SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

LOUANN LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C; KATERINA VOUMVOURAKIS, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST A, and the LARSEN 2021 FAMILY TRUST, SUBTRUST B; and LYDIA LARSEN, as Trustee of the LARSEN 2021 FAMILY TRUST, SUBTRUST B, and the LARSEN 2021 FAMILY TRUST, SUBTRUST C, as trustees and derivatively on behalf of POWER COOLING, INC. and RELIANCE MACHINING, INC., Plaintiffs, vs. LAUREN LARSEN, Defendant, and POWER COOLING, INC., and RELIANCE MACHINING, INC., Nominal Defendants.	Index No. 512169/2022

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs Louann Larsen ("Louann") as Trustee of the Larsen 2021 Family Trust, Subtrust A, and the Larsen 2021 Family Trust, Subtrust C, Katerina Voumvourakis ("Voumvourakis") as Trustee of the Larsen 2021 Family Trust, Subtrust A, and the Larsen 2021 Family Trust, Subtrust B, and Lydia Larsen ("Lydia") as Trustee of the Larsen 2021 Family Trust, Subtrust B, and the Larsen 2021 Family Trust, Subtrust C (Louann, Voumvourakis, and Lydia are collectively known as the "Trustees" or "Plaintiffs"), as Trustees and derivatively on behalf of Power Cooling, Inc. ("Power Cooling") and Reliance Machining, Inc. ("Reliance Machining," collectively with Power Cooling, the "Companies"), respectfully submit this memorandum of law in opposition to the motion of Defendants Lauren Larsen ("Lauren") and nominal Defendants Power Cooling and Reliance Machining (the Companies with Lauren, the "Defendants") seeking to dismiss Plaintiffs' Complaint (the "Motion").[1] For the following reasons, Defendants' Motion should be denied in its entirety.

PRELIMINARY STATEMENT

Defendants' Motion falls woefully short of any standard warranting dismissal of Plaintiffs' Complaint. Defendants' Motion does not address many of Plaintiffs' causes of action and for those that Defendants do address, the Defendants' purported grounds for dismissal are belied by the undisputed facts and the law. Furthermore, Defendants' submissions are replete with self-serving allegations that hardly resolve any, let alone all, of Plaintiffs' allegations. Indeed, Defendants' concessions concerning Lauren's malfeasance demonstrate that Lauren has violated her duties, rendering summary disposition of Plaintiffs' claims improper for numerous reasons.

[1] Defendants' Motion consists of (i) their Notice of Motion (Dkt. No. 10) and (ii) the Affidavit of Lauren Larsen dated June 13, 2022 (the "Larsen Aff.") (Dkt. No. 11) with its accompanying Exhibits A-E (Dkt. Nos. 12-16). Defendants emailed Plaintiffs' counsel a Memorandum of Law in Support of Motion to Dismiss All Claims (the "Def. MOL"), but did not file it with the Court. A copy of the Def. MOL is annexed to the Affirmation of Scott R. Matthews as Exhibit 1.

First, to the extent Defendants take issue with the specificity of Plaintiffs' factual submissions (or alleged lack thereof), Defendants ignores that Lauren controls every link in the informational chain regarding the Companies as their steward for the past two decades. By contending that Plaintiffs' allegations are insufficiently particular, Lauren seeks to use her refusal to share any information with Plaintiffs as both a sword and shield, which the law simply does not allow.

Second, Defendants claim that Plaintiffs should have made a demand on the Companies' Board of Directors (the "Board")[2] prior to bringing a derivative suit. However, such demands are excused in precisely this context, *i.e.*, where a closely held corporation's Board is dominated by a controlling shareholder (Lauren) and – as Lauren concedes – on which her daughter sits. Therefore, as Plaintiffs' Complaint alleges, Plaintiffs' failure to make a demand on the Board is rightfully excused as futile.

Third, Defendants argue that Plaintiffs fail to satisfy the standard for seeking books and records under the Business Corporations Law (the "BCL"). However, Defendants' position rests on an erroneous misreading of the relevant statute, which allows for a demand to be denied only if Plaintiffs "refuse" to furnish an affidavit upon demand. Defendants never demanded such an affidavit. Instead, Lauren only provided a single financial statement purporting to be for fiscal year 2021, but containing line items dating back to 1987. (*See* Lauren Aff. ¶2.) Furthermore, it is undisputed that Lauren did not provide certain documents that should have been provided pursuant to BCL § 624(b), such as minutes for shareholder and Board meetings. Accordingly, Plaintiffs' First Cause of Action seeking books and records under the BCL is properly maintained.

[2] Given the identical management teams helming both Companies, where Plaintiffs refer to the "Board," Plaintiffs are referring to both Companies' boards of directors.

Fourth, in the same breath as they concede several of Plaintiffs' allegations, such as employing Lauren's daughter to a six-figure no-show job, Defendants claim Louann and Lydia have unclean hands. Defendants ignore that Voumvourakis does not suffer from any such alleged infirmities and that Plaintiffs are seeking to vindicate the rights of the non-party beneficiaries of the Trusts. Further, Lauren exerts total control over the Companies (and their funds) and neither Louann nor Lydia have ever had any control over the Companies. Accordingly, Plaintiffs cannot be said to have ratified or participated in any looting of the Companies.

Defendants' Motion fails to resolve all factual disputes in their favor and dismissal must be denied.

FACTUAL BACKGROUND

At the pleading stage, the Court must presume the Complaint's factual allegations to be true.[3]

The Companies

Lloyd Larsen ("Lloyd") – the father of Louann, Lydia, Lauren, and non-party Linnea – created Power Cooling in 1966 and Reliance Machining in 1978, along with his business partner, Karl Zimm.[4] (Compl. ¶1, ¶¶16-17; Lauren Aff. ¶2.) The Companies were jointly operated as closely held family businesses specializing in cooling and heating services, generally referred to as "HVAC" services. (Compl. ¶26.)

[3] The following facts are derived mostly from the Complaint. Where appropriate, Plaintiffs cite to the Lauren Aff., the Affidavit of Louann Larsen dated June 28, 2022 (the "Louann Aff.") and the Affidavit of Lydia Larsen dated June 29, 2022 (the "Lydia Aff."), which are both being filed herewith.

[4] Lauren's criticism regarding Plaintiffs' failure to name Lloyd's business partner in the Complaint is irrelevant for purposes of this action. Given the aspersions Lauren casts upon her sisters for their failure to fully recount the history of the Companies, it bears noting that Lauren cannot recall when Lloyd created the 2002 Trust, of which she still serves as trustee. (*See* Lauren Aff. ¶2.)

Incidental to Lloyd's management of the HVAC businesses, Power Cooling also acquired real property located at 43-27 Vernon Boulevard, Long Island City, New York 11101 and 59-55 60th Street, Maspeth, NY 11378 (collectively, the "Properties"). (Compl. ¶27.) On January 1, 2003, Lloyd and his wife, Herdis Louise Larsen ("Louise"), and Lauren executed a voting agreement making Lloyd, Louise, and Lauren the sole voting shareholders of the Companies. (*Id.* ¶29.)

Lydia's and Louann's Benefits Received from the Companies

All of Lloyd's children worked for the Companies during various periods. Lauren continuously worked for the Companies since 1987. (Lauren Aff. ¶1.) Louann worked for the Companies from 1991 to 1998 when she was in high school and college. (*See* Louann Aff. ¶11.) Louann's husband, Thomas Cordano ("Cordano"), worked as an absorption mechanic at Power Cooling, during which time he received a salary and a corporate credit card. After Lloyd passed away, Lauren fired Cordano, ending his salary, and neither Cordano nor Louann had any further access to the corporate credit card. The only fringe benefits Louann still receives are (i) cellular phone service through the Companies' Verizon account, (ii) an EZ pass, and (iii) a gas card. Louann does not submit bills to the Companies or otherwise have any discretionary control over the Companies' accounts. Louann has also never received funds from the Companies to pay for airline flights, a vehicle, entertainment expenses, or home renovation expenses of any kind. Rather, Louann works as a registered nurse with IQVIA. (*Id.* ¶¶12-19.)

Lydia worked at the Companies from the age of fourteen until she was twenty-five. (Lydia Aff. ¶11.) Over the years, Lydia performed a variety of work ranging from clerical/administrative to working closely with Lloyd and the Companies' engineering and sales departments managing a variety of contracts, proposals, and other business documentation. For her efforts, Lydia received

an annual salary of $25,000. When Lydia left to attend graduate school, she was no longer paid a salary. In 2007, Lydia's husband passed away, and Lydia sought employment at the Companies, which Lauren denied. In 2007, Lydia's salary of $25,000 was reinstated and subsequently increased in 2017 to $35,000, which Lydia receives to this day. During the past three decades, Lydia has received a total of less than seven flights paid for by Companies, primarily to visit Louise in Florida. Lydia and her three children also receive health insurance, an EZ pass, a gas card, and cellular phone service. Lydia's son had worked at Power Cooling for which he was paid an annual salary of $8,000 in 2015, which subsequently increased to $10,000 in 2019. But for the foregoing, neither Lydia nor her family members receive any other benefits. Lydia financed her own vehicles, has never sought or received funds from the Companies for home renovation expenses, and she does not have a corporate credit card or otherwise have any authority to direct the Companies to expend their resources and/or to act in any manner. (*Id*. ¶¶12-22.)

The Trusts

As part of his estate succession plan, Lloyd transferred 51% of the Companies' stock into the "Larsen Family Trust" created on December 1, 2002 (the "2002 Trust") for the benefit of his issue. (Compl. ¶28.) Lauren and non-party, Charles Zimmerman ("Zimmerman"), serve as co-trustees of the 2002 Trust. (*Id*.) Upon Lloyd's passing in 2011, his remaining 49% passed to his wife, Louise. (Lauren Aff. ¶3.) While Plaintiffs do not concede Lauren's description of the events that followed Lloyd's passing, for purposes of this motion, it is sufficient to state that Lauren acquired Lloyd's 49% of the Companies. (Compl. ¶31; *see also* Lauren Aff. ¶3.)

In August 2021, some of the assets of the 2002 Trust were decanted in the Larsen 2021 Family Trust (the "2021 Trust"), which was further divided into three (3) subtrusts – Subtrusts A, B, and C (collectively, the "Subtrusts"), which exist for the benefit of Louann, Lydia, Linnea, and

their issue. (Compl. ¶¶18, 32.) Louann and Voumvourakis serve as co-trustees of Subtrust A. (*Id.* ¶¶19-20, 36.) Lydia and Voumvourakis serve as co-trustees of Subtrust B, and Lydia and Louann serve as co-trustees of Subtrust C. (*Id.* ¶¶19-21, 37-38.) As a result of the decanting, the Companies' stock is now distributed as follows:

NAME OF PARTY	**PERCENTAGE OWNERSHIP**
Subtrust A	19.40%
Subtrust B	19.40%
Subtrust C	9.45%
2002 Trust	2.75%
Lauren	49%
TOTAL	**100%**

(*Id*. ¶33.)

In connection with the 2021 decanting of the 2002 Trust, the parties also negotiated the "Shareholders' Agreement of Power Cooling Inc. and Reliance Machining Inc." dated August 2021 (the "Shareholders' Agreement"), which is the operative shareholders' agreement governing the Companies. (*Id*. ¶68.)

Lauren's Stewardship of the Companies

As Lauren correctly asserts, she has been responsible for overseeing the Companies since Lloyd retired in 2000 and after he passed. (*Id*. ¶40; Lauren Aff. ¶1.) While Plaintiffs have limited visibility into the full extent of Lauren's malfeasance – hence their need for access to the Companies' books and records – Lauren's concessions confirm Plaintiffs' suspicions. While Louann and Lydia may have received some modest fringe benefits over the years in the form of a gas card, EZ pass, and telephone plans paid for by the Companies, what they have received is

dwarfed by the benefits the Companies have conferred upon Lauren and Lauren's family members, including her daughters Kristina, Kathryn, and Kariana. (*See, e.g.*, Compl. ¶¶56-70.)

Under Lauren's leadership, the Companies have an outstanding indebtedness in the amount of $1.4 million, which is guaranteed by the shareholders, but those same shareholders have been denied information regarding that indebtedness, as well as "officer loans" approximating $1 million. (*See* Louann Aff. ¶¶28-29.) Plaintiffs also allege that Lauren's daughters receive various benefits to which they are not entitled, among them salaries for no-show jobs, insurance, and other benefits usually associated with full-time employment. (*See* Compl. ¶¶56-61.) Plaintiffs further have reason to believe that all of Lauren's daughters have life insurance policies paid by the Companies. (*Id*. ¶56.)

While Lauren has repeatedly informed Louann and Lydia that the Companies have no money, she now claims that they are in "excellent financial and reputational health." (*Compare* Compl. ¶¶9-10, 77 *with* Lauren Aff. ¶6.) Moreover, Defendants concede that one of Lauren's daughters receives "unearned" income in the form of a six-figure annual salary, while her other daughters are employed in the accounts receivables department and sit on the Board, respectively. (*See* Def MOL. at 2.) Defendants also admit that the Companies have subcontracted Lauren's husband's company – again confirming Plaintiffs' allegations – but Defendants attempt to downplay the significance by claiming that the sum was "approximately $50,000." (*Id*.; *see also* Lauren Aff., Ex. C; Compl. ¶62.)

Books and Records Demands

In February 2022, Plaintiffs' counsel contacted Zimmerman requesting that he obtain information and documents regarding the Companies, but after initially agreeing to speak with Plaintiffs' counsel, he refused. (*See* Compl. ¶79.) On March 11, 2022, Plaintiffs' counsel contacted

Lauren's counsel seeking books and records concerning the Companies, and requested that the documents be provided by March 25, 2022 (the "March 11th Request"). (*Id*. ¶80, Ex. 1.) Lauren did not provide any documents in response to the March 11th Request, and on March 28, 2022, her counsel advised Plaintiffs to avail themselves of the formal legal mechanisms available to them to obtain the books and records sought. (Compl. ¶83.)

On April 1, 2022, Plaintiffs' submitted a formal written demand for books and records under the common law and BCL § 624 (the "April 1st Demand"), which requested that Lauren respond within five (5) days of receipt. (*Id*. ¶84, Ex. 2.) On April 11, 2022, Defendants' counsel provided Plaintiffs' counsel with what purports to be the combined financial statements for the Companies for the year ended September 30, 2021, but not for the prior periods requested (the "2021 Financial Statement"). (Compl. ¶88, Ex. 3.) No other documents were provided. (*See generally* Compl. ¶¶88-98.) The Companies expressly refused to provide additional documentation, writing that, "We specifically reject the unsworn claim to credible information of any kind that would support further disclosure." (*Id*. ¶99.)

On April 27, 2022, the Plaintiffs commenced the instant action. (*See generally id*.)

ARGUMENT

I. DEMAND OF THE COMPANIES' BOARD IS RIGHTFULLY EXCUSED AS FUTILE

As a threshold matter, Defendants challenge Plaintiffs' ability to maintain a shareholder derivative suit because Plaintiffs did not make a demand upon the Companies' Board. (*See* Def. MOL at 8-9.) However, given that this is a closely held corporation dominated entirely by Lauren over which Plaintiffs have no control and into which Plaintiffs have no visibility, this is precisely the sort of context in which a demand is excusable as futile, as Plaintiffs pleaded. (*See, e.g.*, Compl. ¶134.)

As the Second Department has made clear, "[t]he requirement in Business Corporation Law § 626(c) that a shareholder first demand action from the board of directors before commencing a derivative suit is excused because of futility, inter alia, 'when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction.'" *Tsutsui v. Barasch*, 67 A.D.3d 896, 897 (2d Dep't 2009) (citations omitted). Indeed, Defendants themselves concede that a "demand may be excused where futile, as when the directors are self-interested, or have failed to investigate the challenged transaction or the transaction is so egregious on its face that it cannot be justified by sound business judgment." (*See* Def. MOL at 9, citing *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003).)

"Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally." *Marx v. Akers*, 88 N.Y.2d 189, 202 (1996); *see also Rubenstein v. Rubinstein*, 2006 WL 624890, at *4 (Sup. Ct. N.Y. County March 13, 2006) (demand excused as futile where interested director received funds to pay for brokerage expenses related to building owned by him and other interested director received "higher *pro rata* distributions than other shareholders").

As Plaintiffs allege, the Board is dominated by Lauren, who is the sole decision-maker profiting off the various malfeasance alleged, including *inter alia* paying her family sums of undeserved money and misuse of the Companies' funds, which did not inure to the benefit of any other shareholders. (*See* Compl. ¶¶40-70, 134.) Although Plaintiffs have no visibility into the Board's present constitution, Plaintiffs allege that Article III of the Shareholders' Agreement requires that the Board be comprised of at least three (3) directors (*see id*. ¶72), and Defendants concede that at least one director is Lauren's daughter with the other two believed to be Lauren and Louise, Lauren's elderly mother. (*See* Def. MOL at 2, Compl. ¶73.) It is hard to imagine a

scenario where Lauren's own daughter would vote to ratify a shareholder derivative suit against Lauren (the president and chief executive officer of the Companies (*see* Lauren Aff. ¶1)) for transactions that benefit herself, her mother, and her sisters.

As the New York courts recognized long ago, this is precisely the sort of context in which a demand is excused as futile.

II. PLAINTIFFS ARE PROPER PLAINTIFFS TO MAINTAIN A SHAREHOLDER DERIVATIVE SUIT ON BEHALF OF THE COMPANIES AND DISMISSAL UNDER CPLR 3211(A)(3) IS NOT WARRANTED

Defendants' primary basis for seeking dismissal of Plaintiffs' shareholder derivative claims rests upon Louann's and Lydia's alleged receipt of funds and/or fringe benefits from the Companies, which Lauren self-servingly asserts without any documentary evidence whatsoever.[5] (*See* Def. MOL at 2-3, 8-9; Lauren Aff. ¶5.)

Plaintiffs allege that, at all times relevant to this action, Plaintiffs were either beneficial shareholders as beneficiaries under the 2002 Trust or trustees of the Subtrusts (the present minority shareholders), and that Lauren's malfeasance has spanned years. (*See* Compl. ¶¶3, 12, 131-33, 143-45). Therefore, Plaintiffs possess standing to sue in the name of the corporation. *See, e.g.*, *Cassata v. Cassata*, 148 A.D.2d 944, 945 (4th Dep't 1989) ("Plaintiff was the beneficiary of a trust holding stock in defendant corporation and thus, was entitled to institute a shareholder derivative action."). Moreover, even if Defendants' allegations, which Plaintiffs dispute, are accepted as true for purposes of deciding Defendants' Motion, Plaintiffs are entitled to maintain a shareholder derivative suit to hold Lauren accountable for her malfeasance. *See Grammas v. Charla*, 45 A.D.2d

[5] To be clear, Defendants' allegations concerning Louann's and Lydia's standing to bring shareholder derivative claims have no bearing on the Subtrusts' entitlement to books and records as minority shareholders.

756, 756 (2d Dep't 1974) (holding that 50% owner of corporation could assert a derivative action "and that plaintiff is not estopped by his own alleged wrongful diversion of [corporation's] assets from maintaining this action on [corporation's] behalf").

While complaining that Plaintiffs' allegations are insufficiently particular (despite Lauren controlling all of the information regarding the Companies to the exclusion of Plaintiffs),[6] Defendants submit a conclusory three-page affidavit devoid of any documentary evidence bearing upon Louann's and Lydia's alleged malfeasance. (*See generally* Lauren Aff.) Defendants' Motion also ignores the fact that Lauren controls both the informational flow concerning the Companies and full control over their operations and finances, whereas Plaintiffs have zero managerial control or say in the disposition of any of the Companies' funds and have not shared in any of Lauren's misappropriation. (*See* Lydia Aff. ¶21; Louann Aff. ¶17.)

Therefore, this case does not implicate the same issues as *Steinberg v. Steinberg*, where the defendant's wife (the plaintiff), invariably shared in the "lavish lifestyle" she accused her ex-husband (the defendant) of financing with company funds, such as the "marital abode" in which they both lived. *See Steinberg v. Steinberg*, 106 Misc.2d 720, 722 (Sup. Ct. N.Y. County 1980). Moreover, it cannot be said that Plaintiffs ratified or participated in the wrongs perpetrated upon the Companies by Lauren since Lauren has withheld information from Plaintiffs and Plaintiffs are otherwise powerless to bind the Companies to act. *Cf. Diamond v. Diamond*, 307 N.Y. 263, 266–67 (1954) (affirming dismissal where "plaintiff, estopped by knowledge, ratification and participation, could not, by way of a stockholder's suit, have judgment against her coconspirator,

[6] Should the Court wish to entertain Defendants' particularity argument, it is readily disposed by the fact that Lauren is seeking to use her refusal to furnish pertinent information concerning the Companies as a both sword and shield, which New York jurisprudence does not allow. *See Mattera v. Mattera*, 125 A.D.2d 555, 556 (2d Dep't 1986) (denying dismissal and excusing the pleading's alleged deficiencies where "the circumstances surrounding this [challenged] transaction are peculiarly within the knowledge of the defendants").

for those wrongs"). Plaintiffs did not pay monies to themselves. At worst, they received benefits paid by the Companies under the control of Lauren (or their father), which pale in comparison to those Lauren has conferred upon herself and her immediate family members.

Furthermore, Defendants' Motion completely ignores the fact that Voumvourakis is an independent trustee wholly unaffected by any alleged misconduct on the part of Louann or Lydia. (*See* Affidavit of Katerina Voumvourakis dated June 28, 2022 at ¶6.) This alone disposes of Defendants' Rule 3211(a)(3) argument. Additionally, Defendants baldly assert that Louann and Lydia are seeking more money for themselves when they are clearly seeking to vindicate the rights of their beneficiaries, including non-party Linnea (whom Defendants brazenly discount). Finally, to accept Defendants' reasoning would allow any wrongdoing majority shareholder in a closely held corporation to disqualify her fellow minority shareholders from maintaining a derivative suit by unilaterally conferring *de minimis* benefits upon them. This Court cannot embrace such faulty logic.

Therefore, Plaintiffs are proper plaintiffs and CPLR 3211(a)(3) presents no impediment to their ability to assert derivative claims.[7]

III. PLAINTIFFS' COMPLAINT STATES VIABLE DERIVATIVE CAUSES OF ACTION WHICH SHOULD NOT BE DISMISSED

When scrutinizing Plaintiffs' factual allegations, this Court must accept the facts as alleged in the Complaint as true, afford Plaintiffs the benefit of every possible favorable inference, and determine whether the allegations fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). In so doing, this Court must afford the pleading "a liberal construction." *Id.* at 87. Furthermore, considering that Defendants submit alleged evidence in support of their motion

[7] In the event that the Court concludes any of Plaintiffs are an improper party, Plaintiffs should be afforded the right to re-plead. *See Sigfeld Realty v. Landsman*, 234 A.D.2d 148 (1st Dep't 1996).

to dismiss, "[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Here, the alleged "evidence" Lauren supplies in the form of self-serving averments neither disrupts the viability of Plaintiffs' pleading nor resolves any material issues of fact in Defendants' favor such that dismissal should eventuate.[8]

As the following makes clear, Defendants have not demonstrated sufficient bases on which to dismiss Plaintiffs' Complaint.

a. Plaintiffs' First Cause of Action for Books and Records Pursuant to BCL § 624 Should Not Be Dismissed

Plaintiffs' First Cause of Action seeks to compel the Companies to produce books and records, pursuant to BCL § 624 and the common law, after Plaintiffs' prior attempts in the spring of 2022 were not substantially complied with. (*See* Compl. ¶¶104-125.) Defendants are incorrect in contending that their obligations have been satisfied.

"Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose" *O'Donnell v. Fleetwood Park Corp.*, 203 A.D.3d 1048, 1048 (2d Dep't 2022) (citations omitted). "[I]nvestigating alleged misconduct by management and obtaining information that may aid legitimate litigation are, in fact, proper purposes for a BCL § 624 request, even if the

[8] If anything, Defendants' admissions that Lauren's husband's company received funds "for jobs it performed for Power Cooling" and that, "one of Lauren's daughters is employed by the company in its office[,] another serves on the board of directors[,] and only the third receives unearned salary ($100,000.00 per year)," resolve material issues of fact in Plaintiffs' favor. (*See* Def. MOL at 2.) The amendment to the Companies' certificate of incorporation, per the terms of the Shareholders Agreement, requires that the Subtrusts' consent be obtained for transactions not conducted at arm's length. (Louann Aff. ¶24.)

inspection ultimately establishes that the board had engaged in no wrongdoing." *Ret. Plan for Gen. Emps. of City of N. Miami Beach v. McGraw-Hill Companies, Inc.*, 120 A.D.3d 1052, 1056 (1st Dep't 2014); *see also Tatko v. Tatko Bros. Slate Co.*, 173 A.D.2d 917, 918 (3d Dep't 1991) (noting that proper purposes "include, among others, efforts to ascertain the financial condition of the corporation, to learn the propriety of dividend distribution, to calculate the value of stock, to investigate management's conduct, and to obtain information in aid of legitimate litigation"); *Novikov v. Oceana Holdings Corp*., 46 Misc. 3d 561, 569 (Sup. Ct. Kings County 2014) (holding that minority shareholder was entitled to investigate board's mismanagement via BCL § 624 where shareholder unable to "affect corporate decisions").

Defendants' sole challenge to the viability of Plaintiffs' First Cause of Action concerns Plaintiffs' failure to furnish an affidavit (*see* Def. MOL at 8) that is only required if the corporation from which the records are sought demands it. *See* BCL § 624(c) ("An inspection authorized by paragraph (b**)** may be denied to such shareholder or other person **upon his refusal** to furnish to the corporation, its transfer agent or registrar **an affidavit** that such inspection is not desired for a purpose which is in the interest of a business or object other than the business of the corporation . . . .") (emphasis added). A books and records demand may then be refused if no such affidavit is furnished. *See id*; *see also* 7A West's McKinney's Forms Business Corporation Law § 4:150 ("If the corporation refuses to permit an inspection of its shareholders' records as provided by N.Y. Bus. Corp. Law § 624(b), other than by reason of the applicant's failure to produce the required affidavit on demand, the applicant may apply to the supreme court in the judicial district where the office of the corporation is located, for an order directing the corporation, its officer or agent to show cause why an order should not be granted permitting such inspection by the applicant.")

Plaintiffs never refused to provide an affidavit since Lauren never requested one. (*See generally* Lauren Aff.) Defendants also overlook the fact that Plaintiffs' counsel (acting under a special power of attorney on behalf of Plaintiffs) affirmed that the purpose for the inspection was in good faith. (*See* Compl., Ex. 2 at 3.) Accordingly, Plaintiffs have more than amply demonstrated their good faith. *See Troccoli v. L & B Cont. Indus., Inc.*, 259 A.D.2d 754, 754–55, (2d Dep't 1999) (holding that averments that shareholder "required the information in order to evaluate the worth of his shares and to pursue his concern regarding the corporation's failure to declare any dividends since he obtained the shares over 20 years ago" was sufficient to satisfy good faith requirement obviating need for hearing on the issue). Since Plaintiffs are entitled to *inter alia*, "minutes of the proceedings of [the Companies'] shareholders" (*see* BCL § 624(b)), and it is undisputed that "no documents authorized by paragraph (b) were provided" (*see* Def. MOL at 8), Plaintiffs have stated a cause of action under BCL § 624.

Moreover, to the extent Lauren is claiming that she complied with Plaintiffs' demand by furnishing the unaudited 2021 financial statement for the Companies (*see* Def MOL at 8), what Lauren supplied was insufficient. The financial statement contains line items pertaining to transactions that occurred well prior to 2021, such as the $1.2 million spent to reacquire stock that Lauren states concerns a 1987 purchase of the Companies' stock from Lloyd's former business partner. (*See* Lauren Aff. ¶2 ("Power Cooling's current and prior financial statements record this reacquisition of shares as a purchase for $1.2 million.").) Additionally, certain entries recited in the 2021 financial statement raise far more questions than they resolve, such as items reflecting approximately $1 million in loans to unnamed officers, a $1.4 million indebtedness "collateralized by the Companies' personal property and guaranteed by the stockholders of the Companies," and the Companies being operated at a loss while they appear to collect below-market rent relative to

the value of the Properties. (*See* Compl. ¶¶90-96, Louann Aff. ¶¶26-29.) Accordingly, further documentation and investigation is needed.

Therefore, Plaintiffs' First Cause of Action should not be dismissed.

b. Plaintiffs' Second and Third Causes of Action for Lauren's Breach of Fiduciary Duties Owed to the Companies Should Not Be Dismissed

Plaintiffs' Second and Third Causes of Action allege breaches of Lauren's fiduciary duties of care and loyalty, respectively, due to her decisions to pay her children unearned salaries, grant contracts to her husband's company, and engage in a wide variety of self-dealing, utilizing the Companies for her own personal benefit. (*See* Compl. ¶¶126-150.)

"[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect . . . This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989) (citations omitted).

While Plaintiffs' allegations alone are sufficient to survive Defendants' Motion, Defendants' concessions deliver a fatal blow. First, Defendants concede that one of Lauren's daughters receives an unearned six-figure salary. (*See* Def. MOL at 2.) Second, Defendants concede that Lauren's husband has received subcontracts from the Companies. (*Id*.) These concessions alone collectively cast doubt on whether Lauren is a fit fiduciary to continue helming the Companies. *See Birnbaum*, 73 N.Y.2d at 467 ("We only reaffirm here the most basic principle that a court will not countenance the behavior of a fiduciary who, without full disclosure and consent, enters into a financial arrangement placing his spouse's interests at odds with the interests of those to whom he owes a duty of undivided loyalty.").

Since Defendants' only challenge to Plaintiffs' Second and Third Causes of Action concerns Louann's and Lydia's fitness to maintain an action – which, as discussed *supra* Section II, is meritless – Plaintiffs' Second and Third Causes of Action should not be dismissed given Lauren's concededly divided loyalties.

c. Plaintiffs' Sixth Cause of Action for Corporate Waste Should Not Be Dismissed

Defendants' Motion seeks dismissal of Plaintiffs' Sixth Cause of Action for corporate waste solely due to Defendants' erroneous position that Louann and Lydia are not proper plaintiffs (which they are). For the reasons already recited in Section II, this Court should deny dismissal as Plaintiffs may properly assert derivative claims.

"The essence of a waste claim is 'the diversion of corporate assets for improper or unnecessary purposes.'" *SantiEsteban v. Crowder*, 92 A.D.3d 544, 546 (1st Dep't 2012) (citations omitted). "To disprove a waste claim, a director who had a personal interest in challenged payments has the burden of showing that they were made in good faith and were fair to the corporation." *Id.* at 546 (citations omitted). Lauren's self-serving allegations do not definitively establish that she has acted in good faith against the backdrop of Plaintiffs' allegations pleading an ongoing pattern of Lauren's looting of the Companies. Indeed, Lauren cannot, at the pleading stage, prove good faith. *See Cohen v. Seward Park Hous. Corp.*, 2005 WL 954867, at *4 (Sup. Ct. N.Y. County April 18, 2005) ("In the pre-discovery stage of litigation, it is inappropriate to dismiss a claim by invoking the 'business judgment rule' . . .") (citations omitted).

Therefore, dismissal of Plaintiffs' claim for corporate waste must be denied.

d. Plaintiffs' Seventh Cause of Action for Unjust Enrichment Should Not Be Dismissed

Plaintiffs' Seventh Cause of Action states a viable derivative claim for unjust enrichment. (*See* Compl. ¶¶181-186.) A claim for unjust enrichment must allege that "(1) the defendant was

enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Mobarak v. Mowad*, 117 A.D.3d 998, 1001 (2d Dep't 2014). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *Id*. (citations omitted). Allowing Lauren to retain the entirety of the Companies' funds that have inured to her benefit undoubtedly satisfies the foregoing standard.

Here, Plaintiffs allege a variety of misconduct whereby Lauren and her family members were enriched at the expense of the Companies by "*inter alia*, (i) using the Companies' funds to procure life insurance policies that only benefit Lauren and her family members (and not the Companies), (ii) spending the Companies' funds on a vacation home for herself, (iii) spending the Companies' funds to procure a home in Montana for her daughter Kathryn, (iv) spending the Companies' funds to install an in-ground pool at the residence of her daughter Kristina, (v) spending the Companies' funds for her own and her family members' personal benefit, (vi) subcontracting work to Matejov's company over more qualified companies and/or cheaper bids, and (vii) possibly diverting corporate opportunities to other companies under her ownership." (Compl. ¶183.) Lauren claims – without submitting documentary evidence – that the Companies only paid for a portion of these expenses (*see* Def. MOL at 2; Lauren Aff. ¶4), which actually confirms, not refutes, Plaintiffs' allegations. Since the Companies are invariably damaged by the foregoing misconduct, allowing Lauren to retain the entirety of her spoils defies good conscience. Therefore, Plaintiffs' unjust enrichment claim should be sustained.

IV. PLAINTIFFS HAVE STATED VIABLE DIRECT CLAIMS

Although Defendants' Motion advances minimal, if any, grounds on which to dismiss Plaintiffs' direct claims and lumps Plaintiffs' distinct causes of action together, should the Court wish to examine them further, the Court will be satisfied that all are well-pleaded.

a. Plaintiffs' Fourth Cause of Action for Lauren's Breach of Fiduciary Duties Owed to the Companies' Minority Shareholders Should Not Be Dismissed

This Court should be satisfied that Plaintiffs have stated a direct claim for Lauren's breach of the fiduciary duties she owes as a majority shareholder to the Subtrusts as minority shareholders in the Companies, especially given the parties' familial relationship. Nothing Defendants supply overcomes Plaintiffs' allegations demonstrating that Lauren has evidenced complete indifference to the Companies' minority shareholders.

"The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Berkovits v. Berkovits*, 141 N.Y.S.3d 84, 89 (2d Dep't 2021) (citations omitted). Moreover, "family members stand in a fiduciary relationship toward one another in a co-owned business venture." *Braddock v. Braddock*, 60 A.D.3d 84, 88 (1st Dep't 2009). "[W]here the relevant facts are 'peculiarly within the knowledge of the party against whom the [cause of action] is being asserted,' . . . 'it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings." *Berkovits*, 141 N.Y.S.3d at 90 (citations omitted).

Much like the instant matter, the plaintiff in *Berkovits* (the former majority shareholder of a closely held corporation) alleged that he suffered damages due to his defendant son's malfeasance (the minority shareholder of the same corporation), and the Second Department upheld the lower court's denial of dismissal of the plaintiff's breach of fiduciary duty claims. *See Berkovits*, 141 N.Y.S.3d at 90 ("The complaint sufficiently alleges that Mayer Berkovits owed to Joseph Berkovits a fiduciary duty as a co-shareholder in Aberko, a closely-held family corporation, and that Mayer Berkovits breached that fiduciary duty by inducing Joseph Berkovits to enter into the trust agreement, to the detriment of the interests of Joseph Berkovits and Aberko.").

Here, too, the Complaint alleges that Lauren, as a majority shareholder, owes a fiduciary duty to the Subtrusts (as minority shareholders) that she has breached by *inter alia* "(i) hiring her family members to no-show jobs . . . (ii) failing to take advantage of prevailing market conditions to sell the Companies and/or the Properties while operating the Companies at a loss, (iii) diverting corporate assets for her own and her family members' personal benefit . . . (iv) refusing to make distributions to the Subtrusts despite there being sufficient income generated by the Companies to support such distributions, and (v) refusing to provide Plaintiffs with access to any information regarding the Companies' business." (*See* Compl. ¶155.) While Plaintiffs are unable to ascertain the full scope of the damages the Subtrusts have suffered by Lauren's ongoing misconduct due to her refusal to provide the Companies' records, they estimate the damages to be in the millions, given how many years Lauren's misconduct spans.

Accordingly, Plaintiffs have stated a viable direct claim against Lauren for breaching the fiduciary duties she owes as a majority shareholder to the Companies' minority shareholders.

b. Plaintiffs' Fifth Cause of Action for a Constructive Trust Should Not Be Dismissed

Defendants' Motion ignores Plaintiffs' Fifth Cause of Action, which seeks a constructive trust "over the Companies' assets and income, so that available profits may be distributed in accordance with the terms of the Shareholders' Agreement" given Lauren's persistent pattern of placing the financial benefits to be conferred upon herself and her family members above those for whom she serves as a fiduciary (including the Companies). (*See* Compl. ¶¶163-171.)

The elements of a cause of action for a constructive trust are: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." *Sharp v. Kosmalski*, 40 N.Y.2d 119, 121 (1976). Moreover, "a constructive trust is an equitable remedy

which may be imposed whenever necessary to satisfy the demands of justice." *Mattera*, 125 A.D.2d at 556.

The Complaint clearly alleges that the Plaintiffs agreed to confer sole voting authority upon Lauren in exchange for her promises to abide by the terms of the Shareholders' Agreement and to conduct herself as a trustworthy fiduciary. (*See* Compl. ¶¶165-168.) However, as the present record makes clear, Lauren has exerted her control over the Companies' cash flow to shower herself and her family members with financial benefits – some of which she concedes are "unearned" (*see* Def. MOL at 2) – thereby eroding the value of the Companies' shares to the detriment of the Companies' minority shareholders. Accordingly, Plaintiffs have sufficiently pleaded a claim for a constructive trust to be imposed.

c. Plaintiffs' Eighth Cause of Action for Breach of the Shareholder Agreement Should Not Be Dismissed

Plaintiffs' Eighth Cause of Action alleges that Lauren has breached the Shareholders' Agreement. (Compl. ¶¶187-192.) Defendants' Motion fails to address Plaintiffs' breach of contract claim, but even if it did, even a cursory review demonstrates that Plaintiffs have stated a claim for breach of contract.

"The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages." *Eun Suk Cho v. Byung Ki Koo,* 164 A.D.3d 1306, 1307 (2d Dep't 2018).

Here, Plaintiffs allege the existence of a valid contract, the Shareholders Agreement, which is not in dispute. Plaintiffs performed under the Shareholders Agreement by agreeing to Lauren's receipt of majority control over the Companies and by foregoing certain voting rights. However, as alleged in the Complaint, Lauren has refused to establish a Board consisting of at least three (3)

persons and to seek the consent of the Subtrusts to engage in certain transactions – as required by the terms of the Shareholders' Agreement – in order to continue enabling her ongoing and systematic looting of the Companies. As a result, the value of the Subtrusts' holdings has been, and continues to be, eroded. (*See* Compl. ¶¶187-192.) Accordingly, Plaintiffs have stated a claim for breach of contract.

d. Plaintiffs' Ninth Cause of Action for Declaratory Relief Should Not Be Dismissed

Defendants' Motion also fails to challenge Plaintiffs' Ninth Cause of Action seeking a judicial declaration "(i) stating that Lauren is unfit to remain in charge of the Companies, (ii) removing Lauren as an officer/director of the Companies, and (iii) appointing an independent board of directors to manage the Companies." (Compl. ¶¶193-197.) Considering Lauren's refusal to share information concerning the Companies with Plaintiffs, her ongoing misconduct spanning many years, and the factual concessions she makes supporting some of Plaintiffs' contentions, there "presently exists a justiciable controversy as to whether Lauren is fit to continue running the Companies." (Compl. ¶194.) Accordingly, Plaintiffs' Ninth Cause of Action is properly pleaded.

e. Plaintiffs' Tenth Cause of Action for an Accounting Should Not Be Dismissed

As a companion to Plaintiffs' First Cause of Action seeking books and records pursuant to BCL § 624 and the common law, Plaintiffs' Tenth Cause of Action alleges entitlement to an accounting for the Companies' finances "for the entire period of Lauren's tenure helming the Companies." (Compl. ¶¶198-200.) While Defendants' Motion also ignores this claim, even if it did, the Court should find that it is well-pleaded.

"To prevail on a cause of action for an accounting, in addition to being a shareholder, a party must show that he or she demanded an accounting and that the demand was refused by the

corporation, or that such demand would have been futile." *World Ambulette Transportation, Inc. v. Kwan Haeng Lee*, 161 A.D.3d 1028, 1032 (2d Dep't 2018) (citations omitted).

As the Complaint clearly alleges, Plaintiffs represent the minority shareholders in the Companies and their demands for information concerning the finances of the Companies were substantially rejected. (*See, e.g.,* Compl. ¶¶6-8, 13-15.) As discussed *supra* Section I, given Lauren's domination of the Companies' Board, Plaintiffs' failure to make a demand of the Board is rightfully excused as futile. Accordingly, Plaintiffs have stated a claim for an accounting.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order (1) denying Defendants' motion to dismiss the Plaintiffs' Complaint in its entirety, and (2) granting Plaintiffs such other and further relief as the Court deems just and proper.

Dated: June 29, 2022
New York, New York

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CERTIFICATE OF COMPLIANCE

I hereby certify that the total number of words in the foregoing memorandum of law, inclusive of headings and footnotes and exclusive of the caption, Table of Contents, Table of Authorities and signature block, is 6,990 words and is in compliance with Rule 17 of the Rules of the Commercial Division of the Supreme Court.

Dated: June 29, 2022
New York, New York

Scott R. Matthews