Complaint when we weigh its allegations and completeness against the incomplete and unsupported motion of the Respondents. Thus, all seven causes of action should survive dismissal, including the request for a receiver under the Business Corporation Law which is based on the fact

that Libra and Anderson reside in California and there is no officer in the State of New York to assume responsibility for corporate affairs (R316).

POINT IV

THE ORDER IS BASED ON ERRONEOUS CONCLUSIONS AND DISTINGUISHABLE AUTHORITIES

We respectfully submit that the Order appealed is based on erroneous legal conclusions, misstatements and omissions of critical facts, and authorities that are distinguishable or support the position of the Appellant.

In Fortis Financial Services, LLC v. Fimat Futures U.S.A., Inc., 290 A.D.2d 383 (1st Dep't, 2002), Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc., 120 A.D.3d 431 (1st Dep't, 2014), Fontanetta v. Doe, 73 A.D.3d 78 (2d Dep't, 2010) and VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC, 171 A.D.3d 189 (1st Dep't, 2019), the motions to dismiss were denied. Those cases support the position of the Appellant.

In 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002), the motion to dismiss was denied because the sponsor's documentary evidence did not clearly refute the complaints assertions. That case also supports the Appellant's position. In Romanello v. Intesa Sanpaolo, S.p.A., 22 N.Y.3d 881 (2013), the principal claim survived dismissal. The same conclusion should be reached here.

Simkin v. Blank, 19 N.Y.3d 46 (2012), concerned an attempt by a spouse to reform or set aside a marital agreement based on a claim of mutual mistake. No such issues are presented here. Hurrell-Harring v. State, 15 N.Y.3d 8 (2010), involved a plaintiff seeking to declare indigent representation as provided by the State to be unconstitutional. No such facts are presented here.

In Leon v. Martinez, 84 N.Y.2d 83 (1994), the motion to dismiss was denied. The Court of Appeals found that the complaint and supporting affidavit, although inartfully drafted, adequately alleged, for pleading survival purposes, the causes of action set forth. That case also supports our contentions.

The Lower Court relied upon the Certificate even though it was not certified, introduced by an attorney's affirmation, and was, in effect, only submitted in reply, citing Phillips v. Taco Bell Corp., 152 A.D.3d 806 (2d Dep't, 2017). In that case, the motion to dismiss made pursuant to CPLR Rule 3211(a)(1) and (7), was denied in its entirety. The Court found that the documents offered did not establish a defense as a matter of law or utterly refute the contentions of the plaintiff. That case also supports the contentions of the Appellant.

The Lower Court also found that the Complaint at bar failed to plead bad faith or intentional misconduct on the part of Libra and Anderson. We submit that this

conclusion is obviously erroneous in light of the allegations contained in the Complaint as supplemented and confirmed by the Respondents' submissions.

The Lower Court also found that the action should have been preceded by a demand upon Libra and Anderson to sue themselves. However, the cases cited do not support that contention. In Eos Partners BSIC, LP v. Levine, 42 A.D.3d 309 (1st Dep't, 2007), there was no claim that either defendant director had any interest in the outcome of proposed litigation, nor were there any allegations that the directors were aligned with, or beholden to, the chairman of the board. Such is not the case here. The Complaint alleges, and Respondents' submissions confirm, that Libra has a direct interest in the actions she has taken, including the recoupment of fees to which she had no right, the reduction and elimination of income to the other shareholders, the closing of studio and office facilities, the reduction of staff, and the misuse and misappropriation of corporate property. The Complaint also sufficiently alleges that Anderson is under her influence and that his discretion has been sterilized. That case is therefore distinguishable.

In Barr v. Wackman, 36 N.Y.2d 371 (1975), the defendants were directors of Gulf & Western Industries, a publicly held corporation, and there were at least sixteen directors, eleven of which were not even alleged to have committed any wrongdoing. The Barr case is distinguishable. So is Marx v. Akers, where the defendants were

directors of another public corporation, to wit, IBM. In Glatzer v. Grossman, 47 A.D.3d 676 (2d Dep't, 2008), the plaintiff simply named a majority of the directors without any apparent basis for doing so. Under those circumstances, a demand was properly required. However, such is not the case here.

In Bansbach v. Zinn, 1 N.Y.3d 1 (2003), as here, the plaintiff alleged that the board was dominated and controlled by one shareholder, Zinn, who by reason of his position and associations with the other directors, had caused them to place Zinn's interests above those of the company. That interest was exemplified by the board's immediate action covering Zinn's legal fees, just the way that Libra's first action was to recover fees here to which she was not entitled. Moreover, in that case, "evidence of post litigation events confirm the assertion that demand on these directives was futile", just as events here confirm the same conclusion. The Court of Appeals held that no prior demand was required. The same result should obtain here.

In Goldstein v. Bass, 138 A.D.3d 556 (1st Dep't, 2016), the complaint did not allege that any board members were interested in the various transactions undertaken, unlike the Complaint here. Additionally, the complaint in that case failed to allege facts such as self dealing, fraud or bad faith, all of which are alleged here. Goldstein is inapplicable.

The Lower Court also concluded that no breach of fiduciary duty had been sufficiently alleged. That conclusion flies in the face of the allegations recited above, as supported and confirmed by the Respondents' own submissions. In Burry v. Madison Park Owner, LLC, 84 A.D.3d 699 (1st Dep't, 2011), the defendant failed to meets its burden as the movant on its motion to dismiss, because the very documentary evidence under which that motion was premised undermined its entitlement to dismissal. Such is the case here. To the extent the claims were dismissed, the Court found them to be, in essence, fraud claims and not breach of fiduciary duty. Such is not the case here.

In Swartz v. Swartz, 145 A.D.3d 818 (2d Dep't, 2016), the complaint failed to plead the existence of a fiduciary duty. That argument is not available here as Respondents had such duties, which were properly pled.

In Amfesco Industries, Inc. v. Greenblatt, 172 A.D.2d 261 (1st Dep't, 1991), the motion to dismiss the amended complaint was denied by this very Court. That case supports the position of the Appellant. In Kamin v. American Express Company, 86 Misc.2d 809 (Sup. Ct., N.Y. Co., 1976), the complaint was dismissed because the only question presented was the decision to pay dividends, rather than take some other course of action vis a vis a public company, i.e. American Express. That case is thus distinguishable.

As noted above, the Lower Court relied on The New York Times article as documentary evidence sufficient to flatly contradict the allegations of the Complaint, even though the article was not admissible evidence in the first instance. The cases cited do not support the Lower Court's conclusion. In Herman v. Greenberg, 221 A.D.2d 251 (1st Dep't, 1995), the Court found that an offer of proof supplementing the complaint was insufficient in a case that had been pending for a decade. No such facts are presented here. In Franklin v. Winard, 199 A.D.2d 220 (1st Dep't, 1993), the action was dismissed, but no documentary evidence was involved. Instead, the threadbare complaint simply did not survive. Once again, such is not the case here.

Benedict v. Whitman Breed Abbott & Morgan, 110 A.D.3d 935 (2d Dep't, 2013), went to trial, and pleading allegations were simply not at issue. That case is inapplicable.

The Lower Court also found that the negligence claim was subject to dismissal as duplicative. In Alper v. Seavey, 9 A.D.3d 263 (1st Dep't, 2004), the plaintiff brought an action for rescission and at the same time sued for breach of contract, thereby seeking identical relief two branches of relief that contradicted one another. Such is not the case here. Simply put, intentional conduct and grossly negligent conduct are different and Respondents here are liable for both. Thus, both claims should be sustained.

In Palazzo v. Palazzo, 121 A.D.2d 261 (2d Dept, 1986), an after trial judgment imposed a constructive trust. No such issues are presented here. In Lemle v. Lemle, 92 A.D.3d 494 (1st Dep't, 2012), the Court held that the allegations in the complaint, i.e., the defendants' use of corporate funds to pay personal expenses, excessive compensation, and other acts of self dealing, were sufficient to survive dismissal. Here, the Respondents have misused corporate funds, and reduced or eliminated income to the other shareholders so that more income are available to be paid to Libra, in an amount not yet discovered. Thus, Lemle supports our position.

The Court in Lemle also held that at such an early state of litigation, the business judgment rule did not protect the defendants, and that pre discovery dismissal of pleadings was inappropriate where, as here, those pleadings suggest that the directors did not act in good faith. The Lemle case supports our contentions. This very Court cited CPLR Rule 3211(d) in denying the motion, acknowledging, that, as here, the plaintiff had set forth a reasonable basis to believe that additional discovery would develop sufficient facts to establish the claims asserted in the complaint. This was especially so as the plaintiff had not been provided with full access to corporate books and records, despite unsuccessful requests for same, just like the Appellant at bar.

Although the cause of action for appointment of a temporary receiver in Lemle was dismissed, we seek appointment of a receiver under the Business Corporation Law wherein such an appointment is part of the claim itself. The Order appealed should be reversed as it is based upon authorities which are distinguishable and analysis and conclusions that are contrary to law.

CONCLUSION

The Order appealed should be reversed, the Respondents' motion denied in its entirety, and the action remanded to the Lower Court for further proceedings.

Dated: Williston Park, New York
October 26, 2021

Respectfully Submitted,

CAPETOLA & DIVINS, P.C.[

By: _____

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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STATEMENT PURSUANT TO CPLR 5531

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,

against

ALP, INC., LIBRA MAX,

Defendants-Respondents,

and

MICHAEL ANDERSON,

Defendant.

LAWRENCE FLYNN,

Non-Party Respondent.

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1. The index number of the case in the Court below is 650618/19.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court, New York County.
4. This action was commenced on or about January 13, 2019, by the filing of a Summons and Verified Complaint. A First Amended Complaint was filed on or about July 19, 2019. Issue was joined by service of a Verified Answer of Defendants ALP, Inc. and Libra Max on or about May 25, 2020.
5. The nature and object of the action: derivative corporate action.
6. The appeal is from the Decision and Order of the Honorable Nancy M. Bannon, dated June 6, 2021.
7. This appeal is being perfected with the use of a fully reproduced Record on Appeal.