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, Defendants.	Index No. 651435/2021 MOTION SEQ NO. 1

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT AND FOR SANCTIONS, AND IN SUPPORT OF HER CROSS MOTION FOR SANCTIONS

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Plaintiff Larissa Okun Nusimow ("Plaintiff") respectfully submits this Memorandum of Law by and through undersigned counsel in opposition to Defendant Ester Pinchevsky's ("Pinchevsky") Motion to Dismiss the Complaint and For Sanctions, and in support of her cross-motion for Sanctions.

PRELIMINARY STATEMENT

This case involves misconduct and corporate malfeasance by Pinchevsky, who has served as President of Nominal Defendant 600-602 10th Avenue Realty Corporation (the "Corporation") since April 1993. For many years, Pinchevsky has mismanaged the Corporation, including by failing to hold annual meetings and meetings to elect officers and directors, and failing to provide books and records on demand.

Pinchevsky has also taken advantage of her position as President to line her own pockets. In particular, Pinchevsky has 1) improperly subleased an apartment owned by the Corporation for personal gain since 2008; 2) taken reimbursement for personal expenses without providing necessary receipts; and 3) adjusted her own salary without following proper procedures. And perhaps most troublingly, on December 29, 2020, Pinchevsky took an "owner distribution" of $64,000 without providing for any distribution to Plaintiff, the other 50% owner of the Corporation. Pinchevsky returned this distribution only after Plaintiff filed suit.

In her motion to dismiss, Pinchevsky attempts to evade these clear allegations of wrongdoing by arguing that Plaintiff's claims are barred by the action *600-602 10th Avenue Realty Corporation v. Estate of Hy Nusimow et al.*, Index No. 650120/2017 (the "2017 Action"). This argument is a red herring—while Plaintiff did assert counterclaims against Pinchevsky in the 2017 Action that were dismissed by the Court, much of the misconduct alleged in the Complaint either was not at issue in the 2017 Action, or occurred *after* the counterclaims were

asserted. Moreover, notwithstanding the fact that Pinchevsky's own papers concede that the Complaint raises issues that were not litigated in the 2017 Action, Pinchevsky has the gall to ask the Court to sanction Plaintiff for bringing this lawsuit. That motion for sanctions is itself frivolous and worthy of sanctions.

Pinchevsky's other arguments for dismissal fare no better, and should be rejected out of hand. For the reasons discussed herein, Plaintiff respectfully requests that the Court deny Pinchevsky's motion to dismiss and motion for sanctions, and grant Plaintiff's cross-motion for sanctions.

FACTUAL BACKGROUND

The Corporation was formed in May 1979, and at its formation contained the following shareholders, with their respective percentage of shares: Sol Lieberman – 52%, Hy Nusimow – 24%, and Pinchevsky – 24%. (NYSCEF No. 2 ¶ 9.) Hy Nusimow is the late husband of Plaintiff. (*Id.*) Over time, the Corporation went through several restructuring episodes, resulting in 50% of the shares of the Corporation being held by Hy Nusimow, and 50% of the shares being held by Pinchevsky. (*Id.* at ¶ 11.) Plaintiff became a shareholder by operation of law when her husband, Hy Nusimow, passed away in 2016. (*Id.* at ¶ 12.)

Pinchevsky has served as President of the Corporation since April 1993. (*Id.*at ¶ 13.) There are currently no other officers or directors of the Corporation. (*Id.*at ¶ 14.) As President, Pinchevsky has failed to hold either a shareholder meeting, or a meeting to elect new officers or directors, since at least 2008, despite the Corporation's by-laws requiring an annual meeting every year. (*Id.* at ¶ 16.) Pinchevsky has also denied Plaintiff access to the books and records of the Corporation, despite Plaintiff demanding the same. (*Id.* at ¶ 18.)

Pinchevsky has also misappropriated corporate funds and assets for her own benefit. First, since 2008, Pinchevsky has improperly subleased an apartment in the Building, with a monthly rent of approximately $2,000 per month. (*Id.* at ¶ 19.) In addition, Pinchevsky has taken reimbursement of approximately $350 per month for alleged "telephone and fax expenses" without providing necessary receipts, and improperly adjusted her salary without following proper approvals. (*Id.* at ¶ 20.)

Pinchevsky's misconduct has recently grown more brazen. On December 29, 2020, Pinchevsky took an owner distribution from the Corporation of $64,000. (*Id.* at ¶ 22.). This distribution was purportedly for "2019 taxes," but there was no justifiable tax reason for that distribution. (*Id.*). Pinchevsky took that distribution without making any distribution to Plaintiff, the Corporation's other 50% owner. (*Id.*)

This litigation is related to another action pending in the Commercial Division, the 2017 Action. Plaintiff is a defendant in the 2017 Action. In the 2017 Action, the Corporation seeks to enforce a previously revoked shareholder agreement and force Plaintiff to sell her shares in the Corporation at significantly below market value. (2017 Action, NYSCEF No. 14.) Plaintiff previously asserted counterclaims in the 2017 Action, including a counterclaim for breach of fiduciary duty against Pinchevsky. (2017 Action NYSCEF No. 55.) The Court dismissed that counterclaim with leave to replead. (2017 Action NYSCEF No. 128.) Plaintiff subsequently repled the counterclaims on August 2, 2019, including the breach of fiduciary duty counterclaim. (2017 Action NYSCEF No. 132.) The Court dismissed the repled breach of fiduciary duty counterclaim, without indicating whether or not Plaintiff had leave to replead. (2017 Action NYSCEF No. 170.) Following additional misconduct by Pinchevsky, Plaintiff brought the instant action.

ARGUMENT

A motion to dismiss under CPLR 3211(a)(7) should be granted if, after accepting all the allegations set forth in the complaint as true, the plaintiff nevertheless fails to state any cognizable cause of action. *See*, *e.g.*, *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980). However, the Court need not accept allegations that are wholly conclusory, unsupported by any specific facts. *See Residents for More Beautiful Port Washington, Inc. v. Town of North Hempstead*, 153 A.D.2d 727, 729 (2d Dep't 1989).

A motion to dismiss under CPLR 3211(a)(1) should be granted where a defense is founded upon documentary evidence, such that the documents relied upon "definitively dispose of plaintiff's claim." *Bronxville Knolls, Inc. v. Webster Town Ctr. P'ship.*, 221 A.D.2d 248, 248 (1st Dep't 1995). Such a motion to dismiss should only be granted where "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002).

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 (1st Dep't 1997).

A. Defendant's Arguments that the Complaint is Defective Are Meritless

1. <u>The Complaint Does Not Confuse Individual and Derivative Claims</u>

Pinchevsky first argues that the Complaint should be dismissed because it "confuses" Plaintiff's derivate and shareholder rights. There is no such confusion, as the Complaint clearly identifies which claims are brought by Plaintiff derivatively on behalf of the Corporation (claims 1-2) and which claims are brought by Plaintiff in her individual capacity (claims 3-5). *See, e.g.,*

RCGLV Maspeth LLC v. Maspeth Props. L.L.C., 26 Misc. 3d 1241(A), at *1 (N.Y. Sup. Ct. Mar. 25, 2010) ("Notwithstanding defendants arguments to the contrary [a derivative claim] can be litigated together with individual claims in the same action"). The Defendant offers no support for its frivolous contention that a complaint cannot join properly pled derivative claims with individual claims against the named party defendant.

2. The Complaint Properly Identifies the Corporation as a Nominal Defendant

Pinchevsky's argument that this action should be dismissed because the case caption does not identify the Corporation as a nominal defendant is similarly meritless. As an initial point, the Complaint clearly identifies the Corporation as a nominal defendant in several places, and thus it is quite clear that the Corporation is included in this action only as a nominal defendant. (*See* NYSCEF No. 2 introductory paragraph, ¶¶ 8.) Moreover, Pinchevsky's own cited authority indicates that the proper remedy for an incorrect caption would be to simply amend the caption, not excuse Pinchevsky's wrongdoing by dismissing the Complaint. *See Hu v. Shen*, 57 A.D.3d 616, 619 (2d Dep't 2008) ("The caption of the action should be amended to reflect that Hu is suing in a representative capacity as to the derivative causes of action, and to name Road Corp. as a nominal defendant").

3. The Complaint Properly Pleads Demand Futility

Pinchevsky next argues that the Complaint's derivative claims should be dismissed for a failure to allege demand futility. In advancing a derivative action on behalf of the corporation, a shareholder is excused from making a pre-suit demand on the board of directors where either: 1) a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction; 2) the complaint alleges with particularity that the board of directors did not fully inform themselves about a challenged transaction to the extent reasonably appropriate

under the circumstances; or 3) a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors. *Marx v. Akers*, 88 N.Y.2d 189, 200-01 (N.Y. 1996).

The Complaint easily meets this standard. As an initial point, the Complaint alleges that there is no currently constituted board of directors to whom Nusimow could even submit a demand, other than Pinchevsky herself. With no currently constituted board upon whom to make a demand, a demand would clearly be futile. Pinchevsky entirely ignores and thus concedes this point.

Moreover, Pinchevsky cannot credibly argue that the requirements of the *Marx* test are not satisfied, as Pinchevsky, the sole decision-maker at the Corporation, is clearly "interested" in the transactions at issue in this case such that the first prong of the *Marx* test is satisfied. The Complaint alleges that Pinchevsky has, *inter alia*, improperly subleased an apartment, taken reimbursements without proper receipts, improperly adjusted her own salary, and taken a wrongful distribution in the amount of $64,000. Pinchevsky is clearly "interested" in these transactions, because she herself received the benefits thereof, including a $64,000 windfall. *Rubenstein v. Rubinstein*, 2006 N.Y.L.J. LEXIS 1776, at *10 (N.Y. Sup. Ct. Apr. 6, 2006) (noting that a director is "interested in the challenged transaction" where "the director stands to receive a personal benefit from the transaction at issue that is different from that received by all shareholders"). As courts have recognized in similar circumstances, it would be futile to demand that Pinchevsky sue herself. *See Torres v. Ubiquitous Media, Inc.*, 2009 N.Y. Misc. LEXIS 4999, at *17 (N.Y. Sup. Ct. Oct. 19, 2009) ("It would be futile for Edward to demand that Nicole and Robert, who together make up the majority of the Board, sue themselves").

Pinchevsky feebly attempts to argue that the first prong of the *Marx* test is not satisfied by misconstruing the First Department case *Wandel v. Eisenberg*, which Pinchevsky claims supports her argument. However, the discussion from *Wandel* that Pinchevsky invokes relates to the discussion of directors who were not alleged to have received a personal financial benefit related to the transaction at issue. *Wandel v. Eisenberg*, 60 A.D.3d 77, 80 (1st Dep't 2009). Indeed, the *Wandel* court found that the three out of ten total directors who had received a personal financial benefit from the transaction at issue were considered interested. *See id.* ("It is conceded that of the 10 individuals on the board of directors during the relevant period, three inside directors are alleged to have received backdated options and must therefore be treated as interested"). In this case, Pinchevsky is the sole corporate decision-maker, and she is personally financially interested in the transaction. Thus, *Wandel* supports, rather than refutes, Plaintiff's position, and Plaintiff has satisfied the first prong of the *Marx* test and established demand futility.

Plaintiff also satisfies the third prong of the *Marx* test, that the challenged transactions are so egregious that they could not have been the product of sound business judgment. *Marx v. Akers*, 88 N.Y.2d at 200-01. Despite Pinchevsky's protestations to the contrary, Plaintiff has specifically alleged egregious conduct—including alleging, *inter alia*, that Pinchevsky improperly subleased an apartment, took reimbursements without proper receipts, improperly adjusted her own salary, and took a wrongful distribution in the amount of $64,000. These allegations that Pinchevsky used the Corporation to enrich herself to the detriment of the other 50% shareholder could not have been the sound product of business judgment.

As such, the Court should reject Pinchevsky's argument that this action should be dismissed for a failure to allege demand futility.

B. Plaintiff's Breach of Fiduciary Duty Claim Should Not be Dismissed

Pinchevsky next argues that Plaintiff's breach of fiduciary duty claim should be dismissed for three reasons, none of which warrant dismissal of the claim.

1. Res Judicata Does Not Bar the Claim

Pinchevsky first argues that Plaintiff's breach of fiduciary duty claim should be dismissed as barred by res judicata because Plaintiff asserted derivative breach of fiduciary duty counterclaims against Pinchevsky which were dismissed in the 2017 Action. This argument is doubly flawed. As an initial point, while breach of fiduciary duty counterclaims were dismissed by the Court in the 2017 Action, the Court did not explicitly state that Plaintiff did not have leave to replead. *See Johns v. Town of E. Hampton*, 942 F. Supp. 99, 105 n. 2 (E.D.N.Y. 1996) ("Where the Court is silent as to whether leave to replead a particular claim is permitted, the parties shall assume that leave to replead has been granted . . . ").

More critically, however, the 2017 Action fiduciary duty counterclaims only involved allegations of Pinchevsky's misconduct dating to August 2019, and thus to the extent that there is any factual overlap between the allegations in the 2017 Action and the instant action, that overlap necessarily ends at August 2019. Indeed, Pinchevsky's own papers recognize that there are four significant allegations in the Complaint that did not appear in the 2017 Action, that Pinchevsky: 1) improperly subleased an apartment worth $2,000 per month; 2) took reimbursement of $350 per month without the proper receipts; 3) improperly adjusted her own salary; and 4) took a wrongful distribution of $64,000 in December 2020. Even the allegations in this action that are similar to issues raised in the 2017 Action, such as, for example, Pinchevsky's failure to hold a shareholder meeting since 2008, necessarily includes the new allegations that Pinchevsky has not held such a meeting from August 2019 to the present. It is

settled law that res judicata cannot bar such claims. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (Res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint).

Thus, Nusimow's breach of fiduciary duty claim is not subject to dismissal on the grounds of res judicata.

2. Pinchevsky's Self-Serving Documentary Evidence Does Not "Utterly Refute" Plaintiff's Claims

Pinchevsky next argues that the fiduciary duty claim must be dismissed because it is refuted by documentary evidence. This argument too misses the mark. As Pinchevsky recognizes, a motion to dismiss on the basis of documentary evidence should only be granted where "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen*, 98 N.Y.2d at 326. Pinchevsky's self-serving documentary evidence falls well short of meeting this requirement and, at best, raises disputed questions of fact.

The Complaint specifically alleges that Pinchevsky 1) improperly subleased an apartment with a rental value of approximately $2000 per month; 2) took reimbursements of $350 per month without the proper receipts; 3) improperly adjusted her own salary; and 4) took a wrongful distribution of $64,000 in December 2020. Pinchevsky attempts to negate these allegations of wrongdoing by submitting evidence that purports to show: that Pinchevsky has not improperly subleased an apartment because she is only a tenant in one apartment and her co-tenant lives in the apartment; that Pinchevsky's reimbursements are in fact her permitted salary; and that Pinchevsky took the $64,000 distribution on the advice of her accountant. This self-serving evidence, at best, raises disputed questions of fact inappropriate for resolution at the motion to dismiss stage.

By way of example, Pinchevsky attempts to refute the Complaint's allegation that Pinchevsky took a wrongful $64,000 distribution by submitting a letter from an accountant who purportedly advised Pinchevsky to take the distribution. (NYSCEF No. 14.) Pinchevsky further submits that she returned the improperly withdrawn funds to the Corporation. This raises a factual dispute as to whether the $64,000 distribution was wrongful and breached Pinchevsky's fiduciary duties, or whether it was withdrawn in good faith on the basis of the accountant's advice. And indeed, the fact that Pinchevsky returned this distribution only after the instant lawsuit was filed suggests that the distribution was wrongful and that the accountant's letter is merely an after-the-fact attempt to explain away misconduct. This factual dispute may not be resolved on a motion to dismiss, and Plaintiff is entitled to contest the propriety of that distribution.[1] In addition, Pinchevsky's argument that the claim is somehow invalid because she returned the $64,000 distribution falls flat on its face, and in fact supports the idea that the distribution was improper. A corporate fiduciary is not excused for malfeasance because she returns the money once caught.

Pinchevsky's documentary evidence regarding Plaintiff's other allegations fares no better. Notwithstanding Pinchevsky's assertion that she is only a tenant in one apartment, and that her co-tenant/grandson resides at the apartment, this is not dispositive of whether that apartment is being improperly sublet, or whether Pinchevsky sublets a different apartment.[2] And while Pinchevsky attempts to explain away her $350 monthly withdrawals as her salary as permitted by the 2008 Settlement, this does not explain why the withdrawals are identified in the Corporation's statements as "telephone and fax expenses." This presents another factual issue as

[1] Moreover, to the extent Pinchevsky seeks to rely upon the facts stated in her affidavit, such reliance is improper. *See Serao v. Bench-Serao*, 149 A.D.3d 645, 646 (1st Dep't 2017) ("[F]actual affidavits do not constitute documentary evidence within the meaning of the statute").
[2] And regardless of whether the rental value of the apartment is $2,000 a month or less, this is an issue of damages, not a basis to dismiss the claim.

to whether these payments are in fact permitted salary, and this is inappropriate for resolution at this stage in the litigation.

3. The Breach of Fiduciary Duty Claim is Pled with the Requisite Particularity

Pinchevsky third argues that the breach of fiduciary duty claim should be dismissed because it is "insufficiently pled." "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 (2d Dep't 2010).

Plaintiff adequately alleges all elements of this claim with the required specificity. First, the Complaint alleges, and Pinchevsky does not dispute, that as President of the Corporation Pinchevsky owes fiduciary duties. And second, Plaintiff has specifically alleged numerous acts of wrongdoing by Pinchevsky that have directly caused damages. In particular, Plaintiff has alleged that Pinchevsky has improperly subleased an apartment in the building for personal gain[3], taken $350 a month in reimbursements for purported "telephone and fax expenses," improperly adjusted her salary, and taken an improper $64,000 distribution in December 2020. These specific allegations meet the requirements of CPLR 3016(b). Indeed, Pinchevsky's argument that the allegations lack specificity is undercut by the fact that after Plaintiff filed the Complaint Pinchevsky subsequently returned the wrongful $64,000 distribution. And Pinchevsky's argument that these allegations have been refuted by documentary evidence, or that the Corporation has not been harmed because she returned the $64,000 distribution, are incorrect as discussed *supra*.

[3] Pinchevsky suggests that Plaintiff should have identified a specific apartment, and provided additional details concerning the alleged subleasing. Given that the Corporation's only asset is one building, and that the facts concerning specific apartments within that building are uniquely within Pinchevsky's knowledge as President of the Corporation, this argument should be rejected.

C. Plaintiff's Corporate Waste Claim Should Not be Dismissed

Pinchevsky next argues that Plaintiff's corporate waste claim should be dismissed. Like Pinchevsky's arguments with respect to Plaintiff's breach of fiduciary duty claim, this argument should also be rejected.

Pinchevsky's only argument that the corporate waste claim should be dismissed is that it is duplicative of the breach of fiduciary duty claim. However, Plaintiff is entitled to plead these causes of action in the alternative, and thus the corporate waste claim should not be dismissed at this time. *See Lemle v. Lemle*, 2017 N.Y. Misc. LEXIS 1487, at *13-14 (N.Y. Sup. Ct. Apr. 20, 2017) (allowing plaintiff to plead causes of action for corporate waste and breach of fiduciary duty); *see also* CPLR 3014 ("Causes of action or defenses may be stated alternatively . . . ").

Thus, the Court should not dismiss the claim for corporate waste.

D. Plaintiff's Books and Records Claim Should Not be Dismissed

Plaintiff's claim seeking the books and records of the Corporation should also not be dismissed. Pinchevsky's primary argument for dismissal of this claim is that it should have been brought by way of an order to show cause pursuant to BCL 624(d). This argument ignores that Plaintiff has a common-law, as well as a statutory, right to the books and records, provided that the books and records are sought in good faith and for a valid purpose. *See, e.g., JAS Family Trust v. Oceana Holding Corp.*, 109 A.D.3d 639, 642-43 (2d Dep't 2013). The Complaint clearly indicates that Plaintiff seeks to enforce *both* her common law and statutory rights to the books and records, and Pinchevsky does not argue that Plaintiff does not seek these books and records in good faith, or for an improper purpose. (NYSCEF No. 2 ¶ 43). Nor could she, given the allegations of mismanagement leveled against Pinchevsky by the Complaint. To the extent that the Court finds that Plaintiff's statutory right to books and records under BCL 624(d) should

have been brought as an order to show cause, Plaintiff is still entitled to the Corporation's books and records pursuant to her common law right which contains no such requirement.

Plaintiff also suggests that the books and records claim should be dismissed because it is a personal demand on behalf of plaintiff herself, not a derivative demand. It is unclear why this would be a basis for dismissal of the claim, given that the Complaint clearly identifies that this claim is brought by Plaintiff in her individual capacity as a 50% shareholder of the Corporation, as is proper. *See e.g., JAS Family Trust*, 109 A.D.3d at 642 ("[T]he plaintiffs are correct that a shareholder has both statutory and common-law rights to inspect the books and records of a corporation…") (internal citation omitted).

As such, the Court should deny Pinchevsky's motion to dismiss as relates to Plaintiff's books and records claim.

E. Plaintiff's Accounting Claim Should Not be Dismissed

Pinchevsky next argues that Plaintiff's claim seeking an accounting should be dismissed. Pinchevsky argues that this claim should be dismissed because the Complaint does not allege that Plaintiff made a demand for an accounting. This is incorrect—while the Complaint does not explicitly state that Plaintiff demanded an "accounting," it is clear that Plaintiff made several written requests for books and records relating to the Corporation, and these requests were denied. These requests, and Pinchevsky's subsequent refusal, are sufficient to sustain a claim for an accounting. *See Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107, 119 (1st Dep't 1998) ("Upon refusal of a demand for an accounting, a party may enlist the assistance of the courts. The record in this matter sufficiently reflects defendant's failure to provide complete information regarding the disposition of partnership funds so as to support the cause of action"). And at any rate, the Complaint itself contains a demand for an accounting, which has been

recognized as sufficient. *See Banker v. Banker*, 23 Misc. 3d 1111(A), at *1 (N.Y. Sup. Ct. Jan. 26, 2009) (finding that demand for accounting made in cross claim was sufficient to satisfy demand requirement, and further stating that "even if there was no demand for an accounting, the alleged misconduct . . . is sufficient to require an accounting").

Pinchevsky next argues that the accounting claim should be dismissed because Plaintiff has not established a claim for breach of fiduciary duty. For the reasons discussed *supra*, Plaintiff has established this claim, and so this argument must fail.

Third, Pinchevsky argues that the accounting claim should be dismissed because Plaintiff receives certain monthly financial reports and statements from the Corporation. This argument is misguided—the Complaint demands an accounting of all books, records, financial statements, income, revenues, expenses, profits, benefits, losses, liabilities, obligations, distributions and other financial transactions since 2008. (NYSCEF No. 2 ¶ 52.) The monthly reports and statements identified by Pinchevsky are insufficient.

F. Plaintiff's Claim Seeking Pinchevsky's Removal Should Not be Dismissed

Finally, Pinchevsky argues that Plaintiff's claim seeking Pinchevsky's removal as President should be dismissed because it seeks the relief under BCL 706(d) which relates to corporate directors, as opposed to BCL 716(c), which relates to corporate officers. For the avoidance of doubt, Plaintiff seeks Pinchevsky's removal as both of officer *and* a director, and as President of the Corporation she is currently the only authority in the Corporation. To the extent that the Court requires that this claim invoke BCL 716(c) as well as BCL 706(d), Plaintiff respectfully requests leave to so amend her Complaint.

Pinchevsky also argues that this claim should be dismissed because the claims for breach of fiduciary duty and corporate waste should be dismissed. Because these claims should not be dismissed for the reasons discussed *supra*, this claim should also not be dismissed.

THE COURT SHOULD GRANT SANCTIONS AGAINST PINCHEVSKY FOR HER FRIVOLOUS SANCTIONS MOTION

In addition to moving to dismiss Plaintiff's claims, Pinchevsky also moves for sanctions against Plaintiff. This motion for sanctions should be denied. Moreover, this motion for sanctions is itself frivolous, and should be sanctioned.

Pinchevsky's motion for sanctions is based on an argument that this action is frivolous because the claims herein are otherwise barred by the 2017 Action. This argument is directly contradicted by Pinchevsky's own briefing. For example, Pinchevsky's own briefing recognizes that there are at least four significant new allegations of misconduct in the Complaint. Moreover, given that the counterclaims in the 2017 Action date only to August 2019, they necessarily could not include subsequent allegations of misconduct, particularly the $64,000 distribution that Pinchevsky took in December 2020.

Given that Pinchevsky's motion for sanctions is directly contradicted by her own papers, Pinchevsky cannot credibly dispute that this motion is frivolous, and brought in bad faith. Such a frivolous motion for sanctions, without any basis in law or fact, "is itself a form of frivolous conduct warranting the imposition of sanctions." *See, e.g., Shelley v. Shelley*, 180 Misc. 2d 275, 277 (N.Y. Sup. Ct. 1999).

As such, Plaintiff respectfully requests that the Court both deny Pinchevsky's motion for sanctions, and grant Plaintiff's cross-motion for sanctions.

Dated: New York, New York
July 14, 2021

DAVIS+GILBERT LLP

By: */s/ Paul Corcoran*

Paul Corcoran
Jesse B. Schneider
Daniel Finnegan
1675 Broadway
New York, New York 10019
(212) 468-4800
Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

1. The following statement is made in accordance with N.Y.C.R.R. § 202.70, Rule 17.

2. The enclosed Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint and For Sanctions was prepared on the Microsoft Word processing system, with Times New Roman typeface, 12-point font.

3. According to the Word Count function of the Microsoft Word processing system, the total number of words in this Memorandum, exclusive of the caption, table of contents, table of authorities, signature block and this Rule 17 certification is 4,499.

Dated: New York, New York
July 14, 2021

DAVIS & GILBERT LLP

By: */s/ Paul Corcoran*
Paul Corcoran
Jesse B. Schneider
Daniel Finnegan
1675 Broadway
New York, New York 10019
(212) 468-4800
Attorneys for Plaintiff