SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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DAVID ARONOV, INDIVIDUALLY AND AS A MEMBER OF 290 13TH STREET, LLC SUING ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF 290 13TH STREET, LLC SIMILARLY SITUATED AND IN THE RIGHT OF 290 13TH STREET, LLC,

Plaintiff,

-against-

EUGENE A. KHAVINSON, MIKHAIL KREMERMAN, MICHAEL KHAVINSON, VYACHESLAV FAYBYSHEV, YANA SOSKIL, VITALY KOCHNEV, ARTYOM KIRZHNER, MIKOLA VOLYNSKY, ALEXANDER BOGUSLAVSKY, OMNI BUILD INC., and 290 13th STREET, LLC,

Defendants.

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Index No.: 500499/2016

AFFIRMATION IN SUPPORT OF PLAINTIFF'S MOTION FOR STAY OF TRIAL AND TO COMPEL DEFENDANTS TO GIVE ORDERED ACCOUNTING

RAYMOND R GRASING, Esq., an attorney admitted to practice law before the Courts of the State of Law, affirms the following under the penalties of perjury:

1. I am the owner and principal attorney of the Law Firm of Grasing & Associates, P.C., the attorneys for the Plaintiffs DAVID ARONOV, INDIVIDUALLY AND AS A MEMBER OF 290 13TH STREET, LLC SUING ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF 290 13TH STREET, LLC SIMILARLY SITUATED AND IN THE RIGHT OF 290 13TH STREET, LLC. As such I am fully familiar with the facts and circumstances surrounding this proceeding from a review of the file maintained by this office and from conversations with the aforementioned Plaintiff.

2. This affirmation is submitted in support of the motion of the Plaintiff for a stay of the damages portion of the trial in this action scheduled to begin on January 25, 2024 before the

Hon. Patria Frias-Colon, due to Defendants' willful refusal to submit the accounting for the transactions of 290 13th Street LLC, (the "LLC") during such time as each was a managing member of the LLC, as ordered to do so by verdict after the liability portion of the trial finding they each were liable to give such an accounting to the LLC, and an order of the Hon. Patria Frias-Colon, stated on the record, after the Verdict was rendered in the liability portion of the trial on December 20, 2023, that the Defendants must provide the aforementioned accounting by January 12, 2024 (note-the transcript of the part of the court proceedings of the verdict and the order by the court for the accounting, has been ordered by the Plaintiff but not yet received; a complete copy of that portion of the transcript of the court proceedings will be supplied upon receipt and Plaintiff specifically requests to be able to submit it under separate cover, as an addendum, or in reply in further support of this proposed order to show cause) and which Defendants have failed and refused to provide, and which Defendants have not challenged (though Defendants have made a CPLR 4404(a) motion for judgement notwithstanding the verdict, they do not seek to overturn the finding that the aforementioned defendants are liable for an accounting to the LLC); and, further, to hold the aforementioned Defendants in contempt for their failure to provide the ordered accounting at any time before the damages portion of the trial; and to hold defendants' counsel in contempt for refusing to provide an accounting because he claims no such order exists for anything other than the production of bank statements, which Plaintiff's contend are themselves incomplete, and that Defendants attorney has impermissibly attempted to shift the burden of proof of accounting, in which the individual Defendants who managed the LLC and were found to have violated their fiduciary duty to it, have to account for the transactions made by the LLC during the time they each respectively managed it, and any transaction they do not establish was proper, just, and allowable, they must give back to the LLC in the form of restitution; and that by doing so,

Defendants' attorney has violated his duty of candor to the court, and impeded and prejudiced the administration of justice.

3. The Plaintiff relies, in support of its motion for a stay, on each of the following exhibits, including for ease of reference by the court and by the Defendants:

- Plaintiff's Ex "1" The proposed verdict sheet the court stated it would give to the jury.
- Plaintiff's Ex."2" email from Defendants' attorney Oleg Mestechkin Defendants would not give a sworn accounting.
- Plaintiff's Ex."3": email to Defendants' counsel in good faith attempt to resolve dispute.
- Plaintiff's Ex. "4" Email to Defendants' attorney regarding Plaintiff's request for a stay.
- Plaintiff's Ex. "5": email to Defendants' counsel regarding when Defendants would provide the accounting.
- Plaintiff's Ex. "6"- bank statements Defendants supplied in response to order for accounting (Plaintiff has redacted the account number)

4. The jury returned a verdict in the liability portion of the trial in this action on December 20, 2023 it which they found that each of the three managing members of the LLC, the individual Defendants Eugene Khavinson, Mikhail Kremerman, and Vyacheslav Faybyshev were liable to the LLC for an accounting. The Hon. Patria Frias Colon, J.S.C., gave the Defendants until January 12, 2024 to submit the accounting, and set the damages portion of this trial to commence on January 25, 2024.

5. Defendants have refused to provide an accounting and instead have produced only

IOLA Account bank records from one of the managing members, individual Defendant Eugene Khavinson, who used his IOLA since approximately 2014 as the operating account for the LLC. Defendants produced the bank records for Mr. Khavinson's IOLA Account on Monday 1.22.24, ten days late. They cover only the period of June 2019 through December of 2023. (See emails to and from Defendants' attorney Mr. Mestechkin re: production of the bank statements but nothing more, Pl's Ex. "2," "3," "4," and "5." See also the IOLA Bank Statements Defendants produced, for June 2019 through December 2023, Pl's Ex. "6."),

6. I contacted Defendants' attorney Mr. Mestechkin by email on Monday January 22, 2024 just after receiving the IOLA Bank statements that day from him (he sent them only through email), and asked when he would provide a sworn accounting. In his email reply Mr. Mestechkin said there was no court order that he had to supply a sworn accounting and he would not be supplying anything else. (See emails to and from Defendants' attorney Mr. Mestechkin, Pl's Ex. "2," "3," "4," and "5.").

7. I also conferred with Mr. Mestechkin by telephone on January 24, 2024 to try to resolve our differences (shortly after I sent him the email informing him plaintiff would be seeking a stay of the Damages portion of the trial). I confirmed that telephone conversation in an email to Mr. Mestechkin of later on 1.24.24 (Pl's Ex "3"). As my email states:

> Dear Mr Mestechkin,
>
> I just tried to call you but was told you were unavailable, you then called me back after I left a message with Jayne who answered the phone.
>
> Eugene Khavinson, Mikael Kremerman, and Vaycheslaw Faybeshev were found liable to provide an accounting by the jury's verdict in the liability portion of the trial. The judge, after the verdict, gave you until January 12,2024 to provide one, and you refuse. You just reiterated your refusal again when we just spoke when you called me back on my cell phone. The call ended at approximately 1629 hrs Wed 1.24.24.

During that conversation you said you left it up to me as Plaintiff's attorney to try to show what transactions were or were not done correctly for the LLC and that because you or your predecessor had previously provided all of the financial records for the LLC to the Plaintiff (included their first counsel) nothing more would be forthcoming, and you said I should not have waited as long as I did (this past Monday, 1.22.24) to ask you why you hadn't provided everything I claimed you should (referencing the IOLA bank statements for Eugene Kahavinson's IOLA from June '19 thru Dec '23, which you sent me for the first time Mon afternoon 1.22.24, and which, per Mr Khavinson's sworn testimony at the liability portion of the trial, he used as the LLC's operating account from when Citibank closed closed the LLC's (2nd) Operating acct (The LLC opened it after Chase closed the LLC's first operating account due to Mr Kremerman's legal difficulties in approx May '14).

You also said that Defs did not have any further financial records. You said the LLC had no records from the Citibank account and Citibank had responded to the subpoena issued by Plainitff's first atty's saying exactly that, and that the Defs had no such records for the Citibank Account.

You also said that Defs did not have bank statements for Mr Khavinson's IOLA account, during the time it's been used as the LLC's Operating Account (at last since 2014) other than the ones you sent me. I told you the only bank statements for Eugene Khavinson 's IOLA account during the period of time it's been used as the LLC's Operating Account are the ones you sent on 1.22.24 which were for June 2019 thru Dec of 2023. I asked if you had any more and you said that you did not. I specifically asked for bank statements for Eugene Khavinson's IOLA Account during the period of time it has been used as the LLC's operating but more specifically during the time period Eugene Khavinson testified he had other people's money in the account, which I believe he said was less than $50,000; and you said you did not have any.

I also said to you that the IOLA account statements (i.e., the statements for the LLC's operating account during the time it's been in Eugene Khavinson's bank IOLA) that you sent to me via email on 1.22.24, do not have any checks or images of checks attached to them though at least some of the statements reference checks being paid (including more than $280,000 of checks shortly after a deposit of $486,000 was made, presumably the partial repayment of the loan the LLC made to amino Build in 2014. I said I don't have any checks or documentation showing who or what was paid in what specific amounts, instead, there's just the line item on the statement. You seemed surprised when I asked for the checks but you did not agree to give them. I also said I don't have any backup for the deposits or the withdrawals from the IOLA account during that time, but you did not agree to give me any.

I pointed out my understanding of the law, including that in light of the verdict finding Mikail Kremerman, Eugene Khavinson, and Vyacheslav Faybeshev liable

> for an accounting, that each in fact has to establish that each transaction by the LLC taken during the period each was a managing member, was legitimate and allowable, that they have the Burden of Proof on this, and that any financial transaction they do not establish was legitimate and allowable they have to return to the LLC as restitution.
>
> You told me, however, that you had nothing more to send me and would not provide anything further. You did this even though I pointed out that in my opinion the Defs' actions, and yours, made the verdict that the managing member Defs were liable for an accounting, a nullity and meaningless, and that you were intentionally violating a court order in doing so. I asked if you had anything that I should consider before bringing the proposed OTSC and you said you did not want to go back and forth over everything I said. I also said to you that I mentioned to you when we were selecting alternate jurors on this case on 1.3.24, that the next things due were your motion for a JNOV on 1.12.24, and your accounting due the same day. You said you did not recall that.
>
> I thanked you for your time, and you did the same, and the call ended.
>
> If anything I said was not accurate, please feel free to write me back or to call.."

(See Plaintiff's Exhibit "3" which is the email. As of the time this affirmation is written, Defendants' attorney has not responded to the email or otherwise disputed its contents).

8. Plaintiff will be severely prejudiced if forced to proceed with the damages portion of this trial without the accounting that each of the managing members of the LLC has been ordered to provide.

9. A managing member of an LLC owes a duty of loyalty and a fiduciary duty to the LLC to account for all of the transactions while he was a managing member. Each of the managing members here, the individual Defendants Eugene Khavinson, Mikhail Kremerman, and Vyacheslav Faybyshev, were found, at the liability portion of the trial in this action, to have breached their duty of loyalty and their fiduciary duty to the LLC, and each was found to be liable for an accounting to the LLC.

10. As stated by the court in *Bayer v. Beran, 49 N.Y.S.2d 2, 6–7 (Sup. Ct. NY County 1944)*, a derivative action which usefully, and cogently, cites binding authority, including U.S. Sup Ct precedent:

> The 'business judgment rule', however, yields to the rule of undivided loyalty. This great rule of law is designed 'to avoid the possibility of fraud and to avoid the temptation of self-interest.' Conway, J., in Matter of Ryan's Will, 291 N.Y. 376, 406, 52 N.E.2d 909, 923. It is 'designed to obliterate all divided loyalties which may creep into a fiduciary relation * * *.' Thacher, J., in City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 132, 51 N.E.2d 674, 676. 'Included within its scope is every situation in which a trustee chooses to deal with another in such close relation with the trustee that possible advantage to such other person might influence, consciously or unconsciously, the judgment of the trustee * * *.' Lehman, Ch. J., in Albright v. Jefferson County National Bank, 292 N.Y. 31, 39, 53 N.E.2d 753, 756. The dealings of a director with the corporation for which he is the fiduciary are therefore viewed 'with jealousy by the courts.' Globe Woolen Co. v. Utica Gas & Electric Co., 224 N.Y. 483, 121 N.E. 378, 380. Such personal transactions of directors with their corporations, such transactions as may tend to produce a conflict between self-interest *7 and fiduciary obligation, are, when challenged, examined with the most scrupulous care, and if there is any evidence of improvidence or oppression, any indication of unfairness or undue advantage, the transactions will be voided. Sage v. Culver, 147 N.Y. 241, 247, 41 N.E. 513, 514. See also Everett v. Phillips, 288 N.Y. 227, 43 N.E.2d 18; Gerdes v. Reynolds, 281 N.Y. 180, 22 N.E.2d 331. 'Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation are challenged the burden is on the director not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.' Pepper v. Litton, 308 U.S. 295, 306, 60 S.Ct. 238, 245, 84 L.Ed. 281.
>
> While there is a high moral purpose implicit in this transcendent fiduciary principle of undivided loyalty, it has back of it a profound understanding of human nature and of its frailties. It actually accomplishes a practical, beneficent purpose. It tends to prevent a clouded conception of fidelity that blurs the vision. It preserves the free exercise of judgment uncontaminated by the dross of divided allegiance or self-interest. It prevents the operation of an influence that may be indirect but that is all the more potent for that reason. The law has set its face firmly against undermining 'the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.' Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1.

[Emphasis, by underlining, supplied]

11. Going further back, the fourth Department held, in *Kreitner v. Burgweger, 174 A.D. 48, 53, 160 N.Y.S. 256, 261 (App. Div. 4th Dept. 1916)*:

> This action is for accounting by persons in a trust capacity, and the plaintiff has fully met his burden of proof when he traces the assets of the concern into their hands. The clear duty is then imposed upon them of fully accounting for all such trust moneys, and they can receive credit upon such accounting only for such sums as they definitely show they have expended for a lawful purpose. Upon no theory of law or equity can they be credited with any moneys for which they cannot account.

[Emphasis, by underlining, supplied]

12. Another New York County Supreme Court decision, which also goes through in great detail, the mechanics of, and reasons for, having a fiduciary account for the transactions for which he is responsible, is

> I must next concern myself with Shahmoon's expense accounts and his sundry charges to, and reimbursements from, the subject corporation. On the evidence presented to me the situation in respect of these matters is on an entirely different footing from that of the compensation he openly received as determined by resolutions of the board of directors, duly reported from time to time to the stockholders of the company.
>
> Shahmoon is charged with the misuse of corporate funds in connection with his expenses, and which, it is alleged by the plaintiffs, were not adequately accounted for in the company's books and records. These ran from a low of $5,109.44 in 1955 to a high of $14,952.70 in 1957. For the five-year period 1954–58, an average of about $10,700 per annum was said to have been spent by Shahmoon for travel, entertainment and gifts. These expenditures were, from time to time, reported orally by Shahmoon to the corporation's office manager, whose procedure (in pursuance of Shahmoon's direction) was to reimburse Shahmoon out of the company's petty cash for the sums alleged to have been expended, **778 and—although not usually supported by bills, vouchers, checks or receipts—the office manager allocated the expenses on the basis of what Shahmoon told him or on his own evaluation of the situation.
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> 14 15

Quoting from Jersawit v. Kaltenbach, 256 App.Div. 580, 581, 10 N.Y.S.2d 689, 690, affirmed 281 N.Y. 773, 24 N.E.2d 23, the plaintiffs submit that a '*cestui que trust* or principal is entitled to an accounting by a trustee or agent *who has been entrusted with property* without the necessity of establishing any misappropriation,' (emphasis in opinion) and that the plaintiffs are entitled to a detailed accounting of the sums spent. The defendants argue that the Jersawit case is inapplicable here because Shahmoon was not 'entrusted with property' but merely repaid for expenses incurred. In my view, the plaintiffs have the better of this dispute. All of the company funds were in effect entrusted to Shahmoon and the directors, and they were fiduciaries of the company with regard to their disbursement. It is of no consequence whether Shahmoon received the cash before he spent it or advanced it subject to repayment. He was spending corporate funds and is accountable for them, as are those directors who acquiesced in the outgo.

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Shahmoon testified that moneys which he was refunded by the company represented expenses for corporate purposes only, and that no portion thereof was used for his personal benefit. But his *ipse dixit* in that regard does not suffice. Expenditures not fully disclosed to directors and stockholders are not *ipso facto* allowable. Loose bookkeeping methods as to an executive officer's charges to his company are objectionable.

In Kreitner v. Burgweger, 174 App.Div. 48, 53, 160 N.Y.S. 256, 261, a shareholder's action, the court said:

'This action is for accounting by persons in a trust capacity, and the plaintiff has fully met his burden of proof when he traces the assets of the concern into their hands. The clear duty is then imposed upon them of fully accounting for all such trust moneys, and they can receive credit upon such accounting only for such sums as they definitely show they have expended for a lawful purpose. Upon no theory of law or equity can they be credited with any moneys for which they cannot account.'

I cannot pass on whether the expenses were justified unless I know what they were. The defense talks of the burden of 'vouchering'. Although Shahmoon is not required, by virtue of being a company official, to voucher his personal outlays, it is not unreasonable to require that, if he seeks corporate reimbursement therefor, he state just what he has spent, to whom, and where, and for what purpose. It may be a burden to account, but it is an obligation which the high standard of fiduciary loyalty requires the defendants to satisfy. That obligation has been stated by Chief Judge Cardozo in language plain and eloquent:

**779 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to

> this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'distintegrating erosion' of particular exceptions'. Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1.

[Emphasis, by underlining, supplied]

13. The size of the claimed amounts does not matter. As the court held in *Sorin v. Shahmoon Indus., Inc., 30 Misc. 2d 408, 430, 220 N.Y.S.2d 760, 779 (Sup. Ct. NY County 1961)*, even after finding against the Plaintiff on many of the allegations in the complaint, the Defendant still had to account for all of the transactions in question:

> The defense urges that the expense account in issue, of $10,700 per annum, is petty, indeed miniscule, compared with the $13,000,000 average annual sales of the corporation over the five-year period. The defendants urge that the plaintiffs' charges of wasted millions have degenerated to quibbles over paltry sums. While the amount in question here is certainly not large in comparison to the company's volume of business, the duty of a fiduciary does not extent only to major matters or substantial amounts over which he has control. It extends to the last penny with which he is entrusted. Even though any recovery warranted will be relatively minimal, the maxim of *de minimis non curat lex* is inapplicable. This is not a matter of principal, but of principle. The principle at stake here is simple and ancient: A fiduciary must account for the funds entrusted to his care—and that means 'all of such funds', not 'some' or even 'most' of them (cf. In re Hamilton, 24 Misc.2d 899, 195 N.Y.S.2d 689). A reference whill be ordered at which Shahmoon will be held to account for these sums (see Kreitner v. Burgweger, 174 App.Div. 48, 54–55, 160 N.Y.S. 256, 261–262, supra). By that time, any records which Shahmoon may need for that purpose may be gathered together if not already obtained from his former counsel(see Sorin v. Shahmoon Industries, Inc., 20 Misc.2d 149, 191 N.Y.S.2d 14). The referee will report with his recommendations.

14. What happened in Shamoon, *supra*, should happen here: the damages portion of the case be stayed until the aforementioned Defendants give the required accounting; the case should be referred to a referee to conduct the accounting, including obtaining the documentation supporting the transactions and listing the transaction, and then receiving testimony, writing his report, and submitting it to the court for approval. Only then, should the damages portion of the

trial proceed. Anything less will greatly prejudice Plaintiff.

15. Defendants already testified extensively at trial that they do not have large swaths of financial documents for the LLC. Defendants' attorney Mr. Mestechkin confirmed this again in my telephone conversation with him of today January 24, 2024. Contrary to his assertions, that is all the more reason to insist that Defendants, and Defendants' attorney, not flout court orders, and give the accounting they are required to and to have them do so before the damages portion of the trial on the remaining causes of action commences or concludes.

16. As the Court of Appeals stated in a *Sage v. Culver, 147 N.Y. 241, 247, 41 N.E. 513, 514 (1895)*:

> When a trustee or the officer or director of a corporation deals with himself, as an individual, or in the character of trustee, director, or officer of another corporation, with respect to the funds, securities, or property of the corporation, the transaction is at least open to question by the corporation, or, in a proper case, by its stockholders, and the trustee is bound to explain the transaction, and show that the same was fair, and that no undue advantage has been taken by him of his position, for his own advantage, or the advantage of some other corporation in which he has an interest. When it can fairly be gathered from all the allegations of a complaint that the officers and directors of a corporation have made use of relations of trust and confidence in order to secure or promote some selfish interest, enough is then averred to set a court of equity in motion, and to require an answer from the defendants in regard to the facts. When it appears that the trustee or officer has violated the moral obligation to refrain from placing himself in relations which ordinarily produce a conflict between self-interest and integrity, there is, in equity, a presumption against the transaction, which he is required to explain. Cowee v. Cornell, 75 N. Y. 100; Crown v. Ballard, 1 Ves. Jr. 221, note 2; Gibson v. Jeyes, 6 Ves. 278; Michoud v. Girod, 4 How 553; Butts v. Wood, 37 N. Y. 317; Ogden v. Murray, 39 N. Y. 207; Gardner v. Ogden, 22 N. Y. 332.

[Emphasis, by underlining, supplied]

17. The Court of Appeals explained exactly what an accounting is, in a much more recent case, *Roslyn Union Free Sch. Dist. v. Barkan, 16 N.Y.3d 643, 653, 950 N.E.2d 85, 91 (2011)*:

> Although the complaint here was not barred by the statute of limitations, we agree with the Appellate Division that the school district's allegations do not state a cognizable cause of action against Margaritis for an accounting. This equitable remedy is designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession (*see generally Ederer v. Gursky,* 9 N.Y.3d 514, 525, 851 N.Y.S.2d 108, 881 N.E.2d 204 [2007]).

18. The jury found each of the Defendants liable for fraud and conversion. The Defendants should have to account for the transactions of the LLC while they each were a managing member. Plaintiff should receive the results of that accounting a reasonable time before the commencement of the damages portion of the trial.

19. Defendants' should be held in contempt for willfully disobeying the verdict and the court's order directing they provide the necessary accounting. They have no good faith basis to challenge it and have not sought to overturn it (Defendants 4404(a) motion for a judgement notwithstanding the verdict does not address the accounting). As result they should be sanctioned and ordered to pay Plaintiff's reasonable costs and attorney's fees involved in bringing this motion. So too should Defendant's attorney who in Plaintiff's opinion, has willfully impeded and prejudiced the administration of justice (New York Rule of Professional Conduct 8.4(d)) and violated his duty of candor to the court (New York Rule of Professional Conduct 3.3(a)(2) in failing to disclose, and to follow, binding precedent and disclose the same and instead claim an accounting is something it is not), and (albeit in his refusal, so far stated directly only to me) that there is no court order directing Defendants provide an accounting, let alone by any particular date.

20. If Plaintiff is forced to try the damages portion of the trial without the sworn accounting from the Defendants, it will waste judicial resources. It will force Plaintiff to go through each and every transaction during the lifespan of the LLC, in detail, to try to establish whether or not it was legitimate and whether there is backup documentation to confirm it; and Plaintiff will have to do so with each and every managing member each of is liable for an accounting to the LLC. Defendants should not be able to shift the burden of proof in that way, because it is defendants who have the burden of proof in the accounting to establish that each and every transaction was legitimate and any that was not they will have to return to the LLC in the form of restitution. If forced to do so Plaintiff also will request Defendants, pay Plaintiff's reasonable attorney's fees.

21. For all the reasons cited herein, Plaintiff's motion should be granted in its entirety and the court should issue such other and further relief as it deems just and proper.

Dated: January 24, 2024

By: _____
The Law Firm of Grasing & Assoc., P.C.
Counsel for Plaintiffs
99 Smithtown Blvd,
Smithtown, New York 11787
Tel. 631.240.4480
Fax. 631-295-3380
email: rgrasing@grasinglaw.com

To: Oleg A. Mestechkin, Esq.
Wing. K. Chiu, Esq.
Mestechkin Law Group, P.C.
Counsel for Defendants
2218 Ocean Ave.
Brooklyn 11235
Tel. (212) 256-1113
Fax. (646) 365-2069
email: om[illegible]lawmlg.com
wkc@lawmlg.com
(VIA NYSCEF & Email)