To be Argued by:
JOSHUA ANNENBERG, ESQ.
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

BETTY SEBROW, Individually and as a Shareholder of WORBES CORPORATION,

Plaintiffs-Appellants,

– against –

ZVI SEBROW,

Defendant-Respondent,

– and –

NYCTL 2017-A TRUST and THE BANK OF NEW YORK MELLON as Collateral Agent and Custodian,

Defendants.

Appellate Case No.: 2021-01311

BRIEF FOR DEFENDANT-RESPONDENT

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QUESTIONS PRESENTED

1. Whether the lower court correctly rejected Plaintiff's picayune objections to the form of Defendant's affidavit, where: 1) the affidavit was validly executed and sworn before a New Jersey attorney duly authorized to take oaths under New Jersey law; and 2) a raised seal is not required for such an affidavit submitted in New York litigation.

2. Whether the lower court correctly dismissed Plaintiff's shareholder derivative action, where: 1) Plaintiff did not own shares in Worbes Corporation under the Stockholders' Agreement; and 2) the Stockholders' Agreement is authentic documentary evidence as Plaintiff did not prove forgery.

3. Whether the lower court correctly held the Stockholders' Agreement barred Plaintiff's action; the Plaintiff waived protection of the Dead Man's Statute by invoking and relying upon the Stockholders' Agreement in her Verified Complaint in order to claim ownership of shares in Worbes Corporation.

4. Whether the lower court correctly held the Stockholders' Agreement precludes Plaintiff's action; Plaintiff's right to exercise spousal election was already time-barred when she commenced the instant action.

PRELIMINARY STATEMENT

Defendant-Respondent Zvi Sebrow respectfully requests this Court affirm the lower Court's Order[1], entered October 9, 2020, which dismissed the plaintiff's purported shareholder derivative action pursuant to CPLR 3211(a)(1) and (a)(3).

The lower court correctly dismissed Plaintiff Betty's[2] action, holding "the plaintiff is not a shareholder [in Worbes Corporation]"[3] based upon the Stockholders' Agreement at issue in the Verified Complaint and submitted by defendant Zvi Sebrow.

A. PLAINTIFF'S ACTION, THE STOCKHOLDERS' AGREEMENT AND THE LOWER COURT'S RATIONALE FOR DISMISSAL.

Plaintiff Betty commenced her action, claiming she was "the owner of fifty percent (50%) of the shares"[4] in Worbes Corporation, a closed-corporation formed and operated by her deceased husband's family — the Sebrows. Plaintiff Betty's husband, David Sebrow, was a shareholder in Worbes and its Vice President.[5] David

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[1] R. 6-11.

[2] As the parties share the last name "Sebrow", we refer to them as "Plaintiff Betty" and "Defendant Zvi".

[3] R. 10-11.

[4] R. 11.4.

[5] R. 11.3, 11.4.

Sebrow died in 2017.[6] Defendant Zvi is the President and sole remaining shareholder in Worbes Corporation.[7] Defendant Zvi and David Sebrow were first cousins. R. 22.

In her Verified Complaint, plaintiff Betty specifically invoked and relied upon the 1997 "shareholder agreement [in Worbes Corporation]", which allotted her husband — David Sebrow — with 25% of the corporation's shares.[8] The Verified Complaint further acknowledged that David Sebrow and defendant Zvi subsequently received their respective fathers' shares in Worbes Corporation. Accordingly, David Sebrow and defendant Zvi each owned 50% of the corporation at the time of David's death in 2017.[9]

In response to the Verified Complaint, defendant Zvi moved for dismissal of the action pursuant to CPLR 3211(a)(1) and (a)(3).[10] Based upon the Stockholders' Agreement for Worbes Corporation[11], defendant Zvi demonstrated: 1) plaintiff Betty did not become a shareholder upon her husband's death, and; 2) therefore she had no legal capacity/standing to bring her purported shareholder derivative action.

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[6] R. 11.4.

[7] R. 22.

[8] R. 11.3, 11.4.

[9] R. 11.4.

[10] R. 12-33.

[11] R. 29-32.

The lower court correctly dismissed plaintiff Betty's action, holding she "is not a shareholder [in Worbes Corporation]"[12] under the Stockholders' Agreement. The lower court supported its dismissal of plaintiff Betty's action, reasoning:

> "The plaintiff did not raise an issue that the Stockholders' Agreement is unenforceable in her complaint, and the factual allegations in her complaint are based on the Stockholders' Agreement.[13]
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> ***
>
> This Court finds that the Stockholders' Agreement submitted as a documentary evidence resolved all factual issues as a matter of law, and the defendant made a prima facie showing that plaintiff does not have standing to sue as a matter of law."[14]

In response to the Stockholders' Agreement submitted by defendant Zvi, plaintiff Betty made the conclusory claim that her deceased husband's signature thereon was forged.[15] The lower court soundly rejected this unsupported assertion, holding:

> "If the Stockholders' Agreement was actually forged, then the plaintiff should not rely on such Stockholders' Agreement to allege her causes of action...[Plaintiff] offers inconsistent arguments here."[16]

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[12] R. 10-11.

[13] R. 10.

[14] R. 11.

[15] R. 10; R. 41.

[16] R. 10-11.

SUMMARY OF LEGAL ARGUMENT

The lower court correctly dismissed plaintiff Betty's purported shareholder derivative action for lack of legal capacity. Contrary to her conclusory assertion of shareholder ownership, plaintiff Betty never became "the owner of fifty percent (50%) of the shares of Worbes"[17] upon the death of her husband — David Sebrow.

A. PLAINTIFF'S PICAYUNE CLAIM CONCERNING THE FORM OF DEFENDANT ZVI'S AFFIDAVIT.

In Point I, we rebuff plaintiff Betty's picayune and frivolous arguments that defendant Zvi's affidavit[18] — which submitted the Stockholders' Agreement — was invalid for defective form and lack of a raised notary seal. As plaintiff Betty never returned and rejected defendant Zvi's affidavit, she waived any claimed defect in the form of the affidavit as non-prejudicial.[19] Further, a New Jersey attorney notarized defendant Zvi's affidavit, without a raised seal, as permitted by New Jersey Statutes, New York Statutes and applicable caselaw.[20] The lower court thus properly rejected

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[17] R. 11.4.

[18] R. 22-25.

[19] CPLR 2001 and 2101(f); *Status Gen. Dev., Inc. v. 501 Broadway Partners, LLC*, 163 A.D.3d 740 (2d Dept. 2018); *Falah v. Stop & Shop Cos., Inc*., 41 A.D.3d 638 (2d Dept. 2007).

[20] NJS 41:1-7, 41:2-1, 46:14-2.1, 46:14-6.1; CPLR 2309(c), RPL 299(5) and 311(5); *Charnov v. New York City Bd. of Educ.*, 171 A.D.3d 409 (1st Dept. 2019); *Midfirst Bank v. Agho*, 121 A.D.3d 343 (2d Dept. 2014); *Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 A.D.3d 672 (1st Dept. 2009).

plaintiff's procedural arguments.[21]

B. THE STOCKHOLDERS' AGREEMENT IS AUTHENTIC, DOCUMENTARY EVIDENCE WHICH CONCLUSIVELY BARS PLAINTIFF'S CLAIM OF STOCK OWNERSHIP.

In Point II, we argue the merits: the lower court correctly held the Stockholders' Agreement is authentic documentary evidence which bars plaintiff Betty's claim of stock ownership.

Plaintiff Betty's Verified Complaint specifically invoked and relied upon the Stockholders' Agreement as the operational document for Worbes Corporation, which confirmed David Sebrow's ownership of shares in the corporation.[22] Although she did not attach the Stockholders' Agreement to her pleading, plaintiff Betty is bound by the formal judicial admissions of her Verified Complaint, and cannot avoid the Stockholders' Agreement which is integral to her claim.[23]

The Stockholders' Agreement contained a reasonable restriction on stock transfers to third-parties. Under the Stockholders' Agreement, stock in Worbes Corporation could only be transferred to third-parties under: 1) "unanimous consent

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[21] R. 9.

[22] R. 11.3, 11.4.

[23] *Performance Comercial Importadora E Exportadora Ltda v. Sewa Intl. Fashions Pvt. Ltd.*, 79 A.D.3d 673, 674 (1st Dept. 2010); *Aronitz v. PricewaterhouseCoopers LLP*, 27 A.D.3d 393, 394 (1st Dept. 2006).

of all the other stockholders"[24]; or 2) "a testamentary disposition" to a shareholder's "issue" only.[25] The Stockholders' Agreement thus did not permit a testamentary disposition of shares to one's spouse — meaning from David Sebrow to plaintiff Betty Sebrow.

Here, defendant Zvi, as the sole remaining shareholder, did not consent to a transfer of David Sebrow's shares to plaintiff Betty.[26] Moreover, plaintiff Betty did not inherit David Sebrow's shares since the Stockholders' Agreement limited testamentary transfer of shares to one's issue — not spouse.

Plaintiff Betty opposed the dismissal motion with the conclusory claim that David Sebrow's signature had been forged upon the Stockholders' Agreement submitted by defendant Zvi.[27] However, plaintiff Betty did not: 1) submit any other Stockholders' Agreement with David Sebrow's signature; and/or 2) proffer an expert affidavit by a graphologist. Moreover, plaintiff Betty failed provide any facts to explain how or why David Sebrow's signature on the Stockholders' Agreement was different from his signature otherwise.

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[24] R. 31.

[25] R. 31.

[26] R. 24.

[27] R. 10; R. 41.

Plaintiff Betty's bald, conclusory assertion of forgery is simply incompetent to challenge the authenticity of the Stockholder Agreement submitted by defendant Zvi. *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 384 (2004) ("Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature. Here, there is an absence of factual assertions supporting a claim of forgery....").

Accordingly, the lower court correctly held that defendant Zvi satisfied his burden for dismissal of the action under CPLR 3211(a)(1) and (a)(3):

> "The plaintiff did not raise an issue that the Stockholders' Agreement is unenforceable in her complaint, and the factual allegations in her complaint are based on the Stockholders' Agreement. If the Stockholders' Agreement was actually forged, then the plaintiff should not rely on such Stockholders' Agreement to allege her causes of action.[28]
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> ***
>
> This Court finds that the Stockholders' Agreement submitted as a documentary evidence resolved all factual issues as a matter of law, and the defendant made a prima facie showing that plaintiff does not have standing to sue as a matter of law."[29]

[28] R. 10.

[29] R. 11.

C. PLAINTIFF BETTY HAS WAIVED PROTECTION UNDER THE DEADMAN'S STATUTE, AND HER SPOUSAL RIGHT OF ELECTION IS TIME-BARRED.

In Points III and IV, we dispense with Plaintiff Betty's arguments that the Deadman's Statute precludes use of the Stockholders' Agreement against her, and that the Stockholders' Agreement is invalid as it violates her spousal right of election. See, App. Br. 11-16, 19-23.

1. PLAINTIFF BETTY'S USE OF THE DEADMAN'S STATUTE AS A SWORD AND A SHIELD.

Plaintiff Betty is both the surviving spouse of David Sebrow, and the Executrix of his Estate.[30] However, she sued in her individual capacity only, claiming "David Sebrow's shares of Worbes Corporation" "passed" to her upon his death, and therefore she "became and currently is the owner of fifty percent (50%) of the shares of Worbes."[31]

Plaintiff Betty's Verified Complaint specifically invoked and relied upon the Stockholders' Agreement as the operational document for Worbes Corporation, which confirmed David Sebrow's ownership of shares in the corporation.[32] Plaintiff Betty, therefore, has waived any protection that she may have been afforded under the

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[30] R. 11.4; R. 41, 47-48.

[31] R. 11.4.

[32] R. 11.3, 11.4.

Deadman's Statute.

Indeed, Plaintiff Betty cannot invoke and rely upon the Stockholders' Agreement while simultaneously claim the Deadman's Statute prevents defendant Zvi from using the Stockholders' Agreement against her. As a matter of law, one cannot use the Deadman's Statute as a sword and a shield. Once she relied upon the Stockholders' Agreement in her Verified Complaint, plaintiff Betty "'opened the door' as to that transaction...." *In re Estate of Wood*, 52 N.Y.2d 139, 145 (1981). Defendant Zvi was therefore permitted to use his affidavit and the Stockholders' Agreement "to fully explain the personal transaction in issue." *Id.*

Notably, Plaintiff Betty's appellate brief fails to disclose this dispositive legal principle, which defeats her claim of protection under the Deadman's Statute of CPLR 4519.

2. SPOUSAL ELECTION IS TIME-BARRED.

Plaintiff Betty likewise fails to disclose that any spousal right of election is time-barred as a matter of law. David Sebrow died in May 2017[33], and Surrogates' Court, Nassau County, granted Letters Testamentary to Plaintiff Betty in July 2017.[34] Under EPTL 5-1.1-(A), plaintiff Betty had two years from David Sebrow's death to

[33] R. 11.4.

[34] R. 47-48.

exercise her right of spousal election. She did not do so and any such claim has been time-barred since May 2019. *Matter of Baig*, 192 A.D.3d 1010 (2d Dept. 2021); *Matter of Hornby*, 139 A.D.3d 1153 (3d Dept. 2016).

On the merits, the Stockholders' Agreement does not violate a spousal elective share that Plaintiff Betty may have once been able to exercise. Under *In re Estate of Riefberg*, 58 N.Y.2d 134 (1983), the value of David Sebrow's shares in Worbes Corporation would have been included in the net estate against which Plaintiff Betty may have been able to seek an elective share.

However, spousal elective share is a red herring — it has been time barred since 2019.

STATEMENT OF FACTS

A. THE VERIFIED COMPLAINT: RELIANCE UPON THE STOCKHOLDERS' AGREEMENT; PLAINTIFF BETTY'S CLAIM OF OWNERSHIP OF SHARES.

Plaintiff Betty commenced the instant shareholder derivative action in her own name individually, and not as the Executrix of David Sebrow's Estate. The Verified Complaint alleges five causes of action with regard to the control and operation of Worbes Corporation, and its sole asset: real property located in Bronx, NY.[35]

[35] R. 11.1-11.11.

Plaintiff Betty personally verified the Complaint, swearing to its truth.[36] None of the allegations in the Verified Complaint were made "upon information and belief"; rather, they were sworn under Betty's personal knowledge.

1. RELIANCE UPON THE STOCKHOLDERS' AGREEMENT.

In her Verified Complaint, plaintiff Betty specifically invoked and relied upon the Stockholders' Agreement of Worbes Corporation, which allotted her husband — David Sebrow — with 25% of the corporation's shares. The Verified Complaint thus alleged:

> "9. Worbes was a closely held family corporation of members of the Sebrow family.
>
> 10. By shareholder agreement made as of January 2, 1997 (the "Shareholder Agreement") the then four signatories acknowledged a twenty-five percent (25%) ownership in the shares of Worbes and two other closely held corporations.
>
> 11. Ultimately, the interest of two of the shareholders, Abraham Sebrow and Joseph Sebrow, passed to their sons, Zvi Sebrow and David Sebrow.
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> 12. In accordance with the provisions of the Shareholder Agreement, after Zvi Sebrow and David Sebrow became the only shareholders of Worbes, there was a requirement of unanimity with respect to all decisions of the Board of Directors (the "Board") of

[36] R. 11.11.

Worbes."[37]

2. DAVID SEBROW'S DEATH AND PLAINTIFF BETTY'S CLAIM OF OWNERSHIP OVER HIS SHARES.

The Verified Complaint alleged that upon David Sebrow's death in May 2017, plaintiff Betty became the owner of his shares in Worbes Corporation — 50% of Worbes.

> "17. On May 29, 2017, after battling cancer for over two years, David Sebrow passed away.
>
> 18. Upon his death, David Sebrow's shares of Worbes as well as the other closely held family corporations passed to his wife, Plaintiff Betty Sebrow, who then became and currently is the owner of fifty percent (50%) of the shares of Worbes."[38]

The Verified Complaint does not state any facts to support the allegation that upon David Sebrow's death, his shares in Worbes "passed to his wife, Plaintiff Betty Sebrow."[39] Rather, plaintiff Betty simply makes a conclusory assertion, and thereby claims legal ownership over David Sebrow's 50% share in Worbes.

B. DEFENDANT ZVI'S MOTION: ZVI'S AFFIDAVIT AND SUBMISSION OF THE STOCKHOLDERS' AGREEMENT.

In response to the Verified Complaint, defendant Zvi did not serve an Answer,

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[37] R. 11.3, 11.4.

[38] R. 11.4.

[39] R. 11.4.

but moved for dismissal of the action pursuant to CPLR 3211(a)(1) and (a)(3).[40] In support of his dismissal motion, defendant Zvi submitted his affidavit and the Stockholders' Agreement for Worbes Corporation. Defendant Zvi's affidavit was executed and sworn before a New Jersey attorney, as is permissible in New Jersey.[41]

In his affidavit, defendant Zvi stated he is "the sole and exclusive shareholder, officer, employee and owner of plaintiff Worbes Corporation."[42] Defendant Zvi explained that Worbes Corporation was a family business started by his father and uncles. Ownership of Worbes Corporation was subsequently held by defendant Zvi and his father, Abraham Sebrow, David Sebrow and his father, Joseph Sebrow.[43] Thus, as defendant Zvi stated, he and David Sebrow were first cousins. R. 22.

1. THE 1997 STOCKHOLDERS' AGREEMENT: 25% OF THE SHARES ALLOTTED TO EACH SHARE HOLDER.

Defendant Zvi's affidavit stated that Worbes Corporation and the other family businesses "were governed by a single Stockholders' Agreement entered into on January 2, 1997."[44] Defendant Zvi attached the 1997 Stockholders Agreement as an

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[40] R. 12-33.

[41] R. 25.

[42] R. 22.

[43] R. 22-23.

[44] R. 23.

exhibit to his affidavit.[45] The Stockholders Agreement is signed by Zvi Sebrow, Abraham Sebrow, David Sebrow and Joseph Sebrow.[46]

The Stockholders' Agreement specifically allots 25% of the shares in Worbes Corporation to each shareholder — Zvi Sebrow, Abraham Sebrow, David Sebrow and Joseph Sebrow.[47] The Stockholders' Agreement then states: "The parties hereby confirm that the ownership of the shares in S&S, Worbes and WLC is correct and accurate as set forth hereinabove...." R. 30.

2. THE STOCKHOLDERS' AGREEMENT: RESTRICTION ON TRANSFER OF SHARES IN WORBES.

As discussed in defendant Zvi's affidavit, the Stockholders' Agreement restricted stock transfers to third-parties. Under the Stockholders' Agreement, stock in Worbes Corporation could only be transferred to third-parties under: 1) "unanimous consent of all the other stockholders"[48]; or 2) "a testamentary disposition" to a shareholder's "issue" only.[49]

The Stockholders' Agreement further stated that any attempt to otherwise

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[45] R. 29-32.

[46] R. 32.

[47] R. 30.

[48] R. 31.

[49] R. 31.

transfer shares in Worbes "would be a nullity and unenforceable."[50]

Paragraph 6 of the Stockholders' Agreement thus states in its entirety:

> "No stockholder of S&S, Worbes and WLC shall sell, transfer, assign, mortgage, hypothecate his shares in any of said corporations or enter into any agreement as the result of which some third party shall become a stockholder in any of said corporations *without the unanimous consent of all the other stockholders, with the sole exception that any stockholder may make a testamentary disposition of his shares to his issue* in which event his issue shall own the shares of his deceased father but subject nevertheless to the terms and conditions contained in this agreement. *Any other attempted transfer or disposition of such shares shall be a nullity and unenforceable."*[51]

The Stockholders' Agreement also specifically states that it is "binding upon the heirs, successors and personal representatives of all of the parties." R. 32.

3. TESTAMENTARY DISPOSITION BY THE FATHERS OF ZVI AND DAVID; DEFENDANT ZVI DOES NOT CONSENT TO ANY SHARE TRANSFER TO PLAINTIFF BETTY.

Defendant Zvi's affidavit explains that his father and uncle complied with the share transfer restriction in the Stockholders' Agreement. They each made a "testamentary disposition of their shares to their children" and thus Zvi and David Sebrow "became 50% owners of Worbes" when their respective fathers passed away.

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[50] R. 31.

[51] R. 31 (emphasis added).

R. 23.

In his affidavit defendant Zvi stated that he does not consent to any transfer of shares in Worbes Corporation to plaintiff Betty: "Zvi has not consented to any third party becoming a stockholder of Worbes." R. 24.

C. PLAINTIFF BETTY'S OPPOSITION TO DEFENDANT ZVI'S DISMISSAL MOTION: BETTY'S CONCLUSORY CLAIM OF FORGED SIGNATURE ON THE STOCKHOLDERS' AGREEMENT.

Plaintiff Betty submitted a five paragraph affidavit in opposition to defendant Zvi's dismissal motion. R. 41-42. Although she sued in her own name, and asserted her personal ownership of the shares at issue, plaintiff Betty attested that she is the Executor of the Estate of David Sebrow and attached a purported copy of his Will[52], as well as appointment documents from Surrogates' Court, Nassau County. R. 41, 45-48.

The only argument asserted in her affidavit is a conclusory claim that David Sebrow's signature on the Stockholders' Agreement is a forgery.

> "Having been married to my husband for so long I was and am quite familiar with his signature. *I have carefully*

[52] Since the Surrogate's Court issued Letters Testamentary in 2019, it would seem that David Sebrow's Will has already been probated. See, SCPA 1414(1). However, plaintiff Betty did not submit "A certified copy of the record of the decree admitting a will to probate and of the record of the will so admitted to probate...." SCPA 1422. Thus, there is no evidentiary proof that the Will submitted by plaintiff Betty is indeed a correct copy of David Sebrow's Will admitted to probate.

> *examined the signature on the purported shareholder agreement. I am certain it is a forgery*."[53]

Plaintiff Betty does not claim outright that defendant Zvi forged David Sebrow's signature. However, she continued her affidavit with an unsubstantiated allegation: "Defendant Zvi Sebrow previously admitted to me that he routinely forged my deceased husband's signature when he need it on documents in connection with the running of Worbes...."[54]

Despite plaintiff Betty's assertion of forgery, she did not: 1) submit any other Stockholders' Agreement with David Sebrow's signature; and/or 2) proffer an expert affidavit by a graphologist. Moreover, plaintiff Betty failed to provide any facts to explain how or why David Sebrow's signature on the Stockholders' Agreement was different from his signature otherwise.

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[53] R. 42.

[54] R. 42-43 (emphasis added).

POINTS OF LAW

POINT I

THE LOWER COURT CORRECTLY REJECTED PLAINTIFF BETTY'S PICAYUNE OBJECTIONS TO THE FORM OF DEFENDANT ZVI'S AFFIDAVIT; THE AFFIDAVIT WAS VALIDLY EXECUTED AND SWORN BEFORE A NEW JERSEY ATTORNEY, AND A RAISED SEAL IS NOT REQUIRED FOR SUCH AFFIDAVIT IN A NEW YORK MATTER.

Plaintiff Betty wastes much ink in objecting to the form of defendant Zvi's affidavit, which submitted the Stockholders' Agreement.[55] The lower court correctly rejected plaintiff's procedural opposition, ruling "[T]his Court can consider the affidavit of Zvi Sebrow for the purpose of CPLR 3211." R. 9.

The Appellant's Brief argues that defendant Zvi's affidavit is invalid because:

A. It bears a header of "State of New York", "County of New York", but was executed and sworn before a New Jersey attorney[56]; and

B. The New Jersey attorney did not utilize a "raised seal" in the jurat.[57]

Plaintiff Betty's picayune objections are entirely contrary to New Jersey and New York statutes as well as settled New York appellate caselaw. Defendant Zvi's affidavit was validly executed and sworn before a New Jersey attorney. Any claimed

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[55] App. Br. 6-11.

[56] App. Br. 7-8; R. 25.

[57] App. Br. 8-11; R. 25.

defects in the affidavit's form are waived and/or to be disregarded as a matter of law. Further, as a matter of law, a raised seal is not required on an affidavit executed and sworn in New Jersey, and submitted in New York litigation. It is truly shameful that counsel wastes time on this frivolous argument.

In the first instance, no matter the header indicating State and County of New York, defendant Zvi's affidavit begins by stating that he is "duly sworn, alleges and says."[58] As a matter of law, therefore, his affidavit is "sufficiently sworn and admissible." *Buffington v. Catholic Sch. Region of Northwest & Southwest Bronx*, 198 A.D.3d 410 (1st Dept. 2021) (reversing lower court's rejection of the form of affidavit, where the affidavit stated it was "duly sworn"). As defendant Zvi's affidavit was duly sworn and admissible, plaintiff misrelies on *Seidman v. Indus. Recycling Props*., 52 A.D.3d 678, 680 (2d Dept. 2008), where the Court rejected an "unsworn affidavit."

Next, counsel conceded before the lower court that defendant Zvi's affidavit "was more likely executed in New Jersey" as defendant Zvi and the subscribing New Jersey attorney both live in Teaneck, New Jersey, approximately "1 mile" from each other.[59] A notary or another authorized to administer oaths "in the absence of a

[58] R. 22.

[59] R. 35.

showing to the contrary, is presumed to have acted within his or her jurisdiction and carried out his or her duties as required by law." *Collins v. AA Trucking Renting Corp.*, 209 A.D.2d 363 (1st Dept. 1994); *Sirico v. F.G.G. Prods, Inc.*, 71 A.D.3d 429, 434 (1st Dept. 2010) (quoting *Collins*). Hence, defendant Zvi's affidavit is "presumed" to have been executed and sworn in New Jersey, despite the header of "State of New York", "County of New York". *Id.*

Further, the dichotomy between the header of New York and actual execution in New Jersey is merely a non-prejudicial defect in form. Plaintiff Betty never returned and rejected defendant Zvi's affidavit. She thus waived any claimed defect in the form of the affidavit as non-prejudicial and/or the Court itself may disregard any defect in form.[60]

Finally, contrary to counsel, a "raised seal" is not required under CPLR 2309(c) to demonstrate the authority of a New Jersey attorney to administer an oath on an affidavit submitted in New York litigation.[61] An affidavit executed in New Jersey,

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[60] CPLR 2001, 2101(f); *Status Gen. Dev., Inc. v. 501 Broadway Partners, LLC*, 163 A.D.3d 740 (2d Dept. 2018) (validity of affidavit upheld pursuant to CPLR 2001 and 2101; plaintiff failed to timely reject for claimed defect in form); *Falah v. Stop & Shop Cos., Inc.*, 41 A.D.3d 638 (2d Dept. 2007) (out-of-state affidavit by Ohio physician held valid pursuant to CPLR 2001 "despite the alleged defects in the form of the affidavit.").

[61] NJS 41:1-7 41:2-1, 46:14-2.1, 46:14-6.1 (collectively stating oaths and affidavits may be sworn before a New Jersey attorney and a raised seal is not required to be affixed to any such duly sworn affidavit); the raised seal of a foreign notary is not required under CPLR 2309(c), RPL 299(5) and 311(5), as held by *Charnov v. New York City Bd. of Educ.*, 171 A.D.3d 409 (1st Dept. 2019); *Midfirst Bank v. Agho*, 121 A.D.3d 343 (2d Dept. 2014); *Matapos Tech. Ltd. v.*

sworn before a New Jersey attorney, is fully accepted by the New York courts without a raised seal — otherwise known as a "certificate of authentication". This issue was definitively decided in *Midfirst Bank v. Agho*, 121 A.D.3d 343, 349-350 (2d Dept. 2014), which held *inter alia*:

> "A combined reading of CPLR 2309(c) and Real Property Law §§ 299 and 311(5) leads to the inescapable conclusion that where, as here, a document is acknowledged by a foreign state notary, a separate 'certificate of authentication' is not required to attest to the notary's authority to administer oaths.
>
> Real Property Law §311(5) exempts the officers enumerated in Real Property Law §299, such as foreign notaries, from the requirement for a certificate of authentication."

Under Real Property Law 299 and NJS 41:2-1 and 46:14-6.1, a New Jersey attorney is an officer authorized to take oaths and acknowledgments. Thus, pursuant to *Midfirst Bank v. Agho*, defendant Zvi's affidavit, executed and sworn before a New Jersey attorney, did not require a raised seal for New York litigation.

This Court in *Charnov v. New York City Bd. of Educ.*, 171 A.D.3d 409, 409-410 (1st Dept. 2019), likewise held the lack of a certificate of authentication (raised seal) on an out-of-state affidavit is "not a fatal defect", but a "mere irregularity" to be "disregarded" where prejudice has not been alleged.

Compania Andina de Comercio Ltda, 68 A.D.3d 672 (1st Dept. 2009).

Here, plaintiff Betty has not alleged any prejudice arising from the lack of a raised seal on defendant Zvi's affidavit. Pursuant to the foregoing law, defendant Zvi's affidavit was acceptable in the instant New York litigation — even without a raised seal. The lower court, therefore, properly rejected plaintiff's procedural arguments as to defendant Zvi's affidavit.[62]

POINT II

THE LOWER COURT CORRECTLY DISMISSED PLAINTIFF BETTY'S SHAREHOLDER DERIVATIVE ACTION AS SHE DID NOT OWN SHARES IN WORBES UNDER THE STOCKHOLDERS' AGREEMENT; THE STOCKHOLDERS' AGREEMENT IS AUTHENTIC EVIDENCE AS PLAINTIFF DID NOT PROVE FORGERY.

Under the terms of the Stockholders' Agreement, plaintiff Betty never owned a single share — let alone 50% of the shares — in Worbes upon the death of her husband, David Sebrow. Thus, the lower court correctly dismissed Betty's action, holding "the plaintiff is not a shareholder [in Worbes Corporation]"[63] pursuant to the Stockholders' Agreement.

Plaintiff Betty's Verified Complaint specifically invoked and relied upon the Stockholders' Agreement as the operational document for Worbes Corporation,

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[62] R. 9.

[63] R. 10-11.

which confirmed David Sebrow's ownership of shares in the corporation.[64] Plaintiff Betty is bound by the formal judicial admissions of her Verified Complaint and cannot avoid the Stockholders' Agreement which is integral to her claim.[65]

Further, plaintiff Betty failed to raise a legitimate, bona fide question of fact as to the authenticity of the Stockholders' Agreement, and thus her standing to bring the instant action. *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381 (2004); *Wells Fargo Bank, N.A. v. Smith*, 197 A.D.3d 532 (2d Dept. 2021).

In her affidavit, plaintiff Betty made only a conclusory claim of forgery.[66] She did not submit any other Stockholders' Agreement bearing David Sebrow's signature or an expert affidavit contesting the authenticity of David Sebrow's signature on the Stockholders' Agreement. Moreover, plaintiff Betty failed to provide any facts to explain how or why David Sebrow's signature on the Stockholders' Agreement was different from his signature otherwise.

Accordingly, as a matter of law, the Stockholders' Agreement is authentic documentary evidence and plaintiff Betty thus lacks legal capacity and/or standing

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[64] R. 11.3, 11.4.

[65] *Performance Comercial Importadora E Exportadora Ltda v. Sewa Intl. Fashions Pvt. Ltd.*, 79 A.D.3d 673 (1st Dept. 2010); *Aronitz v. PricewaterhouseCoopers LLP*, 27 A.D.3d 393 (1st Dept. 2006).

[66] R. 41-42.

to bring the instant action. *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 384 (2004); *M&E 73-75, LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 6 (1st Dept. 2020);*Wells Fargo Bank, N.A. v. Smith*, 197 A.D.3d 532 (2d Dept. 2021).

The lower court, therefore, correctly ruled:

> "[T]he Stockholders' Agreement submitted as a documentary evidence resolved all factual issues as a matter of law, and the defendant made a prima facie showing that plaintiff does not have standing to sue as a matter of law."[67]

Defendant Zvi respectfully requests this Court affirm the lower court's dismissal of the plaintiff's purported shareholder derivative action.

A. PLAINTIFF BETTY'S VERIFIED COMPLAINT: RELIANCE ON THE STOCKHOLDERS' AGREEMENT AS A FORMAL JUDICIAL ADMISSION OF ITS CONTROLLING AUTHORITY.

Plaintiff Betty sued in her own name and laid a personal claim to ownership of 50% of the shares in Worbes. In her Verified Complaint, plaintiff Betty asserts "David Sebrow's shares of Worbes Corporation" "passed" to her upon his death, and therefore she "became and currently is the owner of fifty percent (50%) of the shares of Worbes."[68]

Betty's Verified Complaint acknowledges and relies upon the Stockholders'

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[67] R. 11.

[68] R. 11.4.

Agreement as the operational document for Worbes Corporation, which confirmed David Sebrow's ownership of shares in the corporation. The Verified Complaint further recognizes that David Sebrow and defendant Zvi subsequently received their respective fathers' shares in Worbes Corporation. Accordingly, David Sebrow and defendant Zvi each owned 50% of the corporation at the time of David's death in 2017.[69]

Thus, in her Verified Complaint, plaintiff Betty specifically pleads *inter alia*:

> "9. Worbes was a closely held family corporation of members of the Sebrow family.
>
> 10. By shareholder agreement made as of January 2, 1997 (the "Shareholder Agreement") the then four signatories acknowledged a twenty-five percent (25%) ownership in the shares of Worbes and two other closely held corporations.
>
> 11. Ultimately, the interest of two of the shareholders, Abraham Sebrow and Joseph Sebrow, passed to their sons, Zvi Sebrow and David Sebrow.
>
> 12. In accordance with the provisions of the Shareholder Agreement, after Zvi Sebrow and David Sebrow became the only shareholders of Worbes, there was a requirement of unanimity with respect to all decisions of the Board of Directors (the "Board") of Worbes."[70]

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[69] R. 11.4.

[70] R. 11.3, 11.4.

These allegations — personally verified by plaintiff Betty[71] — constitute binding, formal judicial admissions which establish controlling authority of the Stockholders' Agreement over Betty. As a matter of law, statements made in a pleading "constitute formal judicial admissions"[72], which are "evidence of the fact admitted."[73] As plaintiff Betty verified the Complaint upon personal knowledge[74], her reliance upon the Stockholders' Agreement is "binding and conclusive." *Bogoni v. Friedlander*, 197 A.D.2d 281 (1st Dept. 1994).

Accordingly, plaintiff Betty cannot avoid the Stockholders' Agreement which is integral to her claim — as she asserts ownership of shares in Worbes only through her deceased husband, David Sebrow. R. 11.4. (Paragraph 18 of the Verified Complaint).

The lower court thus correctly analyzed Betty's Verified Complaint holding *inter alia*:

> "The plaintiff did not raise an issue that the Stockholders' Agreement is unenforceable in her complaint, and the factual allegations in her complaint are based on the

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[71] 11.11.

[72] *Aronitz v. PricewaterhouseCoopers LLP*, 27 A.D.3d 393 (1st Dept. 2006).

[73] *Performance Comercial Importadora E Exportadora Ltda v. Sewa Intl. Fashions Pvt. Ltd.*, 79 A.D.3d 673, 674 (1st Dept. 2010).

[74] 11.11.

Stockholders' Agreement.[75]

B. PLAINTIFF BETTY DOES NOT OWN SHARES IN WORBES UNDER THE STOCKHOLDERS' AGREEMENT.

As the Stockholders' Agreement controls share ownership and corporate affairs of Worbes, the lower court correctly dismissed Betty's action, holding "the plaintiff is not a shareholder [in Worbes Corporation]"[76] pursuant to the Stockholders' Agreement.

Indeed, based upon the Stockholders' Agreement for Worbes Corporation[77], defendant Zvi demonstrated: 1) plaintiff Betty did not become a shareholder upon her husband's death, and; 2) therefore she had no legal capacity/standing to bring her purported shareholder derivative action.

As discussed in defendant Zvi's affidavit, the Stockholders' Agreement contained a reasonable restriction on stock transfers to third-parties.[78] Under paragraph 6 of the Stockholders' Agreement, stock in Worbes Corporation could only be transferred to third-parties under: 1) "unanimous consent of all the other

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[75] R. 10.

[76] R. 10-11.

[77] R. 29-32.

[78] R. 23-24.

stockholders"[79]; or 2) "a testamentary disposition" to a shareholder's "issue" only.[80]

The Stockholders' Agreement thus did not permit a testamentary disposition of shares to one's spouse — meaning from David Sebrow to plaintiff Betty Sebrow. Moreover, paragraph 6 of the Stockholders' Agreement further stated: "Any other attempted transfer or disposition of such shares shall be a nullity and unenforceable."[81]

The conclusive and controlling nature of the Stockholders' Agreement is further demonstrated by specific language stating it "shall be binding upon the heirs, successors and personal representatives of all of the parties." R. 32.

In his affidavit, defendant Zvi attested that he did not consent to a transfer of David Sebrow's shares to plaintiff Betty.[82] Thus, under the "unanimous consent" provision of the Stockholders' Agreement, defendant Zvi blocked transfer of David's shares to plaintiff Betty. Further, plaintiff Betty did not inherit David Sebrow's shares since the Stockholders' Agreement limited testamentary transfer of shares to one's issue — not spouse.

In the Appellant's Brief, counsel conjures Betty's affidavit as stating, "Her

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[79] R. 31.

[80] R. 31.

[81] R. 31.

[82] R. 24.

husband showed it [the Stockholders' Agreement] to her before he signed it. It had no provision preventing him from bequeathing his ownership interest in Worbes or any other entity, to her." App. Br. 18.

Counsel misapprehends plaintiff Betty's affidavit. Plaintiff Betty's affidavit contains only five paragraphs and none of them say anything such thing. R. 41-42.

Under the terms of the Stockholders' Agreement, plaintiff Betty never owned a single share — let alone 50% of the shares — in Worbes upon the death of her husband, David Sebrow. The Stockholders' Agreement reasonably restricted stock transfers to third-parties by means of unanimous consent or testamentary disposition to "issue" — children — only. *Ferolito v. Vultaggio*, 78 A.D.3d 529, 529-530 (1st Dept. 2010) ("Restrictions on the transfer of stock are not uncommon in closely held corporations as they effectively protect day-to-day corporate operations. 'Such restrictions are considered to be reasonable [where] they do not represent an effective prohibition against transferability. 'but merely limit the group to whom the shares may be transferred.'"); *In re Penepent Corp*., 96 N.Y.2d 186, 192 (2001) ("As a general rule, courts must enforce shareholder agreements according to their terms. Such agreements avoid costly, lengthy litigation and promote 'reliance, predictability and definitiveness' in relationships among shareholders in close corporations.").

No matter plaintiff Betty's conclusory claim that David Sebrow's shares in

Worbes "passed" to her upon his death[83], the lower court correctly dismissed Betty's action, holding "the plaintiff is not a shareholder [in Worbes Corporation]"[84] pursuant to the Stockholders' Agreement.

C. THE STOCKHOLDERS' AGREEMENT IS AUTHENTIC DOCUMENTARY EVIDENCE AS PLAINTIFF BETTY DID NOT PROVE IT WAS A FORGERY.

In opposing defendant Zvi's dismissal motion, plaintiff Betty proffered only a single, conclusory argument: David Sebrow's signature on the Stockholders' Agreement is a forgery.

Paragraph 4 of her Affirmation in Opposition states in relevant part:

> "Having been married to my husband for so long I was and am quite familiar with his signature. *I have carefully examined the signature on the purported shareholder agreement. I am certain it is a forgery*."[85]

Despite plaintiff Betty's assertion of forgery, she does not marshal any evidence to prove her claim. She did not: 1) submit any other Stockholders' Agreement with David Sebrow's signature; and/or 2) proffer an expert affidavit by a graphologist. Moreover, plaintiff Betty failed to provide any facts to explain how

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[83] R. 11.4 (paragraph 18 of the Verified Complaint). A bare legal conclusion in a pleading, which flatly contradicts documentary evidence — such as the Stockholders' Agreement — is not entitled to any consideration. *Connaughton v. Chipotle Mexican Grill, Inc.,* 29 N.Y.3d 137, 142 (2017); *Tal v. Malekan*, 305 A.D.2d 281 (1st Dept. 2003).

[84] R. 10-11.

[85] R. 42 (emphasis added).

or why David Sebrow's signature on the Stockholders' Agreement was different from his signature otherwise. Plaintiff Betty's attachment of David Sebrow's purported Will is likewise unavailing.[86] In her affidavit, plaintiff Betty did not state or explain as to whether there is any distinction between David Sebrow's signature on the Stockholder Agreement and his purported Will.[87]

Plaintiff Betty's bald, conclusory assertion of forgery is simply incompetent to challenge the authenticity of the Stockholder Agreement submitted by defendant Zvi. The New York Court of Appeals has dispositively ruled, "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature." *Banco Popular N. Am. v. Victory Taxi Mgmt.*, 1 N.Y.3d 381, 384 (2004).

A claim of forgery is likewise rejected as a matter of law where "there is an absence of [supporting] factual assertions...." *Id.*; *Karma Props. LLC v. Lilok, Inc.*, 184 A.D.3d 515, 516 (1st Dept. 2020) ("[D]efendants made no assertions to the motion court based on the specific differences between [defendant] Rogers's

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[86] R. 43-46.

[87] There is no evidentiary proof that the purported Will is a correct copy of David Sebrow's Will admitted to probate. Plaintiff Betty did not submit "A certified copy of the record of the decree admitting a will to probate and of the record of the will so admitted to probate...." SCPA 1422. Further, she merely used the Will and Surrogate's Court documents at R. 43-48 to show that she is the Executrix of David Sebrow's Estate — despite bring the instant action in her own name, individually and claiming personal ownership over the shares at issue.

signature and the signature on the amendment....").

Thus, plaintiff Betty's bald, conclusory assertion of forgery does not raise a legitimate, bona fide question of fact as to the authenticity of the Stockholders' Agreement. In turn, plaintiff Betty fails to raise a question of fact as to her legal capacity or standing to bring the instant action, as that is inextricably intertwined with the Stockholders' Agreement. *Wells Fargo Bank, N.A. v. Smith*, 197 A.D.3d 532, 533 (2d Dept. 2021) (dismissal motion for lack of legal capacity/standing granted where "plaintiff failed to raise a triable issue of fact" in that regard). Pursuant to the Stockholders' Agreement, plaintiff Betty never owned a single share — let alone 50% of the shares — in Worbes upon the death of her husband, David Sebrow.

As plaintiff Betty failed to prove the Stockholders' Agreement was forged — or even raise a bona fide question of fact as to forgery — the Stockholders' Agreement is authentic documentary evidence, which demonstrates that plaintiff Betty lacks legal capacity to bring the instant action. *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189,194 (1st Dept. 2019) (dismissal upon documentary evidence is granted where the document is "unambiguous", "of undisputed authenticity", and "its contents are 'essentially undeniable.'"); *M&E 73-75, LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 6 (1st Dept. 2020) (a motion to dismiss based upon documentary evidence is granted where "the documentary evidence submitted

conclusively establishes a defense to the asserted claims as a matter of law.").

The lower court, therefore, correctly ruled:

> "[T]he Stockholders' Agreement submitted as a documentary evidence resolved all factual issues as a matter of law, and the defendant made a prima facie showing that plaintiff does not have standing to sue as a matter of law."[88]

Defendant Zvi respectfully requests this Court affirm the lower court's dismissal of the plaintiff's purported shareholder derivative action.

POINT III

THE LOWER COURT CORRECTLY HELD THE STOCKHOLDERS' AGREEMENT BARS PLAINTIFF'S ACTION; PLAINTIFF BETTY WAIVED PROTECTION UNDER THE DEAD MAN'S STATUTE AND USED IT — AND THE STOCKHOLDERS' AGREEMENT — AS A SWORD AND A SHIELD.

In her Appellant's Brief, plaintiff Betty complains that the lower court was "dismissive" of her argument that New York's Dead Man's Statute, codified in CPLR 4519, precluded consideration of defendant Zvi's affidavit and the Stockholder Agreement. App. Br. 16. The Appellant's Brief further claims this matter is a "textbook" case for application of the Dead Man's Statute. App. Br. 13.

However, plaintiff Betty fails to appreciate that under *In re Estate of Wood*[89],

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[88] R. 11.

[89] 52 N.Y.2d 139 (1981).

the lower court correctly considered the Stockholders' Agreement and held that it bars plaintiff Betty's action. Indeed, plaintiff Betty waived protection under the Dead Man's Statute and impermissibly used it — and the Stockholders' Agreement — as a sword and a shield.

A. PLAINTIFF BETTY'S WAIVER OF THE DEAD MAN'S STATUTE.

Generally, the Dead Man's Statute of CPLR 4519 precludes an interested party from testifying "concerning a personal transaction or communication" with a decedent, as against "the executor, administrator or survivor of a deceased person...or a person deriving his title or interest from, through or under a deceased person...."

However, as the Court of Appeals explained in *In re Estate of Wood*[90], the Dead Man's Statute contains an important exception — a waiver clause:

> "[T]he representative of the deceased has *waived* the protection of the statute by testifying himself or introducing the testimony of the decedent into evidence at trial.[91]
>
> ***
>
> "By the terms of the statute, the representative of a decedent's estate *waives the protection of the statute if he testifies in his own behalf concerning a personal transaction of his adversary with the deceased.*"[92]

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[90] 52 N.Y.2d 139, 145 (1981).

[91] *Id.*, at 144 (1981) (emphasis added).

[92] *Id.*, at 145 (1981) (emphasis added).

Here, plaintiff Betty sued in her individual, personal capacity as a "survivor"[93] of David Sebrow, claiming "David Sebrow's shares of Worbes" "passed" to her upon his death, and therefore she "became and currently is the owner of fifty percent (50%) of the shares of Worbes."[94]

Plaintiff Betty's Verified Complaint specifically invoked and relied upon the Stockholders' Agreement as the operational document for Worbes Corporation, which confirmed David Sebrow's ownership of shares in the corporation.[95] By invoking and relying upon the Stockholders' Agreement, *"a personal transaction of [her] adversary with the deceased"*, plaintiff Betty waived any protection that she may have been afforded under the Dead Man's Statute. *In re Estate of Wood*, 52 N.Y.2d at 145 (1981) (emphasis added).

Indeed, in paragraphs 10-12 of her Verified Complaint, plaintiff Betty specifically invokes and relies upon the authority of the Stockholders' Agreement for: 1) David Sebrow's initial ownership of 25% of the shares in Worbes; 2) David's subsequent ownership of his father's 25% interest/shares in Worbes; and 3) "unanimity with respect to all decisions" of Worbes' Board. R. 11.4.

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[93] CPLR 4519.

[94] R. 11.4.

[95] R. 11.3, 11.4.

Plaintiff Betty then alleges in paragraph 18 of her Verified Complaint that "Upon his death, David Sebrow's shares of Worbes....passed" to her as "his wife", and therefore she "became and currently is the owner of fifty percent (50%) of the shares of Worbes."[96]

Plaintiff Betty verified her Complaint under oath, upon her personal knowledge.[97] CPLR 3020(a) defines a verification as "a statement under oath that the pleading is true...." Similarly, under CPLR 105(u), "A verified pleading maybe used as an affidavit whenever the latter is required." Thus, through her own Verified Complaint, plaintiff Betty proffered an affidavit/testimony invoking and relying upon the authority of the Stockholders' Agreement, which is *"a personal transaction of [her] adversary with the deceased."*[98]

Indeed, the Stockholders' Agreement, signed by defendant Zvi Sebrow and decedent David Sebrow is the operational document for Worbes Corporation, which confirmed David Sebrow's ownership of shares in the corporation. In the instant action, plaintiff Betty claims David Sebrow's shares in Worbes — confirmed under the authority of the Stockholders' Agreement — as her own.[99]

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[96] R. 11.4.

[97] R. 11.11.

[98] *In re Estate of Wood*, 52 N.Y.2d at 145 (1981) (emphasis added).

[99] R. 11.4 (paragraph 18 of the Verified Complaint).

Thus, pursuant to *In re Estate of Wood*, plaintiff Betty waived protection under the Dead Man's statute by invoking and relying upon the Stockholders' Agreement, which is *"a personal transaction of [her] adversary with the deceased."*[100]

Accordingly, the lower court correctly considered the Stockholders' Agreement and held that it bars plaintiff Betty's action.

B. PLAINTIFF BETTY'S IMPERMISSIBLE USE OF THE DEAD MAN'S STATUTE AND THE STOCKHOLDERS' AGREEMENT AS A SWORD AND A SHIELD.

Plaintiff Betty goes a step further from merely waiving protection of the Dead Man's Statute. She impermissibly uses the Statute and the Stockholder's Agreement as a sword and a shield against defendant Zvi. While her Verified Complaint invokes and relies upon the Stockholders' Agreement — "*a personal transaction of [her] adversary with the deceased"*[101]— plaintiff Betty claims the Dead Man's Statute prevents defendant Zvi from using the Stockholders' Agreement as the basis for his dismissal motion. App. Br. 11-16.

Plaintiff Betty's strategy, however, violates the sword and shield ruling of the Court of Appeals in *In re Estate of Wood*:

> "Once having introduced testimony concerning that transaction into evidence, he [decedent's

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[100] *In re Estate of Wood*, 52 N.Y.2d at 145 (1981).

[101] *Id.*

> survivor/representative] cannot thereafter prevent his adversary from testifying to the details of the same transaction, for to do so would give the estate an unfair advantage not intended by the statute.[102]
>
> ***
>
> "It was long ago settled that when the executor questions his adversary as to all or part of a personal transaction with the decedent, he has 'opened the door' as to that transaction and otherwise incompetent testimony is admissible to fully explain the personal transaction in issue...*This prevents the unfair use of the statute as a sword rather than a shield*."[103]

Accordingly, once plaintiff Betty invoked and relied upon the Stockholders' Agreement in her Verified Complaint, she "'opened the door' as to that transaction...." *In re Estate of Wood*, 52 N.Y.2d at 145 (1981). Defendant Zvi was therefore permitted to use his affidavit and the Stockholders' Agreement in the dismissal motion "to fully explain the personal transaction in issue." *Id.* Accordingly, the lower court correctly considered the Stockholders' Agreement and held that it bars plaintiff Betty's action.

To plaintiff Betty's detriment, the very Stockholders' Agreement that she invokes and relies upon, demonstrates that she does not — and cannot — own shares in Worbes Corporation. Defendant Zvi does not consent to transfer of David

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[102] *Id.*

[103] *Id.*

Sebrow's shares[104] and the Stockholders' Agreement permits testamentary disposition of shares only to one's issue — not spouse.[105]

POINT IV

THE LOWER COURT CORRECTLY HELD THE STOCKHOLDERS' AGREEMENT PRECLUDES PLAINTIFF'S ACTION; SPOUSAL ELECTION HAS BEEN TIME-BARRED SINCE 2019 AND IT WOULD HAVE INCLUDED THE VALUE OF DAVID SEBROW'S SHARES — BUT NOT THE ACTUAL SHARES.

In her Appellant's Brief, plaintiff Betty bemoans that the lower court did not address her argument that the Stockholders' Agreement violates her spousal right of election. App. Br. 17-23.

However, this and other of the arguments in the Appellant's Brief, are red herrings. Plaintiff Betty's spousal right of election has been time-barred since May 2019. EPTL 5-1.1-(A). Hence, red herring number 1.

The Appellant's Brief posits another red herring regarding David Sebrow's testamentary intent. App. Br. 23-24. The Stockholders' Agreement at issue was a testamentary substitute. *In re Estate of Riefberg*, 58 N.Y.2d 134 (1983). Further, there is no evidentiary proof that the purported Will annexed to plaintiff Betty's affidavit is a correct copy of David Sebrow's Will admitted to probate. Plaintiff Betty

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[104] R. 24.

[105] R. 31.

did not submit "A certified copy of the record of the decree admitting a will to probate and of the record of the will so admitted to probate...." SCPA 1422. Hence, no proof of testamentary intent, and red herring number 2.

The third red herring is whether David Sebrow's shares go to his Estate or defendant Zvi. App. Br. 21. This is entirely immaterial since plaintiff Betty brought the instant action in her own name, individually and claiming personal ownership over the shares at issue. As plaintiff Betty's Verified Complaint states:

> "Upon his death, David Sebrow's shares of Worbes...passed to his wife, Plaintiff Betty Sebrow, who then became and currently is the owner of fifty percent (50%) of the shares of Worbes."[106]

Finally, on the merits, the Stockholder Agreement does not violate any spousal right of election that she may have once been able to exercise. The value of David Sebrow's shares — but not the actual shares — would have been included in the net estate subject to a timely election. *In re Estate of Riefberg*, 58 N.Y.2d 134 (1983).

A. SPOUSAL ELECTION IS TIME-BARRED.

David Sebrow died in May 2017[107], and Surrogates' Court, Nassau County, granted Letters Testamentary to Plaintiff Betty in July 2017. [108] Under EPTL 5-1.1-

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[106] R. 11.4 (paragraph 18 of the Verified Complaint).

[107] R. 11.4.

[108] R. 47-48.

(A), plaintiff Betty had two years from David Sebrow's death to exercise her right of spousal election. The statute specifically limits spousal election to 2 years post-death:

> "An election under this section must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, *but in no event later than two years after the date of decedent's death....*"[109]

As David Sebrow died in May 2017, plaintiff Betty — as his surviving spouse — had to May 2019 to exercise her right of spousal election. Plaintiff Betty seemingly did not exercise her right of election, and any claim for spousal election has been time-barred under EPTL 5-1.1-(A) since May 2019. *Matter of Baig*, 192 A.D.3d 1010 (2d Dept. 2021) ("A surviving spouse's election to take a share of the decedent's estate 'must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death." (quoting EPTL 5-1.1-A[d][1]); *Matter of Hornby*, 139 A.D.3d 1153 (3d Dept. 2016) (petitioner surviving spouse not relieved of default in failing to exercise right of election within the statutory 2-year period under EPTL 5-1.1-A[d][1]).

Indeed, plaintiff Betty commenced the instant action on November 20, 2019, when her right to exercise spousal election was already time-barred. Accordingly, the

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[109] EPTL 5-1.1-A(d)(1) (emphasis added).

lower court was correct in: 1) not entertaining counsel's argument on spousal election; and 2) holding the Stockholders' Agreement precludes plaintiff's action.

B. THE STOCKHOLDERS' AGREEMENT DID NOT VIOLATE SPOUSAL RIGHT OF ELECTION — HAD IT BEEN TIMELY EXERCISED.

On the merits, the Stockholders' Agreement does not violate a spousal elective share that Plaintiff Betty may have once been able to exercise. Under *In re Estate of Riefberg*, 58 N.Y.2d 134 (1983), the value of David Sebrow's shares in Worbes Corporation would have been included in the net estate against which Plaintiff Betty may have been able to seek an elective share.

In *In re Estate of Riefberg*, the Court of Appeals held that the Stockholders' Agreement at issue was a testamentary substitute and spousal election may be exercised against it for the *value* of stock at issue. *Id.,* at 137-138, 142 (affirming Surrogate's Court decree which "directed the executrix to file an accounting in which the avails of the stock would enter into the calculation of her statutory share."); EPTL 5-1.1.

However, this does not mean that the Stockholders' Agreement in the instant action is violative of a potential elective share that plaintiff Betty may have once been able to timely exercise — but did not. Rather, *In re Estate of Riefberg* holds the value of the shares at issue may be considered in calculating a spousal elective share.

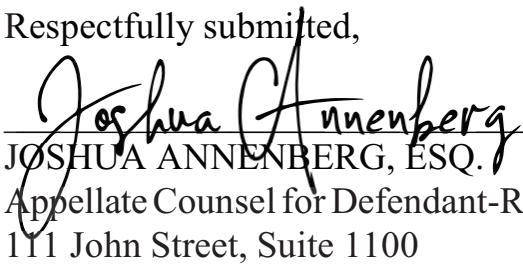
Nonetheless, spousal elective share is a red herring. Plaintiff Betty commenced the instant action on November 20, 2019, when her right to exercise spousal election was already time-barred.

Accordingly, the lower court was correct in: 1) not entertaining counsel's argument on spousal election; and 2) holding the Stockholders' Agreement precludes plaintiff's action.

CONCLUSION

Defendant-Respondent Zvi Sebrow respectfully requests this Court affirm the lower Court's Order, entered October 9, 2020, which dismissed the plaintiff's purported shareholder derivative action pursuant to CPLR 3211(a)(1) and (a)(3).

Respectfully submitted,



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