STATE OF NEW YORK
SUPREME COURT : NIAGARA COUNTY

JASON BURNS, individually and Derivatively on behalf of C.R.B. HOLDINGS,

Plaintiffs,

COMMERCIAL DIVISION
DECISION AND ORDER
Index No.: E177079/2022

- vs -

C.R.B. HOLDINGS INC., ROBERT BURNS,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **BARTLOMEI & ASSOCIATES**
John P. Bartlomei, Esq. Of Counsel
Matthew J. Byrd, Esq. Of Counsel
Attorneys for Plaintiffs

CHRISTEN E. CIVILLETTO, ESQ.

and

BARCLAY DAMON LLP
James P. Milbrand, Esq. Of Counsel
Sarah O'Brien, Esq. Of Counsel
Attorneys for Defendants

WALKER, J.

Defendants, C.R.B. Holdings Inc. ("CRB") and Robert Burns, have applied for an order (Motion No. 2; Doc. 64), dismissing Plaintiff's Amended Complaint, and for sanctions (Doc. 40).

Pursuant to this Court's September 28, 2022 Order ("Order"), granting in part Defendants' motion to dismiss the Complaint, Plaintiff was granted leave to file an Amended Complaint, with respect to certain limited claims (Doc. 37). Plaintiff did so on November 18, 2022 (Doc. 40). While substantially shorter than its 397-paragraph predecessor, the Amended Complaint includes two (2) claims that were dismissed with prejudice. As to the remaining claims, even as re-plead, they are time-barred, duplicative, and/or improperly asserted. For the reasons that follow, the Motion is granted as to dismissal with prejudice, but denied as to sanctions.

Standard of Review

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine ... whether the facts as alleged fit within any cognizable legal theory" *(Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 570-571 [2005]). Moreover, when the "moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one" (*Olszewski v. Waters of Orchard Park*, 303 A.D.2d 995, 995 [4th Dept 2003]). Dismissal based upon documentary evidence is appropriate where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 NY2d 83, 88 [1994]). Allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 [1st

Dept 1999], *affd* 94 N.Y.2d 659 [2000]).

Standing

A shareholder's derivative action is "brought in the right of a … corporation to procure a judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates" (*Marx v. Akers*, 88 N.Y.2d 189, 193 [1996] [quoting Business Corporation Law §626 (a)]). Derivative claims against corporate officers and directors belong to the corporation itself (*Auerbach v. Bennett*, 47 N.Y.2d 619, 631 [1979]; *see also, Isaac v. Marcus*, 258 N.Y. 257, 264 [1932] ["recovery must enure to the benefit of the corporation"]).

Equally important, a plaintiff must be a shareholder of the company "at the time of bringing the action," and at the time of the alleged wrongdoing (*see, e.g.*, BCL § 626(b); *Pessin v. Chris-Craft Indus.*, 181 A.D.2d 66, 70 [1st Dept 1992]). Plaintiff alleges that CRB exercised its option to purchase Plaintiff's shares upon the termination of his employment pursuant to Section 3.4 of the 2014 Shareholders Agreement ("Agreement") on November 6, 2020 (Doc. 45). Moreover, the sale of Plaintiff's shares closed on June 25, 2021 ("Closing") (Doc. 40, ¶87).

As such, Plaintiff was not a shareholder on March 25, 2022, the date upon which he commenced this action. Even if he remained a shareholder following the Closing, he lacks standing to prosecute derivative claims, because he did not make a pre-litigation demand on the board to do so (*see, e.g., Matter of Omnicom Group Inc. Shareholder Derivative Litig.*, 43 A.D.3d 766 [1st Dept 2007]; *Marx*, 88 N.Y.2d at 194 ["…whether and to what extent to explore and prosecute such [derivative] claims lies within the judgment and control of the corporation's

board of directors"]; *Marx*, 88 N.Y.2d at 193 ["[d]eference to the board is essential"]). Demand can be excused only in three (3) exceptional circumstances: (1) where a majority of the board is interested in the challenged transaction; (2) where the board did not fully inform itself about the challenged transaction to the extent reasonably appropriate under the circumstances; or (3) where the transaction was so egregious on its face that it could not have been the product of sound business judgment (*see Marx*, 88 N.Y.2d at 200–01). These exceptions are construed narrowly (*see Matter of Omnicom*, 43 A.D.3d at 768 [emphasizing that "pre-suit demand is the rule, that excusing demand is the exception, and that the exception should not be permitted to swallow the rule"]). Those exceptions do not apply here, nor has Plaintiff pleaded them, as he is required to do (BCL § 626[c]; *see e.g. Matter of Omnicom*, 43 A.D.3d at 768 [no particularity, no standing]). Furthermore, Plaintiff's allegations and damages relate **only** to personal grievances, and not those of the corporation.

Declaratory Judgment (Count One)

It is well settled that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action" *(Samuels v. Gordon*, 2015 N.Y. Misc. LEXIS 2638 at *12 [Kings County 2015]). Here, Plaintiff has an adequate, alternative remedy in the form of a cause of action for breach of the Agreement. Plaintiff's primary allegation in support of his request for a declaratory judgment that the closing of the transfer of shares be declared "null and void," is that the provisions of the Agreement "were not followed by Defendants." Specifically, Plaintiff alleges that the notice and other time periods set out in Sections 3.4 and 3.5 of the Agreement were violated. These allegations, if true, would support a claim for breach of contract, and do not warrant declaratory

relief. Notably in this claim, Plaintiff contends that he has suffered $5,000,000 in damages, indicating the relief he is seeking is monetary, not declaratory.

Rescission of the 2010 Amendment to the Buy-Sell Agreement (Count Two)

Plaintiff seeks rescission of the 2010 Amendment to the Buy-Sell Agreement ("Amendment"), which no longer exists (Doc. 40, ¶112). Plaintiff asserts a variety of theories for rescission: fraud, duress, undue influence, no benefit of independent counsel, lack of meeting of the minds, "fraud and extortion," and "compounding a crime" (*Id.,* at ¶¶112-114). These claims were previously set forth in the Complaint as Counts Eleven though Nineteen (Doc. 1). In dismissing them, the Court determined that "…this dismissal is with prejudice, except to the extent that this dismissal is based upon a failure to plead the relevant facts with specificity and can be rectified by filing a new pleading …" (Doc. 37, p. 2). Time-barred claims, such as any claim based on the Amendment, were dismissed with prejudice. Despite this directive, Plaintiff has now combined each of Counts Eleven through Nineteen into a new Count Two. This claim is time-barred, and has already been dismissed with prejudice.

Even if this claim had not been dismissed with prejudice, the fraud and "fraud and extortion" grounds for rescission are barred by the applicable six year statute of limitations (CPLR 213 [8]; CPLR 213 [1] [rescission six years]; *see also Spinella*, 33 Misc. 3d 1232(A) [Sup. Ct. Kings Co. 2011]). The allegations set forth in support of Count Two expressly relate to conduct that allegedly occurred on January 28, 2010, over twelve years ago, and long after the six year limitations period expired (Doc. 40, ¶114). Plaintiff does not allege that he only recently discovered the fraud in the Amendment, nor can he. Each of the alleged facts that constitute the alleged fraudulent activity (no independent counsel, the presence of his father, and the plain

language of the agreement) were known to Plaintiff when he signed the Amendment on January 28, 2010.

Equally important, none of the grounds (namely, fraud, "fraud and extortion," duress, undue influence, unconscionability, lack of independent counsel, lack of meeting of the minds, and compounding a crime) are properly alleged. Count Two does not contain any allegation that there was a material, fraudulent misrepresentation, or that Plaintiff justifiably relied upon the misrepresentation to his detriment. These deficiencies to the fraud claims are fatal (*see Mandarin Trading*, 16 N.Y.3d at 178; *see also* CPLR 3016 [b]; *Garelick*, 141 A.D.2d at 502 [requiring all elements, including the making of material representations by the defendant to the plaintiff"]).

The claim that rescission is justified by duress and undue influence is similarly deficient, because economic duress requires some obligation on the part of the party to perform (*see Beutel*, 55 N.Y.2d at 958; *Salzman v. Holiday Inns, Inc.*, 48 A.D.2d 258, *modified* 40 N.Y.2d 919). Plaintiff offers nothing more than conclusory statements: "[b]ecause of Defendant Burns' duress and undue influence, the Plaintiff entered into the Amendment that was patently unfair, unjust and one-sided" (Doc. 40, ¶119); and Defendant Burns offered to agree to reduced criminal charges as part of the Amendment (Id., at ¶114). However, the Amendment provides that Defendant will permit the reduction of the criminal charges (which were handled by the District Attorney), and outlines what corporate steps will occur in the event there is another physical assault (Doc. 43). Plaintiff was under no contractual obligation to negotiate with Defendant over the Amendment. Plaintiff was not employed by CRB at that time, and could have simply walked away. Moreover, once Plaintiff entered into the now-superseded Amendment, he benefitted under the terms of the agreement, because he was re-hired by Defendant CRB, and his fifteen percent

stock ownership was secured (for which he has now been paid).

Finally, no civil claim for compounding a crime, especially one committed by Plaintiff, exists in New York. "Extortion" and attempted extortion are criminal offenses (*see* Penal Law § 155.05[2][e]; § 110.00), not civil, and do not imply a private right of action (*Minnelli v. Soumayah*, 41 A.D.3d 388, 388[2007]).

Fraudulent Transfer (Count Three)

Plaintiff alleged in Count Nineteen of the Complaint: "FRAUDULENT TRANSFER OF SHARES, ASSETS, AND PROFITS OF CRB FOR OWN PERSONAL USE" (Doc. 2, p. 55 and ¶300[f]). In the Order, this Court ruled: "…and, to the extent count nineteen relates to the [Agreement, the motion to dismiss] is also granted without prejudice, to the extent count 19 can be re-plead without reference to the [Agreement] …" (Doc. 37, pp. 1-2).

Plaintiff ignores this ruling, and attempts to reformulate a claim for fraudulent transfer. In so doing, he fails to plead any of the required elements of a fraudulent transfer under the New York Debtor Creditor Law, namely, "(1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by the debtor; and (3) that the transfer was done with actual intent to defraud" (*Nisselson v. Ford Motor Co.*, 340 B.R. 1, 37 [Bankr. E.D.N.Y. 2006] [internal citations omitted]). A party asserting a claim under § 276 must plead the "actual intent" element with particularity, including specific dates and items, in accordance with CPLR 3016(b) (*Carlyle, LLC v. Quik Park 1633 Garage LLC*, 75 N.Y.S.3d 139, 140 [1st Dept 2018]). With respect to the first two elements of DCL §276, Plaintiff has not alleged that there was ever a creditor-debtor relationship between Plaintiff, and either of Defendant Burns or CRB (*83-17 Broadway Corp. v. Debcon Fin. Servs.,*

Inc., 39 A.D.2d 583, 585 [2d Dept 2007] [finding that "the complaint does not state a cause of action to recover damages based on a fraudulent conveyance nor does it state a cause of action to set aside the conveyance of the subject properties to the appellant because the transfer was not made by a debtor of the plaintiff"]).

With respect to the third element of § 276 (actual intent to defraud), Plaintiff fails to allege that Defendants had an actual intent to defraud.

Finally, the purported "fraudulent transfer" claim is also duplicative of Plaintiff's breach of contract and breach of fiduciary duty claims.

Breach of Contract (Count Four)

Any claim for breach of contract is subject to the arbitration clause set forth in the Agreement (*Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 307 [1984]). Count Four is based on an alleged breach of the Agreement, which Plaintiff simultaneously disavows. The elements of a breach of contract cause of action are "'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages'" (*Unger v. Ganci*, 200 A.D.3d 1604 [2021], quoting *Niagara Foods*, 111 A.D.3d at 1376, *lv denied* 22 N.Y.3d 864 [2014]; *Brualdi v. IBERIA*, 79 A.D.3d 959 [2d Dept 2010]). The complaint must allege the specific, material provisions of the contract that were allegedly breached (*see, e.g., Woodhill Elec. v. Jeffrey Beamish, Inc.*, 73 A.D.3d 1421, 1422 [3d Dept 2010]; *Copeland v. Weyerhaeuser Co.*, 124 A.D.2d 998 [4th Dept 1986]; *Kraus v Visa Intl. Serv. Assn.*, 304 A.D.2d 408, 408, [1st Dept 2003] [granting motion to dismiss breach of contract claim where plaintiff failed to allege the breach of any particular contractual provision]). The only provisions of the Agreement alleged to have been breached are those identifying the date and

location of the closing on the shares ("Closing") (Doc. 40, ¶143). Plaintiff does not assert that these are material provisions, as he is required to do. Moreover, these are not material provisions. Plaintiff expressly represented that he would not attend the Closing, and therefore whether it was at CRB's headquarters or CRB's attorneys' offices, is of no consequence (Doc. No. 52). Equally relevant, any delay in the closing date was due to Plaintiff's "… previous refusal to consummate the sale of the Purchased Shares" (Id.), and strict compliance has therefore been waived or excused (*Lamberti v. Angiolillo*, 73 A.D.3d 463 [2010] [however, a party to an option contract may waive its right to insist upon strict compliance with those terms, either expressly or by its conduct]). Plaintiff has asserted no other specific, material provision that has allegedly been breached.

Finally, Plaintiff fails to identify damages associated with any contract breach. He simply reasserts a generic allegation that he is entitled to $5,000,000. It is difficult to ascertain how, or why Plaintiff suffered damages. Plaintiff was paid significant profits and other benefits under the Agreement, and was paid the agreed-upon valuation for the fifteen shares that he was originally gifted.

Breach of Fiduciary Duty (Count Five)

A claim for breach fiduciary duty requires a party to allege: (1) the existence of a fiduciary duty, (2) breach of that duty by the defendant, and (3) damages (*Broeker v. Conklin property LLC, 189 A.D.3d 751, 754 [2d Dept 2020* ["a fiduciary relationship exists when one party is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship"]).

Assuming the truth of Plaintiff's allegations, the breach of fiduciary claim must be

dismissed, because it is (1) derivative in nature and (2) subsumed by the breach of contract claim, as the Agreement governs the internal affairs of the Corporation. Plaintiff's allegations all relate to purported harm to the company (*see Sajust, LLC v. Mendelow*, 198 A.D.3d 582 [1st Dept 2021] [dismissal warranted where plaintiff lacked standing to assert breach of fiduciary duty claims because "such claims are derivative [not direct], even if the diminution in value derives from a breach of fiduciary duty"]). Because Plaintiff was not a shareholder of CRB at the time this action was commenced (and, in any event, has not pled with particularity the reasons for not making a demand on the board to bring this action [BCL § 626(c)]), he lacks standing to bring such claims on behalf of CRB.

Conversion (Count Six)

To state a claim for conversion, a plaintiff must plead: (1) Plaintiff's possessory right or interest in the property; and (2) Defendant's dominion over the property or interference with it, in derogation of plaintiff's rights (*Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43 [2006]). Moreover, the complaint must specify an identifiable piece of property or specifically identifiable funds that the defendants allegedly converted (*Lee Dodge*, 148 A.D.3d at 1008).

Plaintiff alleges that Defendant Burns deprived him of "assets, profits and shares" of CRB, and that Defendant Burns converted CRB's assets, profits and shares for his own personal use, without corporate purpose and without approval or authority of Plaintiff (Doc. 40 ¶¶159-161). Plaintiff fails to identify any assets, funds, or shares with particularity, which he is required to do (*Lee Dodge*, 148 A.D.3d at 1009 [granting dismissal where conversion count does not specify any identifiable piece of property or specifically identifiable funds]). Moreover, if Plaintiff is referring to the fifteen shares he previously owned in CRB, which were re-purchased

by CRB for the value agreed upon by the parties in the Agreement, Plaintiff has failed to state a claim for conversion, because he fails to allege that he had a possessory interest in the fifteen shares (*Morrow v. MetLife Invs. Ins. Co.*, 177 A.D.3d 1288, 1289, 113 N.Y.S.3d 421 [2019] [no conversion where no allegations defendant assumed or exercised control over personal property belonging to plaintiff]). Defendant CRB exercised its bargained-for option to purchase these shares, and paid Plaintiff full value for them, in accordance with the Agreement. Finally, Plaintiff repeats *verbatim* the same list of "wrongdoing" that he asserted for virtually all of his claims (Doc. 40, ¶173). These allegations do not support, or state a claim for conversion.

Unjust Enrichment (Count Seven)

In order to recover under this theory, a plaintiff must show that: (1) the other party was enriched, (2) at plaintiff's expense, and (3) it would be against equity and good conscience to permit the other party to retain what is sought to be recovered (*Cruz v. McAneney*, 31 AD3d 54, 59 [2d Dept 2006]).

Here, Plaintiff's allegations are simply a re-hash of the fraud and breach of contract claims peppered throughout the Amended Complaint. For example, Plaintiff alleges that Defendants "diverted assets," "was "injured," and that Defendant was "unjustly enriched by diverting assets and profits of CRB … to the detriment of Plaintiff" (Doc. 40, ¶¶172, 173). Plaintiff then repeats the exact same litany of wrongdoing for most of the remaining causes of action (Id., at ¶173), and concludes with allegations of missed deadlines that are set forth in the Agreement (Id., at ¶¶174-176). Significantly, there is no allegation that Plaintiff conferred any benefit upon Defendants without adequate compensation (Id., at ¶170-173).

More importantly, there is a written agreement that governs the parties' relationship,

which prohibits a separate unjust enrichment claim (*Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 [2012] ["unjust enrichment is not a catchall …"]).

Fraud (Count Eight)

In the Order, the Court held: "…to the extent count nineteen [of the Complaint] relates to the [Agreement, the motion to dismiss] is also granted without prejudice, to the extent count [nineteen] can be re-pled without reference to the [Agreement] …" (Doc. No. 37, pp. 1-2). Plaintiff ignores this ruling and asserts a *verbatim* (and repetitive) claim for fraud, asserting "[d]efendant Burns has made representations to fraudulently induced [sic] Plaintiff to enter into the ... Agreement, terminated Plaintiff from employment while on Paid Family Leave, and used the ... Agreement to steal Plaintiff's Fifteen (15) shares in CRB" (Doc. 40, ¶182).

Even if Count Eight were permissible, it is time-barred and improperly pled. Plaintiff's allegations relating to activities surrounding the signing of the Agreement are barred by CPLR §213(8) (e.g., "Defendant Burns has made misrepresentations to fraudulently induced [sic] Plaintiff to enter into the [Agreement]…", and ["…made representations that he would be compensated a specific salary and provided dividends"]) (Doc. 40, ¶¶ 182, 183). "The elements of a cause of action for fraud require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Dreamco Dev. Corp. v. Empire State Dev. Corp.*, 191 A.D.3d 1444 [4th Dept 2021]). Furthermore, "a fraud claim requires the plaintiff to have relied upon a misrepresentation by a defendant to his or her detriment" (*Id.*). These allegations must be alleged in detail or be dismissed (*Mandarin Trading*, 16 N.Y.3d at 178; *see also* CPLR 3016 [b]; *Garelick v. Carmel*, 141 A.D.2d 501, 502 [2d Dept 1988]; *Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 A.D.3d 1007 [2d Dept 2017]).

Plaintiff alleges that Defendants "engaged in activities detrimental to the welfare and business of Plaintiff," ... "disrupted the business of CRB for [Defendant Burns'] own benefit", and "used his complete control to conceal a litany of acts from Plaintiff and made fraudulent misrepresentations regarding same" (Doc. 40, ¶184). The alleged "acts" include "acting in his own best interest," "funnel[ing] money for personal gain," "[increasing] [Defendant's] salary," "buying vehicles and property," "exercising control over Plaintiff's shares," "not closing a deal with a possible buyer," and "not compensating Plaintiff for concession sales" (Id., at ¶184[[a]-[l]). Plaintiff fails to allege any **post-2014** specific "misrepresentations," that any were "material" (Id., at ¶¶180-187), or that the offending statements (to the extent any are alleged), were made for the purpose of being communicated to Plaintiff in order to induce his reliance thereon, or that the misrepresentations were relayed to Plaintiff, who then relied upon them to his detriment (*Robles v. Patel*, 165 A.D.3d 858, 860 [2d Dept 2018]). Aside from a conclusory statement that "…there was justifiable reliance by Plaintiff due to the relationship of the parties and Defendant Burns' complete control over the corporation and the lawyers that drafted the agreements," it is unclear as to which "misrepresentations" were justifiably relied upon, and for what purpose (Doc. 40, ¶181). Finally, Plaintiff has failed to properly allege damages, aside from the conclusory $5,000,000, or connect them to a misrepresentation (*Dreamco*, 191 A.D.3d at 1444).

Employment Discrimination (Count Nine)

To state a claim for employment discrimination, Plaintiff must allege membership in a protected class, that he was discharged from a position for which he was qualified, and that the discharge occurred under circumstances giving rise to an inference of unlawful discrimination

(*Krause v. Lancer & Loader Grp.*, LLC, 40 Misc. 3d 385, 393 [Sup Ct 2013], citing *Mittl*, 100 N.Y.2d 326 [dismissing claim, in part]).

Plaintiff alleges that he was discriminated against - not because of his own disability - but because he exercised rights under the Paid Family Medical Leave Act to care for his son (Defendant Burns' grandson) (Id., at ¶¶190-196). Plaintiff asserts that Defendant Burns is punishing him as "an extension of his estrangement" from Plaintiff's minor son, and a "dislike" for Plaintiff because he took time off to care for his son (Id., at ¶199). The New York State Human Rights Law ("NYSHRL") does not contemplate such vague, bootstrap arguments, and Plaintiff has failed to allege a single fact that would give rise to an inference of unlawful discrimination.

Plaintiff also failed to allege that he was qualified for the position. Rather, he alleges that he had an unblemished personnel/employment record (Id., at ¶196). This allegation is contradicted by documents that **he** attached to the Amended Complaint. Important here, Plaintiff assaulted Defendant Burns, and Plaintiff's previous dismissal and subsequent re-hiring formed the bases for the 2010 Amendment to Buy-Sell Agreement, and a basis for the Agreement. As Plaintiff's conduct began to disrupt the workplace, and after he was unable to fulfill responsibilities relating to the financial work required for Defendant CRB, his employment was terminated. Plaintiff fails to offer any allegations that would demonstrate the elements necessary to establish a claim under NYSHRL.

Accounting (Count Ten)

In order to substantiate this claim, a member or shareholder must show that a pre-suit demand for an accounting was made and refused (*New York Studios, Inc. v. Steiner Digital*

Studios, 151 A.D.3d 454, 455 [1st Dept 2017]); that a fiduciary relationship existed; "a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (*Jacobs v Cartalemi*, 156 A.D.3d 605, 608 2d [Dept 2017]); and, "[t]o be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law" (*Unitel Telecard Distribution Corp. v. Nunez*, 90 A.D. 3d 568 [1st Dept 2011]). Notably, when the alleged wrong necessitating the accounting causes harm to the company as opposed to the individual shareholder (i.e., for misallocation of the company's assets), the accounting claim is derivative (*Cartalemi*, 156 AD3d at 608).

The purported wrong necessitating an accounting namely, "diverting funds and assets of CRB" (Doc. 40 ¶205), is clearly derivative in nature.

In addition, Plaintiff has failed to plead facts demonstrating that he has no adequate remedy at law.

Finally, Plaintiff alleges (and Defendants aver), that he always had access to CRB's books and records, and that one of his duties as an employee of CRB was to make financial entries (Doc. No. 40 ¶ 15). The process was thorough and transparent (*Id*. at ¶ 36), and Plaintiff was provided the opportunity to hire an independent accountant; he declined (*Id.* at ¶ 37).

Attorneys' Fees (Count Eleven)

"An attorney's fee is merely an incident of litigation and is not recoverable absent a specific contractual provision or statutory authority" (*Gorman v. Fowkes*, 97 A.D.3d 726, 727 [2012]). The Agreement did not provide for an award of an attorney's fees, and Plaintiff does not rely on any statutory provision in seeking such an award (Doc. No. 40 ¶¶ 209-11). As such,

Plaintiff has failed to demonstrate the existence of "any lawful basis upon which such fees would be recoverable" (*Dune Deck Owners Corp. v. Liggett*, 85 A.D.3d 1093, 1096 [2011]).

Accordingly, it is hereby

ORDERED, that the Motion to Dismiss is granted, without sanctions.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by the Court shall not constitute notice of entry.

Dated: April 4, 2023
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice