To be Argued by:
MATTHEW J. BIRD, ESQ.
Time Requested: 10 Minutes

NEW YORK SUPREME COURT, COUNTY OF NIAGARA
INDEX NO.: E177079/2022

New York Supreme Court
Appellate Division - Fourth Department

JASON BURNS,
Individually and Derivatively on Behalf of
C.R.B. HOLDINGS, INC.

Plaintiffs/Appellants

DOCKET NO.: CA 23-00750

v.

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

Defendants/Respondents

BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

QUESTIONS PRESENTED

Question 1 - Was the Lower Court correct in finding that Appellant lacked standing to bring a derivative action?

Answer to Question 1 - No. Appellant has standing because he was a shareholder at the time of the transaction of which he complains and was a shareholder at the time of commencing this action. Any demand on the board to act would have been futile and should have been excused.

Question 2 - Was the Lower Court correct in dismissing all of Appellant's Causes of Action?

Answer to Question 2 - No. Under the appropriate pleading standards, Appellant set forth timely causes of action and the documentary evidence did not warrant dismissal.

NATURE OF THE ACTION

This is an appeal by Plaintiff-Appellant, Jason Burns ("Appellant") from the part of the Decision and Order of the Honorable Timothy J. Walker, Acting Supreme Court Justice ("Lower Court"), dated April 4, 2023 and filed and entered in the office of the Niagara County Clerk on April 6, 2023, that granted Defendants-Appellants' Motion to dismiss the Amended Complaint. (Record 38-53).

This case involves a father fraudulently concealing and stealing corporate profits and shares from his son, and ultimately taking the position that the shares were transferred to him by Appellant at a sham closing on or around June 25, 2021. The closing never actually occurred, and as a result, Appellant is still a shareholder of Respondent CRB.

Respondent Burns has deprived his son of corporate profits and dividends, and has engaged in illegal, fraudulent and oppressive actions toward Appellant, and has caused and continues to cause Respondent CRB's property and assets to be wasted and diverted for his personal and non-corporate purposes.

Aside from his egregious self-dealing, Defendant Burns fraudulently induced Appellant to enter into an agreement, terminated Appellant from employment while on Paid Family Leave, and then used the fraudulent and invalid agreements to illegally convert Appellant's Fifteen (15) shares in Respondent CRB without just compensation. (Record 54-173).

FACTS RELEVANT TO THE QUESTIONS PRESENTED

Background of CRB

Respondent CRB is a New York domestic business corporation organized under Section 402 of the Business Corporation law, and is engaged in the business of owning and operating Tim Hortons franchises in or around Niagara County. Respondent Burns is the Chief Executive Officer of Respondent CRB, and has exhibited complete control over the corporation. (Record 57).

The Appellant was one of the original employees and intimately involved in the opening of the first franchise location at Niagara Falls Boulevard and Military Road in Niagara Falls. Respondent CRB was initially equally owned by Respondent Burns and Cathy Burns, husband and wife, and then Respondent Burns alone after he bought out the interest of his wife when they were divorced in 2006. In November of 2007, Appellant became a minority owner with 15% of common stock, Respondent CRB is an S- corporation for tax purposes and is authorized to issue 200 shares of common stock without par value, 100 of which are presently issued and outstanding. Respondent Burns owns 85 shares and Appellant owns 15 shares. (Record 57).

CRB's Buy-Sell Agreement

On November 14, 2007, there was a Buy-Sell Agreement entered into by and among the parties ("Buy-Sell Agreement"). The Buy-Sell Agreement addresses, among other things, the sales price, restriction on transfer of shares, voluntary transfer of shares and amendments. (Record 58, 107-117).

Under the Buy-Sell Agreement, Appellant was afforded certain rights prohibiting Respondent Burns from taking his shares. Notably, the Buy-Sell Agreement does not provide for the involuntary transfer of shares in the event of assault (and other criminal acts) or termination of employment. Article IV, Section 4.02 addresses involuntary transfers, and while it provides numerous circumstances that could result in an involuntary transfer, termination of employment is not listed. (Record 57, 107-117).

January 28, 2010 Amendment to the Buy-Sell Agreement

On October 14, 2009, there was a physical altercation between Appellant and Respondent Burns that was initiated by Respondent Burns. Despite starting the altercation, Respondent Burns filed a Domestic Incident Report. (Record 61, 121-123).

On January 28, 2010, Respondent Burns presented Appellant with an Amendment to the Buy-Sell Agreement, and fraudulently represented to him that its purpose was to reduce criminal charges, if signed by Appellant ("Amendment to the

Buy-Sell Agreement"). In reality, Respondent Burns made a material misrepresentation to Appellant, to make it easier to take his shares. (Record 61, 121-123).

Appellant was not provided an opportunity to consult counsel prior to being presented with the Amendment to the Buy-Sell Agreement. Without the opportunity to contact or benefit of independent counsel, he signed the Amendment to the Buy-Sell Agreement and Respondent Burns agreed to reduce criminal charges, which resulted in an Adjournment in Contemplation of Dismissal. Appellant had to essentially stay out of trouble for six months, which he did, and the charges were dismissed. (Record 61).

The Amendment to the Buy-Sell Agreement was the result of a material misrepresentation made by Respondent Burns. Appellant justifiably relied on this material misrepresentation because it was made by his father, who demonstrated complete control over Respondent CRB. In reality, the Amendment to the Buy-Sell Agreement substantially diminished Appellant's rights and standing within the corporation, making it easier for Respondent Burns to take ownership of Appellant's shares, without compensation. For example, the Amendment to Buy-Sell Agreement provided that Respondent Burns could (based on a self-serving affidavit) take ownership of Appellant's shares, without compensation if he should "assault, strike, harass, menace, intimidate or threaten" Respondent Burns. There was no

correspondence clause benefiting the Appellant. Specifically, the Amendment to the Buy-Sell Agreement provides that:

> FIRST: A new additional Article at the end of Article IV is hereby added:
>
> I. In consideration of Robert W. Burns, permitting reduction of the criminal charges initiated by him, as complaining witness against Jason R. Burns in the Wheatfield Town Court (P.L. 240.26-1) on October 14, 2009. Jason R. Burns agrees that anytime in the future should he assault, strike, harass, menace, intimidate or threaten Robert W. Burns as evidenced and attested to by Robert W. Burns' Affidavit of such occurrence giving the time, date and place of such an act shall be deemed sufficient to automatically actuate the following:
>
> (A) Article III of said Agreement as to the rights of Jason R. Burns will be cancelled and annulled, and
>
> (B) Jason R. Burns agrees to forfeit his stock and convey any and all shares of such stock he owns in CRB Holdings, Inc., or to Robert W. Burns as he may choose, without payment or remuneration of any kind.
>
> (C) To resign in writing any office or position he may hold in the corporation including Director or Officer as the case may be.
>
> (D) Cancel and annul any other rights he may have under any other Article of said Buy Sell Agreement.
>
> (E) Release and discharge Robert W. Burns and the corporation from any alleged claims, liability or cause of action he may have against Robert W. Burns or the Corporation.
>
> (F) Agrees to turn over all corporate documents in his possession or any articles of personal property belonging to the corporation.
>
> (G) Nothing herein contained shall be deemed to limit Robert W. Burns from bringing any action against Jason R. Burns in connection with his employment or officer of the Corporation, in law oar(sic)

> equity because of any acts of Jason r.(sic) Burns including the acts enumerated above causing his forfeiture.
>
> (Record 61-63, 121-123)

Not only could Respondent Burns take ownership of Appellant's shares, without compensation, the Amendment to Buy-Sell Agreement required Appellant to release and discharge Respondent Burns from any claims and causes of action. To the contrary, Respondent Burns retained all rights to bring claims and causes of action against Appellant. (Record 63, 121-123).

A plain reading of the Amendment to the Buy-Sell Agreement makes it clear that it is unconscionable by its very terms, and the facts and circumstances of how the agreement was caused to be executed by Appellant demonstrates that it is not legally enforceable. Appellant was not given an opportunity to consult an attorney regarding the contents of the Amendment to the Buy-Sell Agreement, and justifiably relied on the material misrepresentations of his father, Respondent Burns, in executing the Agreement. The Amendment to the Buy-Sell Agreement is unconscionable because it is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of Appellant, and its terms are unreasonably favorable to Respondent Burns. Instead, Respondent Burns used the Amendment to the Buy-Sell Agreement to compound a crime, extort Appellant, and make it easier for him to obtain his shares without compensation. (Record 63, 121-123).

Shareholders Agreement

When Appellant did not "assault, strike, harass, menace, intimidate or threaten" Respondent Burns, Respondent Burns had to conjure up another scheme to take Appellant's shares in the corporation. While the above-mentioned provisions were again added to the Shareholders Agreement (See Section 4.1), Respondent Burns added a Section allowing him to obtain the shares owned by Appellant, based on termination of employment, which Respondent Burns controlled. The Shareholders Agreement was entered into on October 1, 2014, by and among the parties ("Shareholders Agreement"). The Shareholders Agreement was drafted at the direction of Respondent Burns by his attorney Christopher Greene, Esq. of Barclay Damon LLP. (Record 64, 126-137)

Section 2.1 and 2.1 of the Shareholders Agreement demonstrates the unconscionability of the Agreement with respect to the transfer of shares which are grossly favorable to Respondent Burns. Specifically:

> 2.1 Restrictions on Transfer by Jason. Jason hereby expressly covenants and agrees that he will not Transfer any of his Shares except in accordance with the provisions of this Agreement. Any purported Transfer by Jason of his Shares in violation of the terms of this Agreement shall be void and of no force or effect whatsoever. Compliance with the provisions of this Agreement is a condition precedent to the Transfer by Jason of any of his Shares and to the recording of such Transfer upon the books of the Corporation. The restrictions on Transfer herein set forth shall not apply to Robert.
>
> 2.2 Permitted Transfer. Notwithstanding the foregoing or any other provision of this Agreement to the contrary, Jason may Transfer any or

all of his Shares to Robert. Any Transfer of Shares by Jason to Robert pursuant to this Section 2.2 shall not be subject to any of the restrictions set forth in this Agreement.

(Record 64-65, 126-137).

Section 3.4 of the Shareholders Agreement provides for the optional purchase of shares upon termination of employment of Appellant, if certain deadlines were met:

3.4 Optional Purchase of Shares Upon Termination of Employment of Jason. In the event that Jason shall cease to be an employee of the Corporation for any reason, the Corporation shall have the option to purchase from Jason any or all of the Shares which Jason owned at the time of his termination as an employee of the Corporation, for the purchase price and upon the other terms specified in Section 3.5 below. The right of the Corporation to purchase all or any portion of the Shares then owned by Jason shall be exercisable by giving written notice to Jason within thirty (30) days following the effective date of the termination of his employment. In the event that the Corporation shall exercise such option, the Corporation shall be required to purchase, and Jason shall be required to sell, such Shares owned by Jason. The consummation of any purchase of Jason's Shares by the Corporation shall take place on a date not more than sixty (60) days following the effective date of termination of the employment of Jason.

(Record 65, 126-137)

Section 3.5 provides for the purchase price at closing as follows:

3.5 Purchase Price: Closing.

(a)Purchase Price

(i) The purchase price of any Shares purchased pursuant to Sections 3.1, 3.2, 3.3 and 3.4 above shall be the Purchase Price.

(ii) The Corporation shall pay the Purchase Price in cash or by wire transfer of immediately available funds. Notwithstanding the foregoing, the Corporation shall have the option, in its sole discretion, to pay a maximum of seventy-five percent (75%) of the Purchase Price by promissory note, which promissory note shall be upon the following terms: (A) seven (7) equal annual installments of principal and interest, the first such installment to be paid not more than sixty (60) days from the date of closing; (B) interest to accrue at a per annum rate equal to the Wall Street Journal Prime Rate as reported on the date of the closing or, if not reported on such date, on the prior date nearest thereto; and (C) no prepayment penalty.

(b) Closing The closing of any sale and purchase of Shares pursuant to Sections 3.1, 3.2, 3.3 and 3.4 above shall take place at the then principal office of the Corporation.

(Record 65-66, 126-137).

Section 6.21 provides for separate counsel to review the terms of the Shareholders Agreement as follows:

6.21 Separate Counsel. Each party to this Agreement acknowledges and agrees that such party has been provided the opportunity and encouraged to consult with counsel of such party's own choosing with respect to this Agreement and that no party other than the Corporation has engaged Damon Morey LLP to represent his interest. Each party has negotiated, reviewed and entered into this Agreement of their own free will and by the exercise of their own independent judgement after having the opportunity to be represented by legal counsel of their own choice and selection.

(Record 66, 126-137).

As aforementioned, certain deadlines and procedures had to be followed in order for the transfer to be complete. If the deadlines and procedures were not complied with, Appellant would continue to have possession of his shares, and

continue to be entitled to profits and disbursements of the corporation, in addition to other rights.

As is set forth in further detail herein, Appellant was wrongfully terminated from Respondent CRB in November of 2020, just over six years after the execution of the agreement. Respondent Burns contends that the Shareholders Agreement governs, among other things, the ownership of Appellant's Fifteen (15) shares in CRB. Yet none of the formalities or deadlines were followed. (Record 66, 126-137).

The Shareholder's Agreement is null and void and forms no basis for anything concerning the ownership, sale, surrender or vanquishment of Appellant's shares in Respondent CRB. A plain reading of the Shareholder's Agreement makes it clear that it is unconscionable by its very terms, and the facts and circumstances of how it was caused to be executed demonstrates that it is not legally enforceable. (Record 67, 126-137).

Respondent Burns demanded that Appellant meet him at the office of Barclay Damon LLP to sign the agreement, which they drafted at the direction of Respondent Burns. Appellant was not "provided the opportunity and encouraged to consult with counsel of such party's own choosing." Rather, the Shareholders Agreement was presented to him for signature, which was the first time he had viewed the document. (Record 67, 126-137).

Appellant was not told by his father what he was signing or that he would be "provided the opportunity and encouraged to consult with counsel of such party's own choosing." Rather, he was told that he had to go meet with new attorneys and "sign some papers." There was no specific mention of what the document was prior to it being placed in front of him for signature. Appellant was told by Respondent Burns that it was the same document that was previously signed and that it had to be redone because the corporation switched law firms. This was a material misrepresentation by Respondent Burns which was justifiably relied on by Appellant based on their relationship and Respondent Burns' complete control over the corporation. (Record 67, 126-137).

The Shareholders Agreement is unconscionable because it is so grossly unreasonable as to be unenforceable because of an absence of meaningful choice on the part of Appellant, and its terms are unreasonably favorable to Respondent Burns. In addition, the Shareholder's Agreement is of dubious legal validity on unconscionability grounds, did not involve a meeting of the minds and was not supported by consideration. (Record 67, 126-137).

Letter of Intent From Kelton Enterprises, LLC

In late 2019 and into early 2020, Respondent Burns notified Appellant that he was considering retiring and selling CRB. Respondent Burns notified Appellant that he would have the first option to purchase his shares.

On January 3, 2020, Respondent CRB received a Letter of Intent from Kelton Enterprises, LLC who is a franchisee of various Tim Hortons restaurants in the Western New York area. The Letter of Intent states that, "You will sell substantially all of the assets comprising the Restaurants and ensure the proper assignment of the Leases to the Buyer (the "Acquisition") for a purchase price of no more than Five Million USD ($5,000,000.00) (the "Price"). The final Purchase price will ultimately be determined under the terms of the Valuation Practice Handbook." The Letter of Intent further states that, "The Buyer will pay the Price as follows: $5,000,000.00 at closing, in good and readily available funds by wire transfer…" (Record 68, 138-147).

There was no sound basis for Respondent Burns to reject this offer, especially when he now claims Respondent CRB is valued at $1,500,000. Appellant urged Respondent Burns to move forward with the deal, which was rejected. Notably, the deal was rejected after Respondent Burns had already notified Appellant that he was considering retiring and selling Respondent CRB. It is Appellant's belief that

Respondent Burns did not go through with the purchase and sale because he did not want to compensate him for his 15% ownership of Respondent CRB. (Record 68).

Plaintiff's Letter of Intent

As noted, in late 2019 and into early 2020, Respondent Burns notified Appellant that he was considering retiring and selling Respondent CRB, and notified him that he would have the first option to purchase his shares. Respondent Burns had already, without sound basis, declined to accept a buy-out valued at approximately $5,000,000. (Record 69, 148-151).

Based on prior representations of his father, which turned out to be a misrepresentation relied on by Appellant, on January 8, 2020, Appellant provided Respondent Burns with a Letter of Intent to purchase his 85 shares, which was consistent with the offer of $5,000,000 that was rejected. As is set forth in the Letter of Intent, "The closing on the purchase of your shares will be contingent on our ("Buyer's["]) obtaining a written commitment letter from a bank or other lending institution…" In furtherance of the purchase and sale under the Letter of Intent, on March 1, 2020, Appellant received a term sheet from Bank on Buffalo. Despite his prior representations, Respondent Burns did not go through with the purchase and sale as offered. (Record 69, 148-151).

Lawnmower Accident involving Appellant's son

On June 1, 2018, Appellant's minor son, Gavin Burns, suffered a traumatic lawnmower accident resulting in the eventual amputation of his left foot. Following the accident, Respondent Burns stole the lawnmower from Appellant, which has yet to be recovered. Multiple surgeries were performed beginning in 2018 to address the injury and continued into July/August of 2020. Gavin's post-surgical rehabilitative care is continuing to this day. This includes, but is not limited to: physical therapy, prosthetic/orthotic consultations and treatment, and personal and family counseling to help Gavin. (Record 70).

The Appellant and the rest of the family have had to process the effects of the injury on Gavin's life, required the Appellant to file for Paid Family Leave benefits he needed to care for his family, and also scheduled necessary and protected time off from work. The application for Paid Family Leave benefits was timely submitted on August 20, 2020 with the first scheduled day off being August 24, 2020. The effective dates of the medical authorizations from Gavin's doctor in support of the benefits initially ran from August 12, 2020 through December 12, 2020 and then were extended to August 11, 2021. (Record 70).

At the time that Appellant submitted his Paid Family Leave application he had been an employee of Respondent CRB for nearly 20 years, had become a part owner, and had a completely unblemished personnel/employment record. Despite having an

unblemished personnel/employment record, Respondent Burns terminated his employment on the sole basis that he applied for Paid Family Leave, and while he was on Paid Family Leave. (Record 70-71).

Appellant's Wrongful Termination and Discrimination

On November 7, 2020, Respondent Burns sent Appellant a termination email, terminating his employment effective November 6, 2020. There was no valid basis for this action, and the sole basis was to take his shares in the corporation, without just compensation. Respondent Burns used the unenforceable and unconscionable agreements to ultimately terminate Appellant, and take his shares under terms favorable to him, including to without just compensation. Without the benefit of the Shareholders Agreement, Respondent Burns would not have had the ability to wrongfully take the shares in the event of a termination. Specifically, the email states:

> Jason, as you know we have been going back and forth with our attorneys an (sic) cannot resolve the issues we have between us, there fore (sic) you leave me no choice but to terminate your employment with CRB Holding Inc. As of November 6 TH (sic) 2020 was your last day with the company, you can call me to make arrangements to pick up your personal items that you may have at the office. My lawyer has a letter of termination for you as to which you will be receiving shortly, Robert W. Burns, President of CRB Holding INC.
>
> (Record 71, 154-155).

In a letter dated November 5, 2020, Appellant was terminated by Respondent CRB via letter, effective November 6, 2021. According to the termination letter:

> Termination of Employment
> Your unsatisfactory performance, lack of attention to detail and insubordinate attitude have had a detrimental effect on the Company and have made it impossible for you to continue as an employee in our work environment, and therefore, your employment with the Company is hereby terminated effective as of the end of the day on Friday, November 6, 2020.
>
> Of course, you will be paid all compensation and benefits, including accrued vacation pay, through the date of termination. You will be provided the standard COBRA notice so that your health insurance can continue at your expense. Further, the indebtedness owed to you, as accrued on the books of the Company, will be honored and paid to you.
>
> (Record 71-72, 156-157).

The Appellant's termination occurred during a resurfacing in the summer of 2020 of a different degree of familial discord. In 2020 the familial breakdown was not directly between the parties, but instead arose out of an unfortunate dissolution of the grandparent relationship between Respondent Burns and his grandson, Gavin. The only thing Appellant was in the middle of during this time frame that impacted his employment was his need to take time off to be with his son whom Respondent Burns had substantially excommunicated himself from on his own terms. Appellant's regularly scheduled Paid Family Leave days off on a near-weekly basis, though initially accepted as it should have been (not only as required by law, but also in the moral framework of the family relationship between the parties), eventually

became the "rub" that Respondent Burns decided had to come to an end by early November, 2020. (Record 72).

The November 5, 2020 termination letter contains a section for the repurchase of Appellant's shares, which states as follows:

> Repurchase of Your Shares
> Pursuant to Section 3.4 of the Shareholders Agreement, dated as of October 1, 2014, to which you are a party, the Company hereby exercises its option to purchase all of the Shares of the Company owned by you, for the purchase price and upon the terms specified in Section 3.5 of that Agreement. I have asked the Company's CPA, Mike Dolan, to assist in the calculation of the Purchase Price and have asked the Company's counsel, Chris Greene, to prepare the necessary paperwork to complete the transaction in accordance with the Agreement. They will work with your attorney John DelMonte on this matter.
>
> (Record 73, 156-157).

The November 5, 2020 termination letter contains a section for a conditional severance offer, which states:

> Conditional Severance Offer
> Apart from the above, on behalf of the Company, I offer you an additional lump sum severance payment in the gross amount of $40,000, to be reduced by lawful withholdings, provided that you execute a release of all claims you may have against me, the Company, or an of its shareholders, officers, employees, or representatives. This offer is conditioned upon your written acceptance of this offer not later than November 13, 2020 at Noon. Chris Greene will prepare the release agreement, to include standard terms typically included in a severance arrangement, and will provide it to John DelMonte.
>
> (Record 73, 156-157).

The terms of the Conditional Severance Offer were not accepted by Appellant, who disputes the termination and validity of the Shareholders Agreement. On November 8, 2020, counsel for Appellant sent a letter to counsel for Respondent CRB in response to the November 5, 2020 termination letter, and disputed the termination and validity of the Shareholders Agreement. (Record 73, 158-160).

As was explained by Appellant's counsel, the termination letter alleges certain pre-textual grounds for the termination which Appellant strongly disagrees with, and maintains that there was not (nor is there) any lawful or justifiable grounds for the termination. Rather, it is well documented and factually indisputable that the termination has been wrongfully triggered as a vindictive and illegal retaliatory discharge of Appellant based on his filing of necessary time off under Paid Family Leave. (Record 74, 156-157).

Respondent CRB Informs Appellant That It Has Elected to Purchase His Shares Under the Shareholders Agreement

In a letter dated June 17, 2021 Respondent CRB notified Appellant of: (a) the termination of his employment with Respondent CRB; and (b) Respondent CRB's election to purchase Appellant's shares under the terms of the Shareholders Agreement. (Record 74, 161-167).

In the letter dated June 17, 2021, Respondents contend that the valuation of Appellant's shares and the terms under which they are to be purchased and sold are governed by the Shareholders Agreement. The letter goes on to state that Respondent

CRB's accountant, Tronconi Segarra & Associates LLP, provided Respondent CRB with a valuation of the shares of One Million Five Hundred Thousand Dollars ($1,500,000). According to said valuation, Respondents contend that the value of Appellant's shares is Two Hundred Twenty-Five Thousand Dollars ($225,000). (Record 74, 161-167).

The June 17, 2021 letter further states that, Respondent CRB scheduled a definite closing date of June 25, 2021 at 10:00 am at the offices of Barclay Damon LLP, located at 200 Delaware Avenue, Suite 1200. The June 17, 2021 letter further states that Appellant is required to bring the stock certificate with him representing his shares and that Respondent CRB will provide him with a certified check for Fifty-Six Thousand Two Hundred Fifty Dollars ($56,250) and a Promissory Note for One Hundred Sixty Eight Thousand Seven Hundred Fifty Dollars ($168,750). (Record 74, 161-167).

Appellant's shares in the corporation are his property, and he did not sell or authorize the sale of his shares to anyone. There has been no agreement or acknowledgment of any intention to sell his shares and there has certainly been no acceptance or agreement of a calculation of their current fair market value which might ever support a sale. In an email dated June 18, 2021, Appellant's counsel rejected acceptance of the letter based on the fraudulent, unconscionable, and illegal nature of the termination and the Shareholders Agreement. (Record 75, 168-170).

Notwithstanding, to the extent that the Shareholders Agreement was to have any legal viability and enforceability (which it does not), Section 3.4 states:

> 3.4 Optional Purchase of Shares Upon Termination of Employment of Jason. In the event that Jason shall cease to be an employee of the Corporation for any reason, the Corporation shall have the option to purchase from Jason any or all of the Shares which Jason owned at the time of his termination as an employee of the Corporation, for the purchase price and upon the other terms specified in Section 3.5 below. The right of the Corporation to purchase all or any portion of the Shares then owned by Jason shall be exercisable by giving written notice to Jason within thirty (30) days following the effective date of the termination of his employment. In the event that the Corporation shall exercise such option, the Corporation shall be required to purchase, and Jason shall be required to sell, such Shares owned by Jason. The consummation of any purchase of Jason's Shares by the Corporation shall take place on a date not more than sixty (60) days following the effective date of termination of the employment of Jason.
>
> (Record 75, 126-137).

None of the dates have been invoked or complied with and though Appellant dismisses the Shareholders Agreement as a whole, the dates serve to extinguish any option to purchase Respondents may have ever had even if the Shareholders Agreement were to somehow be considered valid and enforceable. In addition, the location of the closing, as set forth in Mr. Greene's June 17, 2021 letter, in contrary to what the Shareholders Agreement requires, i.e., that the closing take place "at the then principal office of the Corporation." As a result, Appellant remains a shareholder. (Record 75).

None of the above dates or location of the closing were complied with, yet Respondents claim that the purported closing is complete. This is also contrary to the Shareholders Agreement. The Shareholders Agreement states that the shares shall be endorsed with a legend in substantially the following form (Section 6.5):

> THE SHARES REPRESENTED BY THIS CERTIFICATE ARE TRANSFERABLE ONLY UPON COMPLIANCE WITH PROVISIONS OF A CERTAIN SHAREHOLDERS AGREEMENT, DATED OCTOBER 1, 2014, BY AND AMONG ROBERT W. BURNS, JASON R. BURNS AND C.R.B. HOLDINGS INC., A COPY OF WHICH IS ON FILE IN THE PRINCIPAL OFFICES OF C.R.B. HOLDINOS INC. NO SHARES REPRESENTED BY THIS CERTIFICATE MAY BE SOLD, DONATED, ASSIGNED, MORTGAGED, PLEDGED, HYPOTHECATED, ENCUMBERED, BEQUEATHED, 22 GIFTED, OR OTHERWISE TRANSFERRED OR DISPOSED OF IN ANY MANNER UNLESS MADE IN ACCORDANCE WITH THE AFORESAID AGREEMENT.
>
> (Record 76, 126-137).

Purported Closing and Actions Taken by Respondents Following the Purported Closing

On June 25, 2021, Respondent CRB purportedly proceeded with the sale of the purchased shares from Appellant under the terms of the Shareholders Agreement. Respondent CRB purports to have delivered Appellant a certified check for Fifty-Six Thousand Two Hundred Fifty Dollars ($56,250) and a Promissory Note for One Hundred Sixty Eight Thousand Seven Hundred Fifty Dollars ($168,750). (Record 76).

On July 8, 2021, Barclay Damon LLP stated that is has held in escrow a certified check for Fifty-Six Thousand Two Hundred Fifty Dollars ($56,250) and a Promissory Note for One Hundred Sixty Eight Thousand Seven Hundred Fifty Dollars ($168,750). According to the letter, Barclay Damon LLP states that Respondent CRB will continue to make payments under the Promissory Note by mailing checks directly to Appellant at 4641 Creek Road, Lewiston, New York 14092. (Record 76-77, 171-173)

Barclay Damon LLP was not designated, recognized or authorized to serve as the Escrow Agent in any capacity whatsoever, especially on behalf of or for any purpose to receive any monies or transact any other action on behalf of Appellant. Its purported role as Escrow Agent was not and is not with Appellant's consent or authorization, and nothing Barclay Damon LLP does or professes to do in some fiduciary capacity was or is accepted. Barclay Damon LLP cannot be employed to act in any capacity on behalf of any of the parties in light of its prior attorney-client representation of Appellant in the past, including its involvement in the Shareholders Agreement and overseeing its purported execution by Appellant without any opportunity for him to seek and obtain independent legal counsel. (Record 77).

Respondent Burns' Self-Dealing And Use Of Corporate Assets For His Own Personal Use

Since formation, Respondent Burns has exercised complete control of Respondent CRB, which was used to deprive Appellant of corporate profits and dividends, and ultimately his Fifteen (15) shares, without just compensation. Respondent Burns has knowingly engaged in activities which have been detrimental to the welfare and business of Respondent CRB. Respondent Burns' activities have been perpetrated to disrupt the business of Respondent CRB for his own benefit, and he has used his complete control over the corporation to attempt to conceal the below acts from Appellant. The acts include, but are not limited to:

a. acting in his own best interest rather than in the best interest of Respondent CRB and Appellant.

b. beginning in 2017 when Appellant became a minority shareholder and continuing to this day, Respondent Burns used Respondent CRB to funnel money for his own personal gain, by paying himself dividends, and not paying dividends to Appellant for his Fifteen (15%) Percent ownership.

c. in 2016, Respondent Burns increased his salary from approximately $2,000.00 per week to approximately $7,000.00 per week.

d. using Respondent CRB funds to purchase personal items such as vehicles and real property, without compensating Appellant for his Fifteen (15%) Percent ownership.

e. on or around December 21, 2018, he purchased a house in Fort Myers, Florida, for approximately $605,000, with Respondent CRB funds.

f. on or around January 19, 2022, he purchased 4501 Hyde Park Blvd., in Niagara Falls, New York, with Respondent CRB funds.

g. in 2021 he purchased an Escalade with Respondent CRB funds.

h. in 2022 he purchased a pickup truck with Respondent CRB funds.

i. beginning in 2017 when Appellant became a minority shareholder and continuing to this day, Respondent Burns underpaid Appellant, while indicating on Appellant's W-2 that he earned approximately $150,000.00 per year. Appellant never received the full amount that was indicated on his W-2.

j. fraudulently inducing Appellant to enter into a Shareholders Agreement and Amendment to Buy-Sell Agreement, terminating Appellant from employment while on Paid Family Leave, and then using the Shareholders Agreement to buy-back Appellant's Fifteen (15) shares in Respondent CRB.

k. not closing a deal with Kelton Enterprises, LLC (pursuant to a January 3, 2020 Letter of Intent) to sell the assets of Respondent CRB for a purchase price believed to be approximately $5,000,000, when Respondents now claim Respondent CRB is valued at $1,500,000.

l. not compensating Appellant for approximately $18,000 for funds received from Artpark for concession sales from 2008-2020.

(Record 77-79).

Since becoming 15% owner of the corporation, Appellant was never adequately compensated for business income and dividends. The business income that it says Appellant was paid on his tax returns was not actually paid to him. In addition, he was not provided dividends consistent with those of Respondent Burns, who used corporate assets to make purchases for his own personal use.

Counsel for the parties have engaged in prior negotiations regarding a fair market value of the shares, which would be applied based on a future consensual separation of Appellant's ownership of the corporation. In doing so, counsel for Appellant has requested a full set of accounting documents and materials relied on by the accountants to prepare the balance sheets sent with counsel for Respondents' December 7, 2020 letter. Despite demands for a formal accounting of the corporation's books and records, the corporation has failed to fully respond and comply with Appellant's demands for a formal accounting. (Record 79).

MOTION TO DISMISS STANDARD OF REVIEW

"The inquiry on a motion to dismiss pursuant to CPLR 3211 (subd. [a], par. 7) is whether a cause of action has been stated, not whether a cause of action can be proved. Accordingly, all of the allegations in the complaint must be assumed to be true and the pleadings as a whole are deemed to allege whatever cause of action may be implied from its statement by fair and reasonable intendment." *De Pan v. First Nat. Bank of Glens Falls,* 98 A.D.2d 885, 885, 470 N.Y.S.2d 869, 870–71 (1983). "Motions to dismiss should not be granted unless it is very clear that there can be no relief under any of the facts alleged in the pleadings." *Terry v. Orleans County*, 72 AD2d 925, 926 (4th Dept. 1979).

CPLR § 3211 (a) (1) allows a party to move for judgment dismissing one or more causes of action asserted against him on the grounds that "a defense is founded

upon documentary evidence." The CPLR does not define "documentary evidence", however, to succeed on a motion to dismiss pursuant to CPLR § 3211(a)(1), the documentary evidence submitted must conclusively establish a defense to the asserted claims as a matter of law. If the defendant seeks dismissal of the Amended Complaint based upon documentary evidence, then, as noted, dismissal under CPLR § 3211(a)(1) is warranted only when the documentary evidence "utterly refutes plaintiff's factual allegations" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002)), and "conclusively establishes a defense to the asserted claims as a matter of law." *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270-71 (1st Dept. 2004) (internal quotation marks omitted). In other words, the documents relied upon must "definitely dispose of plaintiff's claim." *Blonder & Co. v. Citibank, N.A.*, 28 A.D.3d 180, 182 (1st Dept. 2006).

For the reasons set forth below, it is respectfully submitted that the Lower Court did not apply the foregoing standard in granting Respondents' Motion to dismiss in its entirety.

ARGUMENT

POINT 1

APPELLANT HAD STANDING TO BRING A DERIVATIVE ACTION

The Lower Court held that "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." With respect to damages, the Lower Court held, "Plaintiff's allegations and damages relate only to personal grievances, and not those of the corporation." (Record 41-42).

"An action commenced by a shareholder alleging the misappropriation or waste of corporate assets is a shareholder derivative action provided for by section 626 of the Business Corporation Law." *Lincoln First Bank, N.A. v Sanford*, 173 AD2d 65, 67 (4th Dept. 1991). Under Business Corporation Law Section 626(b), "it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law." Similarly, under Business Corporation Law Section 626(c), "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort." However, "a futile demand need not be made…The basic question is whether from the particular

circumstances of the liability charged it may be inferred that the making of such a demand would indeed be futile. Thus, it is well established that a demand will be excused where the alleged wrongdoers control or comprise a majority of the directors." *Barr v Wackman*, 36 NY2d 371, 379 (Court of Appeals, 1975).

Contrary to the Lower Court's ruling, Appellant has standing to bring and maintain a derivative action. Appellant maintains that he is currently a shareholder and was a shareholder at the time the action was commenced. Any transfer or sale of his shares was not authorized and is invalid. With respect to history surrounding the purported closing, purported purchase of Appellant's shares and Appellant's current status as a shareholder, reference is made to paragraphs 80, 82, 83, 87, 88, 90, and 91 of the Amended Complaint. (Record 74-77).

Notwithstanding, and to the extent that the Shareholders Agreement was to have any legal viability and enforceability (which it does not), Respondents did not follow the proper procedure to close the sale of the shares, and they cannot now claim that Appellant is no longer a shareholder, and shouldn't have the right of a Shareholder. With respect to proper procedure under the Shareholders Agreement, Section 3.4 provides the requirements, none of which were followed. (Record 65-66).

In addition, the derivative claims are properly asserted, because any demand on the board would have been futile. The Amended Complaint details the reasons

why any demand would be futile, because the alleged wrongdoer, Respondent Burns, is the majority shareholder of the corporation, and has exhibited complete control over the corporation in all respects. It would be futile to demand Respondent Burns to investigate and take action for his own misdeeds. Irrespective of the above, prior counsel for Appellant has made numerous good faith efforts to hold Respondent Burns accountable. But again, those demands did not materialize into any action, given that the allegations were against the only other shareholder. However, the Amended Complaint details the efforts made in paragraphs 76, 81, 83, 93, 96, and 97. (Record 73-79).

POINT II

APPELLANT ASSERTED VALID AND TIMELY CAUSES OF ACTION THAT WERE NOT DISPUTED BY THE DOCUMENTARY EVIDENCE

A. Appellant stated a Cause of action for Declaratory Judgment declaring the closing date for the shares null and void (First cause of action)

The Lower Court held that "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.'" With respect to damages, the Lower Court held "Plaintiff contends that he has suffered $5,000,000 in damages, indicating the relief

he is seeking is monetary, not declaratory." Notably, in dismissing Count One, the Lower Court held that "These allegations, if true, would support a claim for breach of contract, and do not warrant declaratory relief." (Record 42-44).

Under CPRL 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. "A declaratory judgment action requires an actual controversy between genuine disputants with a stake in the outcome. *Carousel Ctr. Co., LP v Kaufmann's Carousel, Inc*., 191 AD3d 1481, 1482 (4th Dept. 2021). In addition, "no general period of limitation is specifically prescribed therein for a declaratory judgment action... In order to determine therefore whether there is in fact a limitation prescribed by law for a particular declaratory judgment action it is necessary to examine the substance of that action to identify the relationship out of which the claim arises and the relief sought." *Solnick v Whalen,* 49 NY2d 224, 229 (Court of Appeals, 1980).

The Amended Complaint alleges Respondent Burns contends that the Shareholders Agreement governs, among other things, the ownership of Appellant's Fifteen (15) shares in CRB, and that the transfer and sale is complete. Appellant disputes Respondents' claim that the sale is complete, as none of the applicable dates were complied with by Respondents. Based on the foregoing, there exists an actual

and justiciable controversy between the parties with respect to the validity of the Shareholders Agreement, and the purported transfer and sale of the shares. (Record 79-82).

This cause of action shouldn't have been dismissed as duplicative of the breach of contract cause of action or because monetary relief is being requested. A cause of action was properly stated, irrespective of damages that may flow from Appellant's ownership of shares. While the Lower Court stated that the allegations would support a claim for breach of contract, it also dismissed the breach of contract claim. The Lower Court's role was to determine whether a cause of action was stated, and nothing further. The allegations, when accepted as true, present a controversy as to who presently owns the shares. Regardless of whether damages are claimed, Appellant seeks a declaration with respect to his ownership of the shares, which was properly stated.

B. Appellant stated a claim for rescission of the 2010 Amendment to Buy-Sell Agreement and it is not time-barred, and was not previously dismissed (Second cause of action)

The Lower Court held that "This claim is time-barred, and has already been dismissed with prejudice." With respect to fraud, the Lower Court further held that "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." The Lower Court further held that, even if timely, "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." With respect to duress and undue influence, the Lower Court held "Plaintiff was under no contractual obligation to negotiate with Defendant over the Amendment." (Record 42-44).

Appellant has stated a cause of action for recission of the 2010 Buy-Sell Agreement. Reference is made to paragraphs 112, 113, 114, 119, 124, and 128 of the Amended Complaint. (Record 83-86).

In any event, “a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action.” *Simcuski v Saeli*, 44 NY2d 442, 448-449 (Court of Appeals, 1978). “The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense.” *Zumpano v Quinn*, 6 NY3d 666, 673 (Court of Appeals, 2006). The Court of Appeals went on to state that, “equitable estoppel will apply "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. Moreover, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations.” Id. at 666, 674.; (quoting, *Simcuski v Saeli*, 44 N.Y.2d 442, 448-449, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978)).

The claim is also not time-barred and properly set forth. Appellant's causes of action are all timely under the applicable statute of limitations, as the operative date for all causes of action is the purported fraudulent transfer of shares, on or around June 25, 2021. Each and every agreement Appellant seeks to rescind allowed Respondents to take the fraudulent action on or around June 25, 2021. Up to that point, there was no question that Appellant was a lawful Shareholder of the corporation. Thus, all causes of action are timely because they were commenced within the appropriate statute of limitations from when Respondents' wrongful acts were discovered.

C. Appellant stated a cause of action for Fraudulent Transfer of Shares, Assets, and Profits of Respondent CRB for own personal use (Third cause of action) and Fraud (Eighth cause of action).

With respect to the Third cause of action, The Lower Court held that Plaintiff "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.'" The Lower Court further held that "the purported 'fraudulent transfer' claim is also duplicative of Plaintiff's breach of contract and breach of fiduciary duty claims." (Record 44-45).

With respect to the Eighth cause of action, the Lower Court held that this claim was previously dismissed when it held that "…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] …" The Lower Court held that "Plaintiff ignores this ruling and asserts a verbatim (and repetitive) claim for fraud..." The Lower Court further held that "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)." With respect to damages, the Lower Court held "Plaintiff has failed to properly allege damages, aside from the conclusory $5,000,000, or connect them to a misrepresentation." (Record 33-34).

"To properly plead a cause of action to recover damages for fraud, a plaintiff must allege that: (1) the defendant made a representation or a material omission of fact which was false and which the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury." *Selechnik v. Law Office of Howard R. Birnbach*, 82 A.D.3d 1077, 1078, 920 N.Y.S.2d 128, 130 (2011).

While CPLR § 3016 (b) requires that the circumstances constituting the wrong shall be stated in detail, "'[t]his provision requires only that the misconduct

complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud'" *Selechnik Id*; (see, *Pike v. New York Life Ins. Co*., 72 A.D.3d 1043, 1050, 901 N.Y.S.2d 76, quoting *Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 373 N.E.2d 278). In addition, "at this early stage of the litigation, [Plaintiff is] entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendants," and "[Plaintiff needs] only set forth sufficient information to apprise defendants of the alleged wrongs" *Selechnik Id*.; (see, *DDJ Mgt., LLC v. Rhone Group LLC*., 78 A.D.3d 442, 443, 911 N.Y.S.2d 7).

"[T]he heightened pleading requirements of CPLR 3016 (b) may be met when the material facts alleged in the complaint, in light of the surrounding circumstances, are sufficient to permit a reasonable inference of the alleged conduct including the adverse party's knowledge of, or participation in, the fraudulent scheme." *High Tides, LLC v DeMichele*, 88 AD3d 954, 957 (2d Dept 2011); (involving causes of action for fraudulent inducement, fraudulent concealment, and fraudulent misrepresentation). "[F]raudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act." *Mar. Midland Bank v Murkoff* 120 AD2d

122, 128 (2d Dept. 1986). To that end, the standard of pleading fraud is clear, i.e., Plaintiff has to permit a reasonable inference of the alleged conduct, and advise the Defendants of the incidents complained of. (See, *Lytell v Lorusso*, 74 AD3d 905, 908 (2d Dept 2010); *Pludeman v Northern Leasing Sys., Inc*., 10 NY3d 486, 492, 890 NE2d 184, 860 NYS2d 422 (2008); *Union State Bank v Weiss*, 65 AD3d 584, 585, 884 NYS2d 136 (2009); and CPLR 3016 (b)).

With respect to fraudulent transfer of shares, courts "will consider 'badges of fraud which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent'". *Pen Pak Corp. v LaSalle Nati. Bank*, 240 AD2d 384, 386 (2d Dept. 1997); (quoting, *MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co*., 910 F Supp 913, 935).

Appellant has remedied any pleading deficiencies in the Amended Complaint. Reference is made to paragraphs 181-184 of the Amended Complaint. The foregoing states a cause of action for fraud against Respondent Burns. Appellant has provided the basis of his fraud claim and specific facts that support his claim. At this stage of the litigation, Appellant has satisfied the pleading standard with allegations that are timely. (Record 86-87, 98-101).

D. Appellant stated a cause of action for Breach of Contract (Fourth cause of action)

The Lower Court held that "Any claim for breach of contract is subject to the arbitration clause set forth in the Agreement." The Lower Court further held that "The only provisions of the Agreement alleged to have been breached are those identifying the date and location of the closing on the shares []. Plaintiff does not assert that these are material provisions, as he is required to do. Moreover, these are not material provisions." With respect to damages, the Lower Court held "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."

"The essential elements of a cause of action to recover damages for breach of contract [are] the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract and resulting damages." *JP Morgan Chase v. J.H. Elec. of New York, Inc.,* 69 A.D.3d 802, 803, 893 N.Y.S.2d 237, 239 (2010).

Appellant states a cause of action for breach of contract, and identified specific provisions that were breached, which are material provisions. (Record 64-66, 75-76). Respectfully, the Lower Court erred in holding that these were not material provisions. They were in fact material provisions, when the entirety of the

agreement deal with the process by which shares could be transferred. Reference is made to Record p. 127, which addresses the purpose of the agreement. The formalities could not have been ignored, and because they were, Respondent Burns is in breach of the contract.

Appellant also stated a breach of contract with respect to the actions of Respondent Burns using corporate assets for his own personal benefit. Reference is made to the Record p. 77-79, which detail the specific allegations. By engaging in this conduct, Respondent Burns has breached the contract. It is a direct breach of Article I, which details the formula for determining thew value of the shares. By using profits for his own personal gain, he is devaluing the shares, and is in breach of the agreement.

The breach of contract claim is also not subject to mandatory arbitration. The agreement provides for injunctive and equitable relief (Record 63, 131).

E. Appellant stated a cause of action for Breach of Fiduciary Duty (Fifth cause of action)

The Lower Court held that this claim "is (1) derivative in nature and (2) subsumed by the breach of contract claim, as the Agreement governs the internal affairs of the Corporation."

“In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that

were directly caused by the defendant's misconduct." *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590, 835 N.Y.S.2d 644, 646 (2007).

Appellant states a cause of action for breach of fiduciary duty, by alleging a fiduciary relationship, Respondent Burns' misconduct, and damages directly caused by the misconduct. Reference is made to paragraphs 150-154 of the Amended Complaint. (Record 90-92).

Respectfully, the Lower Court incorrectly found that this cause of action was derivative in nature. It is a breach to the rights of the individual shareholder as well as to the corporation. As is set forth in Argument Point I, Appellant has standing to bring a derivative action and also protect his individual rights.

F. Plaintiff stated a cause of action for Conversion (Sixth cause of action)

The Lower Court held that "Plaintiff fails to identify any assets, funds, or shares with particularity, which he is required to do." (Record 47-48).

"[I]n order to establish a cause of action for conversion two things must be shown: first, the plaintiff must demonstrate legal ownership or an immediate superior right of possession to a specific identifiable thing (i.e., specific money); and, second, it must be shown that the defendant exercised unauthorized dominion over the thing in question, to the exclusion of the plaintiff's rights." *AMF, Inc. v Algo Distribs., Ltd.*, 48 AD2d 352, 356-357 (2d Dept. 1975).

In *Lemle v Lemle*, 92 AD3d 494, 497 (1st Dept. 2012), the Court held that, "the conversion claim is sufficiently stated by, inter alia, allegations that plaintiff's siblings (1) falsified loan documents so as to eliminate millions of dollars in principal and interest they owed to the corporation; (2) used corporate funds to pay for personal vacation, shopping and other non-business-related expenses; and (3) used corporate funds to pay excessive compensation and benefits to themselves and other individuals who did little or no work for the corporation. Likewise, these allegations of self-dealing are sufficient to state a cause of action that plaintiff's siblings breached their fiduciary duties to the corporation."

Appellant states a cause of action for conversion. Specifically, the Amended Complaint alleges Respondents' actions and the specific property Appellant was deprived of in paragraphs 159-165 of the Amended Complaint. (Record 92-95).

G. Appellant stated a cause of action for Unjust Enrichment (Seventh cause of action)

The Lower Court held that "Plaintiff's allegations are simply a re-hash of the fraud and breach of contract claims peppered throughout the Amended Complaint." The Lower Court further held that "there is a written agreement that governs the parties' relationship, which prohibits a separate unjust enrichment claim." (Record 48-49).

The elements of a cause of action to recover for unjust enrichment are "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity

and good conscience to permit the defendant to retain what is sought to be recovered." *GFRE, Inc. v. U.S. Bank, N.A.*, 130 A.D.3d 569, 570, 13 N.Y.S.3d 452, 454 (N.Y. App. Div. 2015); (quoting *Mobarak v. Mowad*, 117 A.D.3d 998, 1001, 986 N.Y.S.2d 539, 542 (2014)).

Appellant has stated a cause of action or unjust enrichment. Specifically, the Amended Complaint alleges in paragraphs 170-176, the facts demonstrating that Respondent Burns was unjustly enriched at Appellant's expense. (Record 95-98).

H. Appellant stated a cause of action for Employment Discrimination (Ninth cause of action)

The Lower Court held that "The New York State Human Rights Law [] 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." The Lower Court further held that "Plaintiff also failed to allege that he was qualified for the position. Rather, he alleges that he had an unblemished personnel/employment record []. This allegation is contradicted by documents that he attached to the Amended Complaint." (Record 50-51).

Under Executive Law § 296(1), "It shall be an unlawful discriminatory practice:(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or status as a victim of domestic violence, to refuse to hire or employ

or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Appellant states a cause of action for employment discrimination, for all the reasons set forth in paragraphs 189-199 of the Amended Complaint. (Record 101-103).

I. Appellant stated a cause of action for Accounting (Tenth cause of action)

The Lower Court held that this claim is derivative in nature, Plaintiff did not plead facts demonstrating that he has no adequate remedy at law, and "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 []. The process was thorough and transparent [], and Plaintiff was provided the opportunity to hire an independent accountant; he declined []." (Record 52-53).

An accounting procedure is an appropriate remedy to establish improper use of corporate assets. (See, *Gazda v Kolinski*, 91 AD2d 860, 860 (4th Dept 1982)). The grounds for the appointment of a temporary receiver are that "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." *500 W. 172nd St. Realty, Inc. v Romax Props. Corp.*, 126 Misc 2d 268, 271 (Sup Ct, NY County 1984)).

Appellant has stated causes of action for an accounting and appointment of receiver, for the reasons set forth in paragraphs 204-206 of the Amended Complaint. (Record 103-104).

J. Appellant stated a cause of action for Attorney's Fees (Eleventh cause of action)

The Lower Court held that "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." (Record 52-53).

"The rule in New York remains that attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule. Although Business Corporation Law § 626 (e) provides that a successful plaintiff in a shareholders' derivative action may recoup legal expenses and attorneys' fees from the proceeds of a judgment, compromise or settlement in favor of the corporation, it does not authorize the imposition of such expenses on the losing party. The basis for an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf. Those costs should be paid by the corporation, which has benefited from the plaintiff's efforts and which would have borne the costs had it sued in its own right." *Glenn v Hoteltron*

Sys., Inc., 74 NY2d 386, 393 (Court of Appeals, 1989)); (Internal quotes and case cites omitted).

The Amended Complaint states a cause of action for attorney's fees, which is asserted with respect to each cause of action. Appellant has adequately alleged a basis for fees to be awarded under Business Corporation Law, which is in addition to the request for attorney's fees with each claim.

CONCLUSION

For all of the reasons set forth herein, it is respectfully requested that this Court reverse the Decision and Order of the Lower Court.

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Niagara Falls, New York

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