SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LARISSA OKUN NUSIMOW, derivatively on behalf of 600-602 10th Avenue Realty Corporation and on her own behalf, Plaintiff, -against- ESTER PINCHEVSKY, 600-602 10th AVENUE REALTY CORPORATION,	Index No.: 651435/2021 COMMERCIAL DIVISION Mot. Seq. No.: 001

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND FOR SANCTIONS

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Defendant Ester Pinchevsky ("Pinchevsky" or "Defendant") respectfully submits this Memorandum of Law by and through undersigned counsel in support of the instant motion pursuant to Rules 3211(a) of the Civil Practice Law and Rules ("CPLR") for an order dismissing the Complaint and each of its causes of action in their entirety, and for sanctions pursuant to 22 NYCRR 130-1.1.

PRELIMINARY STATEMENT

The commencement of this action constitutes Plaintiff Larissa Okun Nusimow's ("Plaintiff" or "Nusimow") fourth attempt to assert virtually the same claims against Defendant, after her three prior attempts were each dismissed in a related action captioned *600-602 10th Avenue Realty Corporation - v. - Estate of Hy Nusimow et al* (New York County Supreme Court, Index 650120/2017) ("2017 Action"), which was also affirmed by the Appellate Division, First Department decisions. Having been afforded an opportunity to replead, and still seeing her claims dismissed, Plaintiff seemingly commenced the instant action after she was unable to assert any further claims in the 2017 action.

The similarities are striking, and in many instances, the allegations contained in the Complaint in this action are repeated word for word from the 2017 pleadings. *See* Exhibit A for highlighted comparisons of the 2017 Action's First Answer with Counterclaims, Second Answer with Counterclaims, and the instant Complaint.

For a number of reasons below, the instant action must be dismissed in its entirety.

STATEMENT OF FACTS AND HISTORY

The central dispute in this action involves the Defendant's ownership interest of 50% and the Plaintiff's alleged ownership interest of 50% in the Nominal Defendant 600-602 10th

Avenue Realty Corporation[1] (the "Corporation"). At its formation, the Corporation contained three shareholders, Sol Lieberman – 52%, Hy Nusimow – 24%, and Defendant Pinchevsky – 24%. Over time, the Corporation's structure resulted in Hy Nusimow and Pinchevsky each owning 50% of the Corporation. Hy Nusimow passed away in 2016 and is survived by his wife, the Plaintiff. (Complaint ¶10-13).

Following the death of Hy Nusimow, pursuant to the Corporation's Shareholder Agreement, the shareholder's estate representative must first offer the shares of the Corporation to the Corporation for sale, then to the remaining shareholders, and lastly to the general public. An offer was made by the Corporation for $2,000.00 per share, which was declined by Plaintiff. The 2017 Action was commenced by the Corporation in order to adjudicate the parties' rights and/or direct the terms of the sale. The action remains pending to date. The Plaintiff thereafter went to a Surrogate's Court in Florida, following the commencement of the 2017 Action, to obtain an order transferring the sale of the 50% interest from Hy Nusimow's estate to the Plaintiff, and Plaintiff did so with full knowledge of the pendency of the 2017 Action and without service to the Corporation[2].

The relevant facts of the 2017 Action concern its procedural aspects, and the multiple attempts by Plaintiff to assert derivative claims and similar claims to the ones asserted in the instant action. Each time the Plaintiff attempted to assert counterclaims against the Defendant Pinchevsky in the 2017 Action, the Plaintiff was met with dismissals. On August 17, 2017, Defendant filed an answer with no counterclaims. Plaintiff thereafter sought leave in the 2017 Action to amend her answer to include, counterclaims and to name Pinchevsky as a counterclaim

[1] Pinchevsky also asserts that Plaintiff lacks standing to bring this action, given Plaintiff's rights are currently being adjudicated and are subject to a determination by the Court in the pending and related 2017 Action.
[2] The aforementioned facts in this paragraph are contained within the 2017 Action's Amended Complaint, annexed as **Exhibit F.**

defendant, which was granted. Plaintiff filed her First Amended Answer with Counterclaims ("First Answer") on January 11, 2018. *See* **Exhibit G.** Plaintiff initially plead five counterclaims in her First Answer – 1) breach of fiduciary duty (individual); 2) breach of fiduciary duty (derivative); 3) judicial dissolution; 4) appointment of a receiver; and 5) breach of the 2008 Settlement. *Id.* The Court, upon Pinchevsky's motion, dismissed each of the Plaintiff's counterclaims in their entirety with leave to replead only the second and third counterclaims[3]. *See* **Exhibit H** for the Court's decision. This dismissal was affirmed by the Appellate Division, First Department.[4] Plaintiff then filed her Second Amended Answer with Counterclaims ("Second Answer") on August 8, 2019. *See* **Exhibit I** for the Second Answer. The Second Answer asserted three counterclaims – 1) breach of fiduciary duty (derivative); 2) judicial dissolution; and 3) seeking damages and money judgment for breach of fiduciary duty (individual). Each of these causes of action were also dismissed by the Court on January 30, 2020 *without* leave to replead. *See* **Exhibit J** for the dismissal decision and transcript of proceedings.

Thus, after multiple failed attempts to assert counterclaims, the 2017 Action continued and Plaintiff was left in the 2017 Action without any claims of her own to litigate. While the 2017 Action continued and she was barred from asserting any claims, Plaintiff commenced the instant action on March 3, 2021. *See* **Exhibit K** for the Complaint. Plaintiff has manipulated the judicial system to do in this action, what she was otherwise barred from doing in the 2017 Action – assert derivative claims against Pinchevsky.

[3] Plaintiff's individual breach of fiduciary claim was improper and dismissed; Plaintiff's receiver claim is not a separate cause of action but a remedy and was dismissed; and Plaintiff's fifth counterclaim on breach was deemed barred by the statute of limitations. *Id.*
[4] See *infra.*

I. THE COMPLAINT IS DEFECTIVE AND SHOULD BE DISMISSED IN ITS ENTIRETY

A. The Complaint Must Be Dismissed in Its Entirety as It Appears to Confuse Derivative and Individual Claims, and Contains an Incorrect Caption

"A complaint the allegations of which confuse a shareholder's derivative and individual rights will ... be dismissed." *Abrams v. Donati*, 66 N.Y.2d 951, 953, 498 N.Y.S.2d 782, 489 N.E.2d 751 (1985); *Yudell v. Gilbert*, 99 A.D.3d 108, 115, 949 N.Y.S.2d 380, 384 (1st Dep't 2012). The Plaintiff's Complaint does exactly that, as it appears to allege derivative claims for breach of fiduciary duty (first cause of action), corporate waste (second cause of action), and for removal of the president (fifth cause of action), along with individual requests for books and records (third cause of action) and an accounting (fourth cause of action).

While each of the Plaintiff's causes of action are also dismissible on other grounds, at the outset, is patently improper for the Plaintiff to mix derivative and individual claims in the same action. Thus, the Court must dismiss this action in its entirety. In addition, the caption of the Complaint does not specifically state that the Corporation is a nominal Defendant. In a derivative action, the caption of the action should reflect the corporation as a nominal defendant. *See generally Hu v. Ziming Shen*, 57 A.D.3d 616, 618, 870 N.Y.S.2d 373, 375 (2d Dep't 2008); *O'Neal v. Muchnick Golieb & Golieb, P.C.*, 149 A.D.3d 636, 637, 53 N.Y.S.3d 271, 273 (1st Dep't 2017). Here the caption simply reflects the Corporation as a regular Defendant, along with Pinchevsky.

B. The Complaint Fails to Plead That a Demand Was Made, and Improperly Pleads Demand Futility

Business Corporation Law §626(c) requires that a shareholder bringing a derivative action seeking to vindicate the rights of the corporation allege, with particularity, either that an attempt was first made to get the board of directors to initiate such an action or that any such effort would be futile. "The demand requirement rests on basic principles of corporate control—

that the management of the corporation is entrusted to its board of directors, who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts" *Bansbach v. Zinn*, 1 N.Y.3d 1, 8–9, 769 N.Y.S.2d 175, 801 N.E.2d 395 (2003); *Wandel ex rel. Bed Bath & Beyond, Inc. v. Eisenberg*, 60 A.D.3d 77, 79–80, 871 N.Y.S.2d 102, 104 (1st Dep't 2009). Therefore, the demand requirement is excused only when the complaint's specific allegations support the conclusion that "(1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction" *Marx v. Akers*, 88 N.Y.2d 189, 198, 644 N.Y.S.2d 121, 666 N.E.2d 1034 (1996).

The Complaint wholly fails to state that any demand was made. Given that the $64,000.00 payment was returned to the Corporation's account and the remaining contentions in Plaintiff's Complaint are explained herein, a demand would likely have resolved any concerns the Plaintiff had.

In any event, the Plaintiff fails to meet the *Marx* test. The sum of the allegations regarding demand futility are five – 1) that the shareholder may bring an action without a demand if demand would be futile; 2) that the demand would be futile given Pinchevsky's approval would be required and that it relates to Pinchevsky's alleged misconduct; 3) there is no Board for Plaintiff to submit a demand; 4) that alleged unspecified conduct is not the product of sound business judgment; and 5) that Plaintiff is entitled to bring suit without demand. (Complaint ¶26-30).

As for the first prong, it is well established by the First Department that simply pleading that a Defendant or a director "substantially likely to be held liable" for their actions is not

enough to meet the pleading requirements of demand futility. *Wandel ex rel.*, 60 A.D.3d at 80, 871 N.Y.S.2d at 105. Neither is the assertion that "directors "completely disregarded or abdicated their responsibilities" sufficient to plead this prong with particularity. *Id.* That is exactly the Plaintiff's main justification for not making a demand, that because the Complaint involves Pinchevsky's action, she would not do anything on behalf of the Corporation or that she could be liable. Plaintiff does not plead this aspect of demand futility with sufficient particularity.

As for the second prong, nowhere in the Plaintiff's pleading is it alleged that Pinchevsky failed to inform herself to a degree reasonably necessary about any actions complained of in this action; in fact, as per Exhibits B and D, even the distribution Plaintiff complains of was a) returned to the Corporation's account; and b) taken at the advice of an accounting professional. *See also* Pinchevsky Affidavit ¶8-9 and Warwick Affidavit ¶6. Thus, the Complaint is deficient in this respect as well. Lastly, as for the third prong, Plaintiff alleges no more than a conclusory sentence that Pinchevsky's conduct, namely misappropriation of corporate assets, "is so egregious that it could not have possibly been the product of sound business judgment." (Complaint ¶29).

It is not sufficient merely to name directors as defendants "with conclusory allegations of wrongdoing or control by wrongdoers" to justify failure to make a demand. *Marx*, 88 N.Y.2d at 199–200, 666 N.E.2d at 1040 *citing Barr v. Wackman*, 36 N.Y.2d 371, 379, 329 N.E.2d 180, 186 (1975). "This pleading tactic would only beg the question of actual futility and ignore the particularity requirement of the statute." *Barr*, 36 N.Y.2d at 379, 329 N.E.2d at 186. Here, Plaintiff simply alleges the proper "language" without particularizing her allegations. Plaintiff does not particularize: 1) specific conduct that is egregious; 2) why the conduct is egregious; or

3) why it is not the product of sound business judgment. As such, Plaintiff fails to meet the particularity pleading requirements required to satisfy the ability to commence a derivative action without a demand, and on these grounds, this action is dismissible in its entirety.

II. PURSUANT TO CPLR 3211(a) ET. SEQ. EACH CAUSE OF ACTION OF THE COMPLAINT SHOULD BE DISMISSED

A. Standard for a Motion to Dismiss

A motion to dismiss under CPLR 3211(a)(1) requires the court "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.,* 10 A.D.3d 267, 270, 780 N.Y.S.2d 593 (1st Dept.2004); *See* CPLR 3211(a). Dismissal is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" *Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002); *see Greenapple v. Capital One, N.A.,* 92 A.D.3d 548, 550, 939 N.Y.S.2d 351 (1st Dept.2012), and conclusively establishes a defense to the asserted claims as a matter of law" *Weil, Gotshal,* 10 A.D.3d at 270–271, 780 N.Y.S.2d 593; *Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 433, 992 N.Y.S.2d 2, 4–5 (1st Dep't 2014)

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction. The Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 638 N.E.2d 511, 513 (1994) (internal citations omitted).

"[F]actual allegations that do not state a viable cause of action, that consist of bare legal conclusions, are inherently incredible or clearly contradicted by documentary evidence are not entitled to" consideration on a motion to dismiss. *See Skillgames LLC v. Brody*, 1 AD3d 247, 250 (1st Dept. 2003), *citing Caniglia v. Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept. 1994); *see also*, *Ozdemir v. Caithness Corp.* 285 AD2d 961 (3d Dept. 2001); *Summit Solomon & Feldsman v. Lacher*, 212 AD2d 487, 487 (1st Dept. 1995). "Conclusory allegations or bare legal assertions with no factual specificity are [likewise] not sufficient, and will not survive a motion to dismiss" *In re Kenneth Cole Productions, Inc.*, 27 NY3d 268, 278 (2016), *citing Godfrey v. Spano,* 13 NY3d 358, 373, (2009); *see Health-Loom Corp. v. Soho Plaza Corp.*, 209 AD2d 197, 198 (1st Dept. 1994).

B. Plaintiff's First Cause of Action for Breach of Fiduciary Duty Must Be Dismissed Pursuant to CPLR 3211(A)(1), (4), and (7).

i. Res Judicata; Duplicative Allegations

"A motion made pursuant to CPLR 3211(a)(4) should be granted where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter." *White Light Prods. v. On The Scene Prods.*, 231 A.D.2d 90, 93–94, 660 N.Y.S.2d 568 (1st Dep't 1997); *Diaz v. Philip Morris Companies, Inc.*, 28 A.D.3d 703, 705, 815 N.Y.S.2d 109, 111 (2d Dep't 2006).

Both the 2017 Action and the instant action involve claims asserted by Plaintiff Nusimow against Defendant Pinchevsky. After being given leave by the Court to replead their counterclaims in the 2017 action, the Plaintiff plead the following allegations with respect to a breach of fiduciary cause of action, which was again dismissed.

> "35. Ms. Pinchevsky has repeatedly breached that duty by, among other improper behavior that will become apparent during discovery in this matter:
> a. Using corporate funds to defray her personal expenses, thereby engaging in misappropriation and corporate waste;

> b. Failing to maintain the Building, the Company's primary asset, in a legally compliant and commercially suitable manner;
> c. harassing legal tenants and thereby placing the Company in legal jeopardy;
> d. Failing to establish and conduct appropriate corporate formalities in the day-to-day operations of the Company, including regularized recordkeeping and periodic meetings of the board and shareholders;
> e. Refusing repeated demands by her fellow shareholder, Larissa Okun Nusimow, that she make available for inspection all corporate documents pertaining to the Company; and
> f. Failing to honor prior Court orders pertaining to her management and occupancy of the Building, including entry into a shareholder's agreement and curtailing usage of the Building for personal benefit…"[5]

After being afforded two opportunities to plead a breach of fiduciary duty claim against Pinchevsky, on two occasions, the Court dismissed the Plaintiff's conclusory allegations. Here too, the Plaintiff continues to make the same conclusory allegations in the Complaint including alleged: a) failure "to hold either a shareholder meeting, or a meeting to elect new directors or officers, since at least 2008…" (¶16); b) "Pinchevsky has also denied Plaintiff access to the books and records of the Corporation despite Plaintiff's entitlement as a shareholder to these books and records." (¶18); c) "Pinchevsky has also misappropriated corporate funds and assets for her own benefit." (¶19); d) "Pinchevsky has also adjusted her own salary without following the proper procedures. Pinchevsky's salary is paid out of the Corporation's coffers. (¶21). Plaintiff continues to plead similar conclusory allegations that have already been dismissed twice by the Court in the 2017 Action.

In the First Answer with Counterclaims from the 2017 Action, the Plaintiff previously pleaded a derivative cause of action against Defendant for breach of fiduciary duty, as her second counterclaim. *See* Exh. G. It was dismissed with leave to replead. In dismissing the Plaintiff's First Answer with Counterclaims, the Court stated in its decision:

[5] *See* Exhibit I

> "the second counterclaim is dismissed with leave to replead as it fails to state a breach of fiduciary claim with particularity (CPLR 3016 [b]). The circumstances constituting the alleged wrong must be stated in detail. The second counterclaim ***contains nothing more than conclusory allegations of wrongdoing and fails to plead Pinchevsky's misconduct in sufficient detail***."

600-602 10th Ave. Realty Corp. v. Estate of Hy Nusimow, No. 650120/2017, 2019 WL 3006983, at *2 (N.Y. Sup. Ct. July 10, 2019, Hon. Andrea Masley) (emphasis added) *affirmed* *600-602 10th Ave. Realty Corp. v. Est. of Nusimow,* 193 A.D.3d 402, 141 N.Y.S.3d 688 (1st Dep't 2021).

The trial Court afforded Plaintiff an opportunity to replead her counterclaims. The Plaintiff again plead a breach of fiduciary counterclaim, plead derivatively, as outlined. *See* First Counterclaim to Second Answer at Exh. I[6]. The Court again dismissed Plaintiff's derivative breach of fiduciary claim. On the record, the Court stated the following: "the motion to dismiss that counterclaim is granted for the same reasons that were stated in the prior decision." *See* Exh. J p. 9, ⁋10-12. The Court again dismissed Plaintiff's boilerplate, conclusory derivative breach of fiduciary duty claim. This time, the Court did not grant Plaintiff leave to replead her counterclaims. With no recourse in the 2017 Action, Plaintiff has frivolously sought to assert claims in this action that are otherwise barred by the Court's prior orders.

The Plaintiff took the position in the 2017 Action that it twice asserted derivative claims against Defendant for breach of fiduciary duty. The Plaintiff failed to properly plead these causes of action on two separate occasions and should not be allowed repeated attempts to bring its previously deficient claims until the Plaintiff is able to "get it right." As such, the Plaintiff's first counterclaim is barred by the doctrine of *res judicata* and should not be maintained.

[6] Plaintiff's then counsel stated to the Court regarding the dismissed counterclaim for breach of fiduciary duty: "It says Larissa Okun Nusimow acted in her capacity as a 50 percent shareholder, demands judgment derivatively on behalf of company in that amount." See Transcript of Proceedings at p. 6, ⁋ 9-11, attached as **Exhibit E**.

ii. Documentary Evidence Conclusively Refutes Any New Allegations

To the extent that there are new allegations plead in the instant action, those new allegations can be utterly refuted by documentary evidence. By refuting the four allegations, Plaintiff's cause of action is nothing more than the conclusory allegations that have been previously dismissed by this Court.

There are four allegedly new "allegations' contained in the instant pleading, all appearing in Paragraph 33 of the Complaint. These allegations, which are disputed, plead that Pinchevsky has diverted corporate assets by: (1) improperly subleasing an apartment in the Building with a rental value of approximately $2,000 per month; (2) taking reimbursements without the proper receipts; (3) improperly adjusting her own salary; and (4) taking a wrongful distribution in the amount of $64,000 in December 2020.

a. "Improperly Subleasing the Apartment"

First and foremost, this allegation is conclusory at best. It does not mention a specific apartment address and number, the reason for subleasing, or the length of subleasing. In any event, Pinchevsky is only a tenant at one apartment, that is apartment 3FN located at the Subject Property, 602 10th Avenue, New York, NY ("Apt. 3FN"). Documentary evidence establishes that there are two named individuals on the lease, Pinchevsky and her grandson [name], the later of which resides at the Subject Property.

Secondly, the Plaintiff's allegations that the apartment has "a rental value of approximately $2,000 per month" is flatly incorrect as this apartment is rent stabilized. Thus, the legal rent currently charged is $517.74, which Pinchevsky timely pays each month. *See* Exh. A and Warwick Affidavit ¶5. Plaintiff's allegation of "improper subleasing" is utterly refuted by the fact that: 1) the resident of the lease is the occupant; and 2) the legal rent for this rent-stabilized apartment is

being timely paid. Thus, there is no conceivable breach of duty or harm to the corporation plead or that can exist with respect to Apt. 3FN. Plaintiff pleads no further details in this respect.

b. Improper Expenses

Plaintiff next pleads that Pinchevsky is taking reimbursements without the proper receipts. This allegation too, is utterly refuted by documentary evidence. With respect to reimbursement, the instant complaint only mentions reimbursements in one specific instance, in paragraph 20, where it states that "Pinchevsky has taken reimbursement of approximately $350 per month for alleged "telephone and fax expenses" from the Corporation's coffers without providing necessary receipts.

On December 8, 2008, in resolution of an action captioned *Hy Nusimow v. Ester Pinchevsky and 600-602 10th Avenue Realty Corp.,* New York County Supreme Court, Index 101648/2008 ("2008 Action") Hy Nusimow, Pinchevsky, and the Corporation entered into a Settlement Agreement that was read into the record by the Hon. Herman Cahn and ordered ("2008 Settlement"). *See* **Exhibit E**. Pursuant to the 2008 Settlement, to which Plaintiff's spouse and the shareholder Hy Nusimow was a party to, Pinchevsky was to receive a salary of $350.00 per month. These "reimbursement payments" are in fact, payment of the monthly sums Pinchevsky is owed under the agreement and nothing more. Plaintiff does not point to any additional specific reimbursements that were misappropriated. Plaintiff fails to allege how these payments cause any harm to the company, given they are contemplated within the 2008 Settlement. If the sum of Plaintiff's allegations simply state that Pinchevsky is taking $350.00 a month, which she is owed under the terms of the 2008 Settlement, there is no harm to the corporation.

c. Improper Adjustment of Salary

As is outlined further below, this allegation, too, is nothing more than conclusory and lacks the required specificity pursuant to CPLR 3016.

d. Distribution of $64,000.00

While Defendant disputes the Plaintiff's position that the distribution was wrongful, given that the distribution, like any, is taken on the advice of an accounting professional, and was not unreasonable or egregious. *See* Exh. D. In any event, the amount of $64,000.00 was returned back to the corporation's bank account in full. *See* Exh. B. Plaintiff's remedy would be to seek the return of these funds to the corporation, which have already been returned. *See generally Ginsberg ex rel. Palace Mgmt. Inc. v. Rudey*, 280 A.D.2d 267, 267, 720 N.Y.S.2d 123, 123 (1st Dep't 2001); *Rodolico v. Rubin & Licatesi, P.C.,* 112 A.D.3d 608, 610, 977 N.Y.S.2d 264, 266 (2d Dep't 2013). Thus, there are no sums to recover there is no harm to the corporation and no viable remedy. This allegation too, shows that documentary evidence utterly refutes the allegations of Plaintiff's First Cause of Action.

iii. Plaintiff's First Cause of Action Must Be Dismissed as Insufficiently Plead

"Mere speculation cannot support a cause of action for corporate waste or breach of fiduciary duty." *Kassover v. Prism Venture Partners, LLC*, 53 AD3d 444, 450 (1st Dept. 2008); *In re Kenneth Cole Productions, Inc.*, 27 NY3d at 278. Pleadings "are required to set forth ... factual assertions of specific wrongdoing" *Greenbaum v. Am. Metal Climax, Inc*., 27 AD2d 225, 232 (1st Dept. 1967). Spurious and "conclusory allegations of breaches of fiduciary duty are not enough." *Id*.

A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)" *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 808, 921 N.Y.S.2d 260 (2d Dep't 2011); *Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683, 684, 935 N.Y.S.2d 304, 306 (2d Dep't 2011).

"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" *Rut v. Young Adult Inst., Inc*., 74 A.D.3d 776, 777, 901 N.Y.S.2d 715 (2d Dep't 2010); *See also Tuper v. Tuper*, 101 A.D.3d 1651, 1652, 956 N.Y.S.2d 739, 740 (1st Dep't 2012).

In addition to the reasons set forth above, Plaintiff's first cause of action for breach of fiduciary duty is also deficiently plead. The pleading fails to plead the alleged conduct resulting in breach of fiduciary duty with specificity. The Plaintiff, as it did on multiple occasions, continues to assert the similar or the same conclusory and speculative allegations it has in multiple prior pleadings, each of which have been dismissed.

In paragraph 16, Plaintiff pleads that Pinchevsky has failed to hold either a shareholder meeting or other corporate meetings since 2008. This exact allegation was rejected on two separate occasions in the 2017 Action.[7] In paragraph 17, Plaintiff address allegations that allegedly arose "since 2008." These allegations are insufficiently plead; Plaintiff does not allege when these alleged instances occurred in this 13-year period, most of which would be barred by the six-year statute of limitations. In addition, allegations of very similar nature appeared in paragraph 35 of Plaintiff's First Counterclaim to her Second Answer, which was previously dismissed. *See* First Answer at Exh. G. Paragraph 18 contains the same allegations regarding denial of access to books and records that appeared in paragraph 35 of Plaintiff's First Counterclaim to her Second Answer, which was replead after a first dismissal, and again dismissed for conclusory allegations.

Allegations regarding an alleged improper sublease (Complaint ¶¶19, 33) are utterly refuted by documentary evidence. In addition, Plaintiff's subleasing allegations fall woefully short of being plead with specificity; no apartment is specified, no details are specified on how the alleged subleasing is occurring; no details are provided as to why the alleged subleasing is improper.

[7] *See* Exhibit G at Counterclaims ¶¶31(c), 42 and Exhibit I at Counterclaims ¶¶35(d), 42.

Allegations regarding taking reimbursements without proper receipts are also utterly refuted by documentary evidence. Plaintiff fails to acknowledge these are in fact payments pursuant to the 2008 Settlement. *See* Exh E, p.4, ⁋12-13. Given this, there is no allegation how there is any harm to the corporation by way of these $350.00 monthly payments (Complaint ¶ 20, 33). These payments were specifically contemplated and agreed to by Hy Nusimow's attorney and son in 2008, and Nusimow's attorney did not object to the $350.00 payments at the time of the 2008 Settlement[8].

Plaintiff also alleges that Pinchevsky has also "adjusted her own salary" without following the proper procedures (Complaint ¶¶ 21, 33). This allegation is nothing more than conclusory. It does not allege how the salary was adjusted, what amount it was adjusted by, why the salary was improper, and what alleged procedures were not followed.

Plaintiff's allegations regarding the $64,000.00 payment have been refuted by documentary evidence. Plaintiff's pleading does not contain any allegation of harm to the corporation besides the amount of the payment, which has since been returned. The Complaint fails to allege any further specific allegations with respect to the first cause of action. As such, the Complaint fails to state a derivative cause of action for breach of fiduciary duty.

C. Plaintiff's Second Cause of Action is Duplicative, Improper, and Must Be Dismissed

Plaintiff next brings its second cause of action for Corporate waste, nearly identically pleading the same facts as the first cause of action. The substance of the allegations is addressed in the previous paragraphs.

Directors or officers of a corporation stand in a fiduciary relationship to the corporation, must act in good faith and "owe the corporation their undivided loyalty and are not permitted to

[8] *See Id.* at p.1, ⁋2-8 (Court's instructions to object if disagree); p.9, ⁋22-23 (Avi's Nusimow's understanding), and p. 10, ⁋2-3, 10-18 (Avi Nusimow's agreement and representation of Hy Nusimow's interest

derive personal profit at the expense of the corporation." *Schachter v. Kulik*, 96 A.D.2d 1038, 1039, 466 N.Y.S.2d 444 (2d Dept 1983). Directors and officers who engage in waste of corporate assets may be liable for breach of fiduciary duty. *See e.g., SantiEsteban v. Crowder*, 92 A.D.3d 544, 546, 939 N.Y.S.2d 28, 30 (1st Dep't 2012). Corporate waste is nothing more than an element, or a component of, breach of fiduciary duty. It is clear from the language that waste is merely one potential component of a breach of fiduciary duty. The second cause of action is therefore duplicative of the first and must be dismissed. *See 770 Owners Corp. v. Spitzer*, 25 Misc. 3d 1204(A), 901 N.Y.S.2d 902 (Sup. Ct. 2009) (dismissing a cause of action for corporate waste where a cause of action for breach of fiduciary duty was also asserted). As such, this is not an independent cause of action and must be dismissed as failing to state a cause of action, and/or as duplicative.

D. Plaintiff's Third Cause of Action Demanding Books and Records is Procedurally Improper and Defective and Must Be Dismissed

This cause of action is both procedurally improper and legally defective. Plaintiff's third cause of action, her demand for books and records, is procedurally improper as it is not brought in the method prescribed in Business Corporation Law §624(d), which reads as follows:

> (d) Upon refusal by the corporation or by an officer or agent of the corporation to permit an inspection of the minutes of the proceedings of its shareholders or of the record of shareholders as herein provided, the person making the demand for inspection may apply to the supreme court in the judicial district where the office of the corporation is located, upon such notice as the court may direct, f***or 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.*** Upon the return day of the order to show cause, the court shall hear the parties summarily, by affidavit or otherwise, and if it appears that the applicant is qualified and entitled to such inspection, the court shall grant an order compelling such inspection and awarding such further relief as to the court may seem just and proper.

N.Y. Bus. Corp. Law § 624 (McKinney) (emphasis added).

Plaintiff does not seek relief under BCL §624(d) by way of order to show cause, which is the only statutory mechanism contemplated. Courts have dismissed causes of action brought under BCL 624(d) with leave to file as an order to show cause. *See Greenberg v. Falco Const. Corp.*, 29 Misc. 3d 1202(A), 958 N.Y.S.2d 307 (Sup. Ct. 2010) ("[b]ecause BCL § 624(d) requires that a demand for inspection be made by order to show cause, plaintiff's fifteenth cause of action is hereby dismissed without prejudice with leave to demand inspection pursuant to BCL § 624."); *See also Cuva v. U.S. Tennis Ass'n. E., Inc.,* 13 Misc. 3d 1221(A), 831 N.Y.S.2d 347 (Sup. Ct. 2006), opinion adhered to on reargument *sub nom. Cuva v. U.S. Tennis Ass'n E., Inc*. (N.Y. Sup. Ct. 2006) ("BCL § 624(d) provided respondents with the procedural vehicle to compel their disclosure by the court."). As such, any request for relief under BCL §624(d) *must* be brought as an order to show cause; it cannot be maintained as a separate cause of action. Therefore, Plaintiff's third cause of action is procedurally improper.

In addition, Plaintiff's demand for books and records is a personal demand on behalf of Plaintiff herself, not a derivative demand. Thus, dismissal is warranted herein. *See e.g*., *Abrams*, 66 N.Y.2d at 953, 489 N.E.2d at 752.

E. Plaintiff's Fourth Cause of Action Requesting an Accounting Must Be Dismissed

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 23, 867 N.Y.S.2d 169 (2d Dept 2008). "To state a viable cause of action for an accounting, a plaintiff must also allege that he or she demanded an accounting, which the defendant refused to provide. *LMEG Wireless, LLC v. Farro*, 190 A.D.3d 716, 140 N.Y.S.3d 593, 598 (2d Dep't 2021). Plaintiff's cause of action for an accounting fatally fails to plead that a demand was

made. *See generally A. Colish, Inc. v. Abramson,* 150 A.D.2d 210, 211, 540 N.Y.S.2d 813, 814 (1989). On its face, without a demand, the fourth cause of action is dismissible.

In addition, if a Plaintiff is unable to sufficiently plead a claim for breach of fiduciary duty, it cannot maintain a cause of action for an accounting. *Cf Le Bel v. Donovan*, 96 A.D.3d 415, 417, 945 N.Y.S.2d 669, 671 (1st Dep't 2012). As Defendant also seeks to dismiss the Complaint in its entirety, and Plaintiff's causes of action for breach of fiduciary duty and corporate waste, to the extent the first and second causes of action are dismissed, Plaintiff's fourth cause of action also must be dismissed.

Furthermore, this cause of action fails to account for the fact that Plaintiff receives monthly financial reports and statements for the Corporation. *See e.g.* **Exhibit C** for two reports. The Corporation's management company Arnold S. Warwick & Co., Ltd. prepares these monthly reports which are distributed to the estate of Hy Nusimow, Larissa Nusimow and Avi Nusimow. *See* Warwick Affidavit ¶ 7.

F. Plaintiff's Fifth Cause of Action Seeking Removal of the President is Improperly Plead and Must Be Dismissed

Plaintiff's final cause of action seeks removal of Pinchevsky as President under Business Corporation Law §706(d). First and foremost, Plaintiff seeks relief under the incorrect statute and as such her cause of action is dismissible on these grounds alone. Plaintiff specifically pleads that "Plaintiff is entitled to bring an action seeking the removal of a corporate director for cause pursuant to BCL § 706(d)" (Complaint ¶54) and that as her relief, "Plaintiff accordingly requests an order removing Pinchevsky as President of the Corporation for cause."

If Plaintiff is seeking to remove Pinchevsky as the President, she is seeking to remove a corporate *officer* pursuant to Business Corporation Law §716(c), not a director pursuant to BCL § 706(d). Plaintiff does not plead that she wants Pinchevsky removed from the Board of Directors,

just that Plaintiff seeks to have Pinchevsky removed as president. The Business Corporation Law defines officers as "a president, one or more vice-presidents, a secretary and a treasurer, and such other officers as it may determine, or as may be provided in the by-laws." N.Y. Bus. Corp. Law § 715(a) (McKinney). Plaintiff clearly pleads that she seeks removal of Pinchevsky as President but pleads the incorrect statute. Thus, this cause of action is deficient and must be dismissed.

In addition, if Pinchevsky is successful in dismissing the causes of action for breach of fiduciary duty and/or corporate waste, then there is no "cause" to maintain a cause of action for removal of the President, and that therefore this action must also be dismissed.

III. SANCTIONS SHOULD BE GRANTED FOR THE FILING OF THIS FRIVOLOUS ACTION GIVEN THE PLAINTIFF HAS BEEN AFFORDED MULTIPLE PRIOR ATTEMPTS TO PLEAD HER CLAIMS, EACH OF WHICH WERE MET WITH DISMISSAL

Conduct during litigation, including on an appeal, is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false. *See* 22 NYCRR 130–1.1; *Mascia v. Maresco*, 39 A.D.3d 504, 505, 833 N.Y.S.2d 207, 208 (2d Dep't 2007).

As set forth in this memorandum, this pleading is frivolous and repetitive of the claims asserted in the 2017 Action. Here, Plaintiff commenced this meritless action as a separate proceeding as her claims were otherwise barred by the 2017 Action. Plaintiff, for example, has twice attempted to plead a derivative breach of fiduciary duty/waste claim against Pinchevsky, and twice, the Courts have dismissed Plaintiff's conclusory allegation. Plaintiff's claims would otherwise be barred by the law of the case in the 2017 Action, and Plaintiff, without merit in law or fact, now brings the same claims in the instant action. Plaintiff's continuous use of the Court to

litigate the same claims that have been dismissed on multiple occasions is sanctionable and sanctions should be awarded accordingly.

CONCLUSION

For the foregoing reasons, Plaintiff and Counterclaim-Defendant respectfully request an order (i) dismissing the Complaint in its entirety, (ii) granting sanctions in favor of Defendant Pinchevsky, and (iii) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 24, 2021

WOODS LONERGAN PLLC

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RULE 17 CERTIFICATION
PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to Rule 17 of the Commercial Division Rules that the foregoing memorandum was prepared on a computer using Microsoft Word.

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Dated: New York, New York
May 24, 2021

/s/ Andreas E. Christou
Andreas E. Christou, Esq.