To be Argued by:
CHARELS. J. ENGLERT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

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

Plaintiffs-Appellants,

– against –

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

Defendants-Respondents.

Docket No.: CA 23-00750

BRIEF FOR DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Appellees C.R.B. Holdings Inc. ("CRB Holdings" or "CRB") and Robert Burns ("Robert Burns") (collectively, "Appellees") submit this Response to Appellant Jason Burns' Plaintiff-Appellant's Brief ("Brief"). Appellant, just as he tried in the action below, is asking this Court to unwind every agreement between the parties until the Court reaches one from 2007 – fifteen years and two contracts ago – so that he can take advantage of a provision that Appellant regards as more favorable to him: a mutual restriction on the sale or transfer of stock. Appellant will not accept the fact that Appellee CRB properly exercised its right to purchase Appellant Jason Burns' fifteen shares of stock in CRB. To accomplish his goal of unwinding the agreements, Appellant initially asserted a veritable hodgepodge of theories, some of which are not even recognized under New York law, and all of which are time-barred and/or defectively pleaded. (Record on Appeal ("Record"), p. 191). All thirty-three claims were dismissed on multiple, independent grounds. Appellant was granted leave to re-file some claims. All of those claims were dismissed by the court below. On appeal, Appellant not only clings to most of his theories, but also he re-asserts an unfounded and meritless "bootstrap" theory in an effort to avoid the applicable statutes of limitation. Dismissal was proper. The Judgment should be affirmed in its entirety.

PROCEDURAL BACKGROUND

On March 25, 2022, Appellant filed more than thirty-three overlapping, rambling, and largely time-barred claims against CRB and Robert Burns. (Record, p. 191) For thirty of those claims, Appellant sought a generic $5,000,000 in compensatory damages and $10,000,000 in punitive damages. (Record, pp. 263-269) Appellant sought the appointment of a receiver, an accounting, and attorneys' fees for the remaining three claims. (Record, pp. 268-269)

The Hon. Timothy J. Walker, J.S.C., dismissed all of those meritless claims, some with prejudice, on September 28, 2022 ("September 28, 2022 Order"). (Record, p. 285). Appellant was given the opportunity to re-file some of those claims, so long as those amended causes of action could be re-plead without reference to the parties' 2014 Shareholders Agreement or include the time-barred claims associated with the 2010 Amendment to the Buy-Sell Agreement signed by the parties. (Record, pp. 286, 287)

Appellant filed an Amended Complaint on November 18, 2022 (Record, p. 54) Judge Walker, after full oral argument and briefing, dismissed all of those claims by order dated April 4, 2023, and entered April 7, 2023 ("April 4, 2023 Order"). (Record, p. 6.) Judge Walker specifically noted in his April 4, 2023 Order that "[w]hile 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."). (Record, p. 6)

Appellant moved for reconsideration and re-argument. These motions were denied. This appeal followed. (Record, p. 3) As Judge Walker determined, none of Appellant's claims should survive a motion to dismiss because they are all time-barred, non-existent, and/or otherwise improperly pleaded. Multiple, independent grounds exist for dismissal for each cause of action.

FACTUAL BACKGROUND

Appellee CRB Holdings owns and operates multiple Tim Horton's franchises in Niagara County. (Record, p. 277) Appellee Robert Burns is the majority owner and Chief Executive Officer of CRB Holdings. *Id*.

Appellant Jason Burns ("Jason Burns") is Robert Burns' son. *Id*. Jason Burns began working for Appellant CRB in December 2000, when he was eighteen years old. *Id*. At that time, Appellee CRB Holdings was owned by Appellee Robert Burns and his ex-wife equally. *Id*. Eventually, as the business grew and family circumstances changed, Robert Burns bought out his ex-wife's interest in CRB Holdings and, in 2007, gifted a 15% ownership interest in CRB Holdings to his son, Jason Burns. *Id*.

The agreement was memorialized in a buy-sell agreement dated November 14, 2007 ("2007 Buy-Sell Agreement"). *Id*.

In October 2009, Jason Burns physically assaulted Robert Burns. *Id*. An Order of Protection was entered against Jason Burns by a Niagara County Court judge, and Appellant's employment with CRB Holdings was terminated. *Id*. Robert Burns subsequently forgave Jason Burns and in early 2010, offered to have him return to work at CRB Holdings. *Id*. To that end, Jason and Robert Burns executed an amendment to the 2007 Buy-Sell Agreement dated January 28, 2010 ("2010 Amendment to the Buy-Sell Agreement.") *Id*. The 2007 Buy-Sell Agreement was expressly superseded by the 2010 Amendment to the Buy-Sell Agreement. Eventually, in 2014, the 2010 Amendment to the Buy-Sell Agreement was expressly superseded by a subsequent Shareholders Agreement dated October 1, 2014 (the "2014 Shareholders Agreement"). (Record, p. 277)

The 2010 Amendment to the Buy-Sell Agreement contained the following provision regarding a restriction on the transfer of shares: "To insure compliance with the restrictions on transfers of Shares in the THD Agreements, to provide for continuity of the Corporation's management, and to create a market for the Shares upon the occurrence of certain events, the Shareholders have agreed to the restrictions on transfer of Shares and the creation of options and obligations for the purchase and sale of Shares as provided in this Agreement." (Record, p. 108)

The superseded 2007 Buy-Sell Agreement is the only agreement that had a mutual restriction on the transfer or sale of stock; both the superseded 2010 Amendment to the Buy-Sell Agreement and the operative 2014 Shareholders Agreement permit—as mutually bargained for provisions— CRB and/or Robert Burns to unilaterally transfer or sell shares under certain conditions, which is precisely what occurred here. (Record, compare pp. 109 [2007 Buy-Sell Agreement] with 122-123 [2010 Amendment to the Buy-Sell Agreement] and 128-129 [2014 Shareholders Agreement])

The 2014 Shareholder Agreement

In 2014, CRB Holdings hired counsel to handle the preparation and execution of the 2014 Shareholders Agreement. (Record, p. 277) The 2014 Shareholders Agreement governs all aspects of stock ownership in CRB Holdings including, under certain circumstances, CRB Holdings' option to purchase back the 15 shares of stock previously gifted to Jason Burns. *Id.* It expressly supersedes the 2007 Agreement and the 2010 Amendment to the Buy-Sell Agreement. (Record, p. 134)

Specifically, pursuant to Article III, Section 4, CRB Holdings has the option to purchase Jason Burns' shares of stock in the event his employment with CRB Holdings is terminated. See Exhibit A, Art. III, §4. *Id.*

There is a specific formula set forth in the 2014 Shareholders Agreement to value the shares and calculate the purchase price for the shares. *Id.*

The 2014 Shareholders Agreement expressly states that all parties are entitled to retain independent counsel. (Record, p. 278)

The parties have conducted business pursuant to the terms of the 2014 Shareholders Agreement for the eight years prior to the litigation. *Id*. Appellant Jason Burns has enjoyed numerous benefits under the 2014 Shareholders Agreement during this time, including but not limited to: an annual salary, health insurance, payment for his truck, and distributions totaling approximately $700,000. *Id*.

Appellant Jason Burns even made an offer to purchase Robert Burns' shares in January 2020 pursuant to the terms of the 2014 Shareholders Agreement. *Id*. A copy of this offer is attached to the Amended Complaint and other documents and shows that Appellant Jason Burns offered to purchase Robert Burns' share at a price based on the "book value" of the shares as provide for in Section 1.1(b) of the 2014 Shareholders Agreement. (Record, pp. 148-151) That offer was declined. (Record, p. 278)

Jason Burns' Paid Family Leave

In June 2018, Jason Burns' son and Robert Burns' grandson, Gavin Burns, suffered a partial foot amputation when his leg was caught under a riding lawn

mower being operated by Jason. *Id*. This traumatic event resulted in Jason taking time off work throughout 2018, 2019, 2020, and 2021. *Id*. During this difficult time, Robert Burns financially and emotionally supported his son, grandson and their family. *Id.*

In late-August 2020, Jason applied for and was approved to take intermittent Paid Family Leave ("PFL") in connection with amputation revision surgery for Gavin. *Id.* Appellant Jason Burns took PFL during the weeks of August 24, 2020; September 1, 2020; September 8, 2020; September 14, 2020; September 21, 2020; September 28, 2020; October 5, 2020; October 12, 2020; October 19, 2020; and November 2, 2020. Robert Burns never objected to the leave or said anything negative about those absences. *Id*.

Jason's Termination and Buy-Back of Shares

Throughout 2020, problems developed between Jason and various employees at CRB Holdings' main office, including a new employee hired to handle some of the financial matters that Jason Burns could no longer adequately handle. *Id*.

Jason Burns refused to train office workers in various tasks, mocked employees in CRB's main office, refused to appropriately communicate about his work, disappeared for extended periods of time, and otherwise created a tense, disruptive, and hostile work environment for CRB Holdings' employees. Jason

Burns refused time off and counseling and became increasingly more disruptive. *Id*. After weeks of deliberation and discussions, CRB came to the incredibly difficult decision to terminate Jason's employment. *Id*.

In addition, CRB exercised its contractual right to purchase Jason Burns' fifteen shares pursuant to terms of the 2014 Shareholders Agreement. As provided for in the 2014 Shareholders Agreement, CRB.'s accounting firm, Tronconi Segarra & Associates LLP ("TSA"), prepared a valuation of the Corporation and calculated the purchase price for Jason Burns' shares. TSA's valuation for the Corporation was One Million, Five Hundred Thousand Dollars ($1,500,000), and accordingly, Appellant Jason Burn's fifteen shares were valued at Two Hundred Twenty-Five Thousand Dollars ($225,000). (Record, p. 278) Throughout this process, Jason Burns was represented by attorney John DelMonte. (Record, p. 279)

Jason Burns always had access to CRB's books and records, and in fact, as he alleges, was quite familiar with them given that one of his duties as an employee of CRB was to make financial entries. (Record, pp. 57-58, 279) In addition, during the negotiation period when TSA was conducting its valuation of the company and of Jason Burns' shares, Jason and his attorneys' were given access to CRB's financials, including CRB's balance sheet, CRB's historical tax basis schedule, distribution entries, and schedules showing all distributions made

to Robert Burns dating back to 2009 and distributions made to Jason Burns since 2010. (Record, p. 279).

To be absolutely clear, the process by which the accounting firm TSA calculated the purchase price was very transparent, and the accountants were made available to Jason Burns and his attorney to answer any questions he may have had as it related to the valuation of his shares. *Id.*

Jason was even provided the opportunity to hire another independent accountant to perform a valuation to obtain a second opinion on the value of the shares. *Id*. Jason never did this. *Id.*

On January 28, 2021, Jason, together with his attorney John DelMonte, participated in a videoconference with CRB's accountant, TSA, as well as CRB's counsel, Christopher Greene, to discuss the valuation of Jason's shares and to answer any questions that Jason still had in relation to the valuation of the Corporation or the calculation of the purchase price for Jason's shares. CRB again provided Jason the opportunity to inspect its books and records. *Id*.

During the period between November 6, 2020 (the date Jason's employment was terminated) and June 25, 2021 (the formal closing date of CRB's purchase of Jason Burns' shares), there were extensive, ongoing negotiations between CRB's counsel, Christopher Greene, and Jason's counsel, John DelMonte, concerning the terms of Jason's separation and the purchase price of Jason's shares. *Id*. The parties

continued to negotiate in good faith to arrive at a resolution that was acceptable to both Robert Burns and to Jason Burns, but unfortunately they could not settle the matter and Jason Burns refused to consummate the sale of his shares. *Id.*

Jason and his attorney were acutely aware of CRB's election of its option to purchase Jason Burns' shares, but repeatedly refused to participate in a closing. *Id.* Jason Burns continued to demand a much higher price than the valuation calculated by accountants at TSA pursuant to the Shareholder Agreement. *Id.*

Accordingly, on June 17, 2021, CRB's counsel, Christopher Greene, sent a letter to Jason's counsel advising that the formal closing would occur on June 25, 2021 at Barclay Damon LLP. The formal closing took place on June 25, 2021 and CRB placed the purchased the price into escrow, where it remains today. *Id.*

Appellant Jason Burns' Unsuccessful Employment Discrimination Claim

In 2021, Jason filed a claim with the New York State Workers' Compensation Board, Discrimination Unit. A hearing was held before Administrative Law Judge Melissa Richburg on January 4, 2022, and the administrative law Judge ruled against Jason Burns on January 10, 2022, dismissing all of his claims. (Record, p., 183)

The Administrative Review Division of the Worker's Compensation Board affirmed the dismissal on December 7, 2022. (Record, p. 183)

STANDARD FOR 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 Dep't 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 Dep't 1999), affd 94 N.Y.2d 659 (2000).

On appeal the standard is no different. The court, reading all allegations in the complaint as true, must determine if the allegations state a cognizable legal theory. *Grunder v. Recckio*, 138 A.D.2d 923 (4th Dep't 1988). When the documentary evidence presented proves that the asserted allegations have no merit,

dismissal is warranted. *See Capital Tel. Co. v. Motorola Communications & Elec.*, 208 A.D. 1150 (3rd Dep't 1994) (where the verified interrogatories of a defendant amplified the allegations in its affirmative defense, sufficient proof was tendered to survive a motion to dismiss that affirmative defense).

POINT I: APPELLANT BURNS IS NOT A SHAREHOLDER AND THEREFORE LACKS STANDING TO ASSERT DERIVATIVE CLAIMS ON BEHALF OF THE CORPORATION.

A shareholder's derivative action is a lawsuit "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). As the New York Court of Appeals explained:

> The remedy sought [in a derivative action] is for wrong done to the corporation; the primary cause of action belongs to the corporation; recovery must enure to the benefit of the corporation. The stockholder brings the action, in behalf of others similarly situated, to vindicate the corporate rights and a judgment on the merits is a binding adjudication of these rights.

Isaac v. Marcus, 258 N.Y. 257, 264 (1932) (citations omitted).

A derivative 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 Dep't 1992) ("Business Corporation Law § 626 (b) mandates that shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought and at the time of the transaction(s) of which they complain.").

The Lower Court specifically held that Appellant was not a shareholder on March 25, 2022, the date upon which he commenced this action. (Record, p. 40) Judge Walker notes that Appellant's own allegations aver that Appellee CRB exercised its option to purchase Appellant's fifteen shares upon the termination of his employment pursuant to Section 3.4 of the 2014 Shareholders Agreement on November 6, 2020. (Record, p. 40) Moreover, the Lower Court affirmed, the sale of Appellant's shares closed on June 25, 2021 ("Closing") (Record, p. 40) By his own allegations, Appellant lacked standing to bring a shareholder's derivative suit when he filed his initial Complaint and Amended Complaint, and he lacks standing now. Dismissal of all derivative claims, including breach of fiduciary duty, conversion, and accounting, is required on this ground alone. *Auerbach*, 47 N.Y.2d at 631; *Isaac*, 258 N.Y. at 264 ("recovery must enure to the benefit of the corporation"); BCL § 626(b); *Pessin*, 181 A.D.2d at 70.

Appellant's response to this holding is that "Appellant maintains that he is currently a shareholder" since he disagrees with the share buy-back. (Brief, p. 29) This amounts to wishful thinking and no more. He cites *Lincoln First Bank, N.A. v. Sanford*, 173 A.D.2d 65, 67 (4th Dep't 1991) to support his argument. *Lincoln* does not support Appellant's position. There, unlike here, an actual shareholder challenged an action by the corporation. *Lincoln*, 173 A.D.2d at 67. Appellant has cited no case where a former shareholder, or even a shareholder contesting the valid purchase of his shares, mounted a shareholder's derivative lawsuit. Moreover, *Lincoln* reaffirms the principle that, in a shareholder derivative action, the *corporation* is entitled to the award of damages, not the individual shareholder. *Id*. Appellant seeks five million dollars in compensation for supposed wrongs done to *him*. (Record, pp. 52, 53) The gravamen of this case is a personal grievance, and not one belonging to the corporation.

Judge Walker held that dismissal of all derivative claims was also independently justified by Appellant's failure to make a pre-litigation demand upon the board to prosecute the lawsuit. The Lower Court noted, "[e]ven 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"])." (Record, pp. 40-41)

As the Lower Court noted, 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. *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"). None of those exceptions apply here, nor has Appellant specifically 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).

Faced with dismissal, Appellant now contends that his failure should be excused because "Respondent Burns, is the majority shareholder of the corporation, and has exhibited complete control over the corporation in all respects." (Brief, p. 30) Appellant cites *Barr v. Wackman*, 36 N.Y.2d 371, 379, 329 N.E.2d 180 (1975), to support his contention. *Barr* does not stand for such a

generalized standard. There, the court held that "… justification for failure to give directors notice prior to the institution of a derivative action is not automatically to be found in bare allegations which merely set forth prima facie personal liability of directors without spelling out some detail, [but] such justification may be found when the claim of liability is based on formal action of the board in which the individual directors were participants…[i]t is not sufficient, however, merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers. This pleading tactic would only beg the question of actual futility and ignore the particularity requirement of the statute." *Barr,* 36 N.Y.2d at 379, 329 N.E.2d 180.

Appellant alleges no formal action, and nothing more than conclusory allegations of actions appropriately taken by a majority shareholder. Appellant's excuses fail to meet the exceptional circumstances for failing to make a pre-suit demand that are authorized by New York law. *See Marx*, 88 N.Y.2d at 200–01. Appellant's derivative claims—i.e., all claims that arise out of purported wrongs to Appellee CRB—were properly dismissed. The Judgment should be affirmed.

POINT II: PLAINTIFF FAILED TO PROPERLY ALLEGE OR STATE A SINGLE CLAIM IN HIS DISMISSED COMPLAINT AND DISMISSAL WAS THEREFORE PROPER.

A. The Trial Court Properly Dismissed the First Cause of Action for Declaratory Judgment.

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 Sup. Ct. 2015). "The declaratory judgment form of action may not be used for what is essentially a traditional form of action merely because, incidentally, the question of construction of certain contract clauses is involved… [i]t should be entertained only when the circumstances render it useful and necessary, where it will serve some practical purpose in quieting and stabilizing an uncertain or disputed jural relation." *Seaboard Sur. Co. v. Massachusetts Bonding & Ins. Co*., 42 Misc. 2d 435, 436–37, 248 N.Y.S.2d 302, 304 (Sup. Ct. 1964).

Dismissal is particularly appropriate where a party seeks monetary damages or when a party fails to allege valid future damages. In *Seaboard,* in dismissing the contract action in a "contrived" form of a declaratory judgment, the court specifically relied upon the fact that the plaintiff sought damages as part of its claim. *Seaboard*, 42 Misc. 2d at 437, 248 N.Y.S.2d at 302, 304; *cf City of*

Rochester v. Vanderlinde Elec. Corp., 56 A.D.2d 185, 188, 392 N.Y.S.2d 167, 170 (4th Dep't. 1977) (permitting declaratory judgment, but noting the impact of delay and the distinction between that case and *Seaboard* where "plaintiffs' action does not seek money damages but seeks only an assessment of its rights under the contract"). Moreover, the lack of a valid future damages claim renders the declaratory judgment claim dismissible as duplicative since it is "unnecessary and inappropriate" when a party has an adequate, alternative remedy in another form of action. *Apple Records, Inc. v. Capitol Records, Inc*., 137 A.D.2d 50, 54, 529 N.Y.S.2d 279 (1st Dep't. 1988); *NMC Residual Ownership L.L.C. v. U.S. Bank N.A*., 153 A.D.3d 284, 291, 60 N.Y.S.3d 110 (1st Dep't. 2017).

The Lower Court correctly dismissed Appellant's First Cause of Action for Declaratory Judgment Declaring the Closing of the Shares Null and Void. The Lower Court noted that Appellant alleges that the notice and other time periods set out in Sections 3.4 and 3.5 of the 2014 Shareholders Agreement were violated, which is the same basis for the Appellant's breach of contract claim. (Record, pp. 41-42) Moreover, the Lower Court found, Appellant alleges a sum certain, which indicates that the relief he seeks is monetary, not declaratory, and which also belies his claim for declaratory relief. (Record, p. 41) Appellant seeks $5,000,000 in compensatory damages and $10,000,000 for punitive damages for the declaratory

judgment claim. (Record, p. 105) These requests also confirm that Appellant's claim is not for valid future harms, but rather a past alleged harm.

On appeal, Appellant contends that: "[a] cause of action was properly stated, irrespective of damages that may flow from Appellant's ownership of shares." (Brief, p. 32) Appellant cites no authority for this proposition. Appellant nowhere addresses the authority to the contrary. *Seaboard*, 42 Misc. 2d at 437, 248 N.Y.S.2d at 302, 304. Appellant also argues that the Lower Court cannot find that a breach of contract action would be sufficient, and then dismiss the breach of contract action. (Brief, p. 32) Again, Appellant cites no authority for this proposition.

Count One was properly dismissed. The Judgment should be affirmed.

B. The Trial Court Properly Dismissed the Second Cause of Action for Rescission of the 2010 Amendment to the Buy-Sell Agreement.

In Count Two, Appellant seeks rescission of an agreement that no longer exists. The 2010 Buy-Sell Amendment was expressly superseded by the parties' valid and enforceable 2014 Shareholders Agreement. (Record, p. 134) The Lower Court appropriately dismissed the claim with prejudice. (Record, pp. 40-41).

The Lower Court held that "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."

(Record, p. 42)

Appellant ignores the Lower Court's determination that his rescission claim was previously dismissed with prejudice. (Record, p. 286), and then offers several arguments as to why this claim can be timely unilaterally reasserted in the Amended Complaint.

To start, Appellant simply asserts that he states a valid claim in paragraphs 113, 114, 119, 124, and 128 of the Amended Complaint. (Record 83-86). All of these allegations, however, relate to activity, representations, facts, or conditions – including the contract "terms" that are "plainly" unconscionable – that were known to Appellant on January 28, 2010. His causes of action, if any, accrued at that time, and are now barred by the applicable six-year statute of limitations for both

rescission and fraud. CPLR 213 [8]. CPLR 213 [8] ("… an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.").

These claims are also untimely from an equitable standpoint. A plaintiff waives its right to seek rescission of the agreement by failing to promptly seek rescission after accepting the benefits of that agreement. *New York Tel. Co. v Jamestown Tel. Corp.*, 282 N.Y. 365, 372, 26 N.E.2d 295 (1940); *R & A Food Servs. v Halmar Equities*, 278 AD2d 398 [2000]; *Capstone Enters. of Port Chester v. County of Westchester*, 262 AD2d 343 (1999). Appellant not only failed to seek rescission back then, or at any time in the subsequent decade, but he also accepted all benefits under the 2010 Amendment to the Buy-Sell Agreement until 2014, when the parties signed the 2014 Shareholders Agreement, the operative agreement between the parties, and failed to tender back those benefits earned under the 2010 Amendment to Buy-Sell Agreement. Appellant's claim for rescission is time-barred, by statute and in equity.

The dismissal should be affirmed on these grounds alone.

Even if the claim was not time-barred or previously dismissed by the Lower Court, rescission claims based on the 2010 Amendment to the Buy-Sell Agreement

simply cannot survive a motion to dismiss. Appellant's claims lack even the most basic elements of claims for fraud or rescission. One such element is that he is lacking an adequate remedy at law, which Appellant wholly fails to allege. *Rudman v Cowles Communications*, 30 NY2d 1, 13 (1972) ("[T]he equitable remedy [of rescission] is to be invoked only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored."). Indeed, Appellant alleges the opposite. He avers for each and every claim that $5,000,000 will make him whole. Appellant also fails to aver that rescission of the superseded 2010 Amendment to the Buy-Sell will somehow put the parties back into the same position they were in before the agreement, a required element. *Id*.

Similarly, Appellant fails to allege a material, fraudulent misrepresentation, or that Appellant justifiably relied upon the misrepresentation to his detriment. These deficiencies are fatal. *See Mandarin Trading*, 16 N.Y.3d at 178; see also CPLR 3016 (b) ("Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail"); *Garelick*, 141 A.D.2d at 502 ("Moreover, in order to plead a valid cause of action sounding in fraud, the complaint must set forth all of the elements of fraud including the making of material representations by the defendant to the plaintiff").

Appellant's contentions that rescission is justified by duress or undue influence are similarly deficient. *See Beutel*, 55 N.Y.2d at 958, 449 N.Y.S.2d 180, 434 N.E.2d 249; *Morad*, 27 A.D.3d at 627–28, 812 N.Y.S.2d at 128. The law in New York is clear that to assert "economic duress" there must have been some sort of obligation on the part of the party to perform. *Salzman v. Holiday Inns, Inc*., 48 A.D.2d 258, 369 N.Y.S.2d 238, *modified* 40 N.Y.2d 919, 389 N.Y.S.2d 576, 358 N.E.3d 268; *see also Bethlehem Steel Corp. v. Solow*, 63 A.D.2d 611, 405 N.Y.S.2d 80, 82 (1978). There is no such averment here.

Next, Appellant advances a novel theory as to why his time-barred rescission claim for the 2010 Amendment to the Buy-Sell Agreement should be revived. He attempts to bootstrap all of Appellees' alleged wrongdoing into a single "operative" date: the closing date of June 25, 2021, which closing was authorized under the 2014 Shareholders Agreement. (Brief, pp. 33-34) In other words, Appellant conflates all of his claims relating to the 2010 Amendment to Buy-Sell Agreement and the 2014 Shareholders Agreement into one amorphous event (the "bootstrap theory") and argues that these claims are timely. Appellant's self-serving bootstrap theory is unsupported by case law.

As a general principle, "any Statute of Limitations begins to run when a cause of action accrues…" *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402, 615 N.E.2d 985, 986 (1993). In New York, a breach of contract cause of action

accrues at the time of the breach. *Id*. It begins to run even though "… the injured party may be ignorant of the existence of the wrong or injury." *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 403, 615 N.E.2d 985, 987 (1993). A fraud claim accrues at the time the alleged misrepresentations occurred and the plaintiff, "acting with reasonable diligence, could have discovered the alleged fraud." *Boardman v. Kennedy*, 105 A.D.3d 1375, 1376, 964 N.Y.S.2d 337, 338 (2013); CPLR 213. Each type of claim must be evaluated independently. Here, the only remotely timely event that underlies Appellant's claims is Appellee CRB's authorized buy-back of Appellant's fifteen shares, which is why Appellant is working so hard to undo the 2014 Agreement with a litany of allegedly wrongful acts that occurred up to twelve years ago.

Finally, Appellant argues that the doctrine of equitable estoppel saves his time-barred claims relating to the 2010 Amendment to the Buy-Sell Agreement. Appellant misapprehends the doctrine of equitable estoppel. That doctrine applies when a party has actively prevented another party from filing a timely action. *See Zumpano v. Quinn*, 6 N.Y.3d 666, 674, 816 N.Y.S.2d 703, 849 N.E.2d 926 (2006) (denying application of the doctrine, and noting "equitable estoppel will apply 'where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action'[citation omitted]"). A plaintiff must establish that "subsequent and specific" actions by defendants somehow kept them from timely

bringing suit. *Id*. It applies "where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." *Kotlyarsky v. New York Post*, 195 Misc.2d 150, 153, 757 N.Y.S.2d 703, 707 (Sup.Ct.2003); *Zumpano v. Quinn*, 6 N.Y.3d 666, 674, 816 N.Y.S.2d 703, 849 N.E.2d 926 (2006) (noting "equitable estoppel will apply only 'where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action'").

Here, there is no such allegation or suggestion. The allegations alone establish that Appellant knew in 2010 the supposed facts that underlie his claim that the 2010 Amendment to the Buy-Sell Agreement was allegedly secured by fraud, economic duress, "unfairness," or any other theory.

Appellant failed to address the Lower Court's main concerns that Count Two was previously dismissed with prejudice, and is otherwise dismissible because it is time-barred and insufficiently plead. Neither Appellant's bootstrap theory, nor his tortuous reading of the doctrine of equitable estoppel, saves Count Two. Dismissal should be affirmed. *See Mandarin Trading*, 16 N.Y.3d at 178.

C. The Trial Court Properly Dismissed the Third Cause of Action for Fraudulent Transfer of Shares, Assets, and Profits of CRB for own personal use and the Eighth Cause of Action for Fraud.

Counts Three and Eight are catch-all reformulations of Appellant's other time-barred and improper fraud and contract claims. Neither of these claims were

pleaded with any particularity or coherence, and both were appropriately dismissed by the Lower Court.

Count Three – Fraudulent Transfer

A claim of fraudulent transfer under the New York Debtor Creditor Law requires allegations that: "(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 Dep't 2018).

The Lower Court dismissed Count Three. It notes first that Appellant was permitted to refile his fraudulent transfer claim *only* to the extent he did not reference the 2014 Shareholder's Agreement. (Record, p. 44) As Judge Walker notes, "Plaintiff ignores this ruling, and attempts to reformulate a claim for fraudulent transfer." *Id*.

Even if Appellant were permitted to re-assert Count Three, the Lower Court notes that it is dismissible for other reasons, particularly to the extent Count Three is based upon fraudulent transfer under the New York Debtor Creditor Law. As the

Lower Court noted, Appellant has failed to allege that there was ever a creditor-debtor relationship between the parties, as he is required to do. *Broadway Corp. v. Debcon Fin. Servs., Inc*., 835 N.Y.S.2d 602, 604 (App. Div. 2d Dep't 2007); DCL § 276. (Record, pp. 44-45) Appellant also failed to plead that Appellees had an actual intent to defraud him, as he is required to do. (Record, p. 44-45) Finally, as the Lower Court held, Count Three is duplicative of Appellant's breach of contract and breach of fiduciary duty claims. (Record, pp. 44-45)

Appellant bases his appeal for Count Three on one argument. He cites a case under the debtor-creditor law that implies that "badges of fraud" allow the court to *infer* fraud, even where it has not been properly pleaded. *Pen Pak Corp. v. LaSalle Nat. Bank of Chicago*, 240 A.D.2d 384, 386, 658 N.Y.S.2d 407 (1997) (Brief, p. 37). *Pen Pak* does not help Appellant. There, unlike here, the plaintiff alleged and demonstrated a debtor-creditor relationship and the parties "concede[d] that the value of the assets purchased was far less than the debt assumed." *Id*. In other words, the plaintiff alleged and the parties conceded the requisite elements of a claim for fraudulent transfer under DCL § 276, and therefore the additional "badges of fraud" were justifiably inferred in light of the detailed pleadings. 240 A.D.2d at 385, 658 N.Y.S.2d at 407. That is not the case here. Appellant fails to even allege a creditor-debtor relationship. The dismissal of Count Three should be affirmed.

Count Eight - Fraud

"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. *Kochan v. Prumbs*, 66 Misc. 3d 1203(A), 120 N.Y.S.3d 578 (N.Y. Sup. Ct. 2019); *Barrett v. Glenda*, 154 AD3d 1275, 1277 [4th Dept] (2017) (must state with particularity facts to support "misrepresentation of a material fact, scienter, justifiable reliance, and injury"); *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]); *Connaughton v. Chipotle Mexican Grill, Inc*., 29 N.Y.3d 137, 142, 75 N.E.3d 1159, 1162–63 (2017).

Critically, a false representation does not, without more, give rise to a right of action, either at law or in equity, in favor of the person to whom it is addressed. To give rise, under any circumstances, to a cause of action, either in law or equity, reliance on the false representation must result in injury. If the fraud causes no loss, then the plaintiff has suffered no damages. *Id*.; *see also* John R. Higgitt, Practice Commentaries, McKinney's Cons. Laws of **1163 ***602 N.Y., CPLR

C3211:22 ["(T)he (CPLR 3211[a] [7]) motion is useful in disposing of actions ... in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action"].

The Lower Court dismissed Count Eight because Appellant refiled it after it had been dismissed with prejudice. The Lower Court notes: "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)." (Record, p. 49). In addition to the dismissal with prejudice, none of these allegations are sufficient, as discussed further below.

> The Lower Court notes other, independent reasons for dismissal:
>
> Even if Count Eight were permissible, it is time-barred and improperly pled. Plaintiff's allegations relating to activities surrounding the signing of the [2014 Shareholders] 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"]) (Record, pp. 49-50).

These alleged inducements related to the *signing* of the 2014 Shareholders Agreement, which puts Appellant's claim well outside the six-year statute of limitations applicable to fraud action.

Count Eight is also improperly pled. The Lower Court held that "[a]side 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." (Record, p. 50)

As the Lower Court held, Appellant fails to identify a single material misrepresentation of fact that constitutes fraud in connection with the 2014 Shareholders Agreement. Appellant points to paragraphs 181 – 184 of the Amended Complaint (Brief, p. 37). While those paragraphs mention "misrepresentations," Appellant never identifies a single misrepresentation, let alone a material one or even the specific details about such a statement. This is required. *Garelick*, 141 A.D.2d at 502; *Lee Dodge*, 148 A.D.3d at 1009, 51 N.Y.S.3d at 533. Appellant fails to allege that a false representation was made with the intent to deceive him. Nowhere does the Appellant use the word "intent" or

"intention" in connection with a fraudulent misrepresentation. Appellant also fails to allege justifiable reliance, nor can he. *Dreamco*, 191 A.D.3d 1444, 142 N.Y.S.3d at 690–91. This Court would have to accept that Appellant, a business person with longtime experience in the franchise business, could not read the 2014 Shareholder's Agreement, could not understand the terms of the 2014 Shareholder's Agreement, or could not secure counsel (but somehow was able to make sophisticated bid to buy Appellee CRB in January 2020). (Record, pp. 57, 58, 69, 81)

Furthermore, Appellant fails to allege that he "relied upon a misrepresentation by a defendant to his or her detriment," which is fatal to his claim. *Dreamco*, 191 A.D.3d at 1444, 142 N.Y.S.3d at 690–91.

With respect to the other allegedly fraudulent "activities" in paragraph 184, it is hard to discern what constitutes a misrepresentation, or when they occurred because Appellant omits any particulars, including times, dates, and the like, all of which are required for proper pleading. *Mandarin*, 16 N.Y.3d at 178; *see also* CPLR 3016 (b). These remaining allegations, to the extent they are understandable, reference activity that would only be relevant if there was a duty under the 2014 Shareholder Agreement and all the other elements of fraud were met.

Appellant's response is to ask this Court to ignore the statute of limitations, the pleading defects, and the fact that this claim was dismissed with prejudice, and

"infer" fraud or look for "badges" of fraud. Appellant cites several cases, none of which stand for the proposition that the essential elements of fraud need not be pleaded. Appellant cites *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 958, 931 N.Y.S.2d 377, 382 (2011). In that case, the plaintiff alleged the required elements for fraud, but the claim was dismissed because the plaintiff still did not offer sufficient detail from which fraud could be inferred. That case does not support Appellant's position. Appellant failed to allege the requisite elements to establish a claim for fraud.

Selechnik, cited by Appellant, also has no applicability here. *Selechnik v. L. Off. of Howard R. Birnbach*, 82 A.D.3d 1077, 1079–80, 920 N.Y.S.2d 128 (2011). There, although the complaint lacked any affirmative misrepresentations by the defendant law office itself, the court inferred wrongdoing with respect to the "doctrine of respondeat superior and on the theory of negligent hiring and retention, which are not required to be pleaded with specificity." *Id*. Appellant cites no case where the required elements of fraud were missing and a court inferred them.

Counts Three and Eight should never have been refiled and are dismissible on this ground alone. Even if permitted, they are time-barred and otherwise improperly pled. This Court should affirm the judgment.

D. The Trial Court Properly Dismissed the Fourth Cause of Action for Breach of Contract.

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 Dep't 2010). The complaint must allege the specific, material provisions of the contract that were allegedly breached. *See Woodhill Elec. v. Jeffrey Beamish, Inc*., 73 A.D.3d 1421, 1422 (3d Dep't 2010); *Copeland v. Weyerhaeuser Co.*, 124 A.D.2d 998 (4th Dep't 1986); *Kraus v Visa Intl. Serv. Assn*., 304 A.D.2d 408, 408, (1st Dep't 2003) (granting motion to dismiss breach of contract claim where plaintiff failed to allege the breach of any particular contractual provision)

The Lower Court dismissed Appellant's claim for breach of contract on four independent grounds: failure to allege a material breach, immateriality, waiver, and, even if a material breach occurred, a lack of damages. (Record, pp. 45, 46) The Lower Court noted that the only provisions alleged to have been breached are those identifying the date and location of the closing on the shares ("Closing") (Record, pp. 45-46) and that Appellant failed to even allege that those provisions are material, as he is required to do. (Record, p. 46). Further, the Lower Court held that even if these provisions were alleged to be material, which Appellant failed to

do, they are not material provisions because they relate only to a location for a signing and closing that Appellant already indicated he would not attend. (Record, p. 46) The Lower Court held that whether the closing was at Appellee CRB's headquarters or CRB's attorneys' offices is of no consequence (Record, p. 46) The Lower Court also specifically found that Appellant waived strict compliance, or that strict compliance was excused, due to Appellant Jason Burns' "… previous refusal to consummate the sale of the Purchased Shares…" *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). Finally, as the Lower Court noted, Appellant Jason Burns has alleged no actual damages, only a generic $5,000,000 in compensatory damages and $10,000,000 in punitive damages (Record, pp. 52-53), but no actual damages because he was paid market value for the fifteen shares that CRB bought back. (Record, p. 46).

Appellant Jason Burns offers no supportable argument in response. He never refutes the Lower Court's finding that he failed to allege materiality in the Amended Complaint. That failure is evident from the Amended Complaint. Appellant offers no response to the fact that he waived strict compliance by refusing to show up at the Closing. *Lamberti*, 73 A.D.3d at 463, 905 N.Y.S.2d at 561. Appellant offers no response to the Lower Court's finding that he failed to

allege contract damages, an essential element of his breach of contract claim, and indeed was paid for the fifteen shares he was originally gifted. (Record, p. 46)

Appellant focuses his briefing on materiality and trying to pinpoint a specific provision that Appellees have materially breached. Appellant first asserts that the time and place provisions for the Closing on the re-purchase of the fifteen shares are "in fact material" because the 2014 Shareholder Agreement relates to shares generally. This argument must be rejected. For a failure to perform a contractual obligation to constitute a material breach of the contract, the obligation must be so essential to the agreement that the obligation's omission defeats the parties' object in entering the contract. *Feldmann v. Scepter Group, Pte. Ltd*., 185 A.D.3d 449, 450, 128 N.Y.S.3d 13 (1st Dep't 2020); *Bisk v. Cooper Sq. Realty, Inc*., 115 A.D.3d 419, 419, 981 N.Y.S.2d 408 (1st Dep't 2014). "[T]he mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract." *ADC Orange, Inc. v. Coyote Acres, Inc*., 7 N.Y.3d 484, 489, 824 N.Y.S.2d 192, 857 N.E.2d 513 (2006) (quoting *Ballen v. Potter*, 251 N.Y. 224, 228, 167 N.E. 424 (1929)); *Oink Ink Radio, Inc. v. One Destiny Prods., Inc*., 199 N.Y.S.3d 373, 383 (N.Y. Sup. Ct. 2023). Here, as the Lower Court noted, whether the closing was at CRB's lawyer's office or the parties' accountant's office, or on a certain day, in no way, shape, or form impacts CRB's right to re-purchase its shares, the value of those shares, or its decisions about the shares.

Those provisions do not defeat the parties' object in entering into the contract. The time and date are immaterial.

Appellant next incorporates seven pages of his Amended Complaint to support his contention that specific provisions were materially breached. None of those references support Appellant's contention. Pages 64-66 reiterate the language of the 2014 Shareholder's Agreement. Appellant nowhere identifies a single, specific material provision that was breached, let alone materially breached.

On pages 75 and 76, Appellant's breach allegations revolve around the contention that "[t]here has been *no agreement or acknowledgment* of any intention to sell Plaintiff's 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." (Record, p. 75 [*emphasis* added]). This is the reality that Appellant refuses to accept and that has fueled his baseless claims: there is no provision in the 2014 Shareholder's Agreement that requires him to "accept" or "agree" to CRB's repurchase of the 15 shares. The parties long before agreed to address the mutuality of the right to repurchase shares. (Record, compare pp. 109 [2007 Buy-Sell Agreement] with 122-123 [2010 Amendment to the Buy-Sell Agreement] and 128-129 [2014 Shareholders Agreement]) Under the valid and enforceable 2014 Shareholders Agreement, Appellee CRB can exercise its unilateral right to re-purchase the shares under certain circumstances, and that is precisely what

occurred here. (Record, pp. 24, 48, 76, 128-129, 162, 172) There can be no material breach of a contract obligation that does not exist. Indeed, this is precisely why Appellant is working overtime to rescind the 2010 Amendment to the Buy-Sell Agreement *and* the 2014 Shareholder Agreement: the long-supplanted 2007 Agreement had a mutual restriction. That mutual restriction no longer exists as a result of mutually bargained for subsequent agreements.

Appellant next points to pages 77-79 of the Record's Amended Complaint in an effort to find other material provisions that may have been breached. Those pages are unavailing. They contain a generalized and far-fetched list of complaints about Appellee Robert Burns, all of which are contradicted by documentary evidence or Appellant's own allegations, but none of them relate to a single contract provision in the 2014 Shareholder's Agreement, material or otherwise. Pages 77-79 do not save Appellant's breach of contract claim.

In short, Count Four is dismissible because Appellant Jason Burns has not and cannot identify a single material provision of the 2014 Shareholders Agreement that has been materially breached by Appellees. *Med. Care of W. New York v. Allstate Ins. Co*., 175 A.D.3d 878, 879, 107 N.Y.S.3d 529, 531–32 (2019) (defendant entitled to dismissal where amended complaint failed to identify a single material provision that had been breached).

E. The Trial Court Properly Dismissed the Fifth Cause of Action for Breach of Fiduciary Duty.

Under New York Law, to succeed on a cause of action for breach of a fiduciary duty, a party must allege (1) the existence of a fiduciary duty, (2) breach of that duty by the defendant, and (3) damages. *Barton v. Smartstream Techs., Inc*., No. 16-CV-1718, 2016 WL 2742426, at *7 (S.D.N.Y. May 9, 2016) (alteration and internal quotation marks omitted). "[A] fiduciary relationship arises only when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Id*. (alteration and internal quotation marks omitted); *Broeker v. Conklin property LLC*, 189 A.D.3d 751, 754 (2020 [2d Dept]) (similar).

The Lower Court dismissed this claim on several independent grounds, including that the claim is (1) derivative in nature and (2) subsumed by the breach of contract claim, since the 2014 Shareholders Agreement governs the internal affairs of the Corporation. The Lower Court held:

> 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.

(Record, p. 14)

Appellant disagrees, but offers little in the way of a substantive response. He argues that paragraphs 150-154 of the Amended Complaint (Record, pp. 90-92) establish the requisite elements for this claim. These paragraphs simply list conclusory allegations that suggest Appellee was "acting in his own best interest rather than in the best interest of CRB and Plaintiff" and offer a list of random "activities" and "disruption" of the business that constitute a "breach of fiduciary duty." (Record, p. 90). Appellant's bald assertions that Appellee breached a duty of care and loyalty in the negotiation of the 2014 Shareholder agreement are unfounded and contradicted by the by the evidence in the record. Moreover, even if Appellant properly alleged the required elements of this claim, and had standing to do so, these are conclusory statements, not facts, and the Court is not required to accept them in support of these poorly pleaded claims.

Finally, as established above in Section I, Appellant lacks standing to assert the breach of fiduciary claim because Appellant was not a shareholder of CRB at the time this action was commenced and therefore has no standing to bring

derivative fiduciary duty claims on behalf of CRB. *See Sajust,*198 A.D.3d at 582. (finding that defendant's motion to dismiss was properly granted on the ground that 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"). Since Appellant is no longer a shareholder and was not a shareholder at the time this lawsuit was commenced, he cannot maintain this derivative claim. *Sajust*, 198 A.D.3d at 582. Dismissal of Count Five should be affirmed.

F. The Trial Court Properly Dismissed the Sixth Cause of Action for Conversion.

A conversion takes place when someone intentionally and without authority assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. 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, 51 N.Y.S.3d at 533 (granting dismissal where conversion count does not specify any identifiable piece of property or specifically identifiable funds).

The Lower Court held that Appellant failed to "identify any assets, funds, or shares with particularity, which he is required to do." (Record, p. 47-48). Moreover, the Lower Court found, "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])." (Record, p. 48) As Appellant alleges, and as the documents appended to the Amended Complaint confirm, Appellee CRB exercised its bargained-for option to purchase the previously gifted 15 shares from Appellant and escrowed the money for those shares. (Record, pp. 48, 76, 162, 172) These actions were in accordance with the 2014 Shareholders Agreement. (Record, p. 65, 162, 172). Finally, Appellant repeats verbatim the same list of "wrongdoing" that he asserted for virtually all of his claims (Record, pp. 93-94). These allegations do not support or state a claim for conversion.

Appellant refutes this finding and again points to the generic allegations contained within paragraphs 159-165 of the Amended Complaint. (Record, p. 93-94) This generic list of grievances is several times repeated word for word

throughout the Amended Complaint. It does not satisfy the requirements for asserting a conversion claim because that claim requires allegations of a possessory interest and identifiable property and specifically identifiable funds. *Lee Dodge*, 148 A.D.3d at 1009, 51 N.Y.S.3d at 533. As the Lower Court noted, if Appellant is referring to a possessory interest in the fifteen shares he previously owned in CRB, and which were re-purchased by CRB for the value agreed upon by the parties in the 2014 Shareholder Agreement, Appellant has failed to state a claim for conversion because he fails to allege that he has 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). As Appellant avers, and as the Lower Court noted, Appellee CRB exercised its bargained for option to purchase the fifteen shares previously owned by Appellant. Appellant was paid full value for them, in accordance with the 2014 Shareholders Agreement. (Record, pp. 24, 48, 76, 162, 172) All of these facts are confirmed in the documentary evidence. *Id.* Appellant has not and cannot state the elements of a claim for conversion.

Appellant's conversion claim for "assets, profits, or shares," is not saved by his reliance on the *Lemle* case. 92 AD3d 494, 497 (1st Dep't 2012). There, the conversion claim was derivative only, and the complaint alleged specific, identifiable corporate property that was subject to an obligation to be returned, but was used for an unauthorized purpose, including falsified loan documents and

payments to non-existent employees. *Lemle*, 92 A.D.3d 494, 496, 939 N.Y.S.2d 15 (2012). No such specific corporate property has been alleged to be converted here. Appellant cannot maintain a derivative claim, either, as argued above in Section I. *Lemle* is completely distinguishable.

Appellant's barebones claim for "conversion" was properly dismissed by the Lower Court. The Judgment should be affirmed.

G. The Trial Court Properly Dismissed the Seventh Cause of Action for Unjust Enrichment.

To prevail on a claim of unjust enrichment, a plaintiff must establish that it conferred a benefit upon the defendant, and that the defendant will obtain that benefit without adequately compensating the plaintiff therefor. *See MT Property, Inc. v. Weinstein*, 50 AD3d 751, 855 N.Y.S.2d 627 (2d Dep't 2008); *Wolf v. National Council of Young Israel*, 264 AD2d 416, 694 N.Y.S.2d 424 (2d Dep't 1999). Stated somewhat differently, a plaintiff must show that: (1) the other party was enriched, (2) at that party's expense, and (3) that it is 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, 816 N.Y.S.2d 486 (2d Dep't 2006).

The Lower Court dismissed Appellant's Unjust Enrichment claim on multiple, independent grounds. It held that "Plaintiff's allegations are simply a re-hash of the fraud and breach of contract claims peppered throughout the Amended Complaint." (Record, p. 48) 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).

Appellant responds to none of these grounds. Appellant simply points to paragraphs 170-176 of his Amended Complaint. Those paragraphs, however, nowhere assert even the most basic facts to support the required allegations of this type of claim: plaintiff conferred a benefit upon the defendant, and that the defendant will obtain that benefit without adequately compensating the plaintiff therefor. *See, e.g., MT Property, Inc. v. Weinstein*, 50 AD3d 751, 855 N.Y.S.2d 627 (2d Dep't 2008). Appellant simply repeats his mantra that Appellees "diverted assets, profits, and shares" for their own benefit. (Record, pp. 95-97), and that Appellees engaged in certain conduct, all of which is solidly refuted by the documentary evidence. (Record, pp. 107-117, 121-123)

Moreover, Appellant nowhere disputes the existence of an actual agreement between the parties, which alone precludes a separate claim for unjust enrichment. *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012); *Corsello v. Verizon N.Y.*, Inc., 18 N.Y.3d 777, 790 (2012). Appellant simply disagrees with the result and makes no legal argument to support his appeal. Count Seven lacks even the bare minimum requirements for this claim and was therefore properly dismissed. *See Wolf*, 264 AD2d 416, 694 N.Y.S.2d 424. The Judgment should be affirmed.

H. The Lower Court Properly Dismissed the Eighth Cause of Action for Unemployment Discrimination.

The Human Rights Law, as set forth in the Executive Law §296(1)(a), makes it an unlawful discriminatory practice for an employer, 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. N.Y. Exec. Law § 296 (McKinney). To state a claim for discrimination, a plaintiff must allege that he or she is a member of a protected class, that plaintiff was discharged from a position for which he or she 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, 965 N.Y.S.2d 312, 319 (Sup. Ct. 2013), *citing Rainer N. Mittl, Ophthalmologist, P.C. v N.Y.S. Div. of Human Rights*, 100 NY2d 326, 330 (dismissing NYSHRL claim, in part).

As the Lower Court noted, Appellant Jason Burns 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) (Record, pp. 48-49) Appellant asserts that Appellee Robert 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 (Record, pp. 48-49). The Lower Court held that "[t]he 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." (Record, p. 51) Appellant nowhere alleges that he was discriminated against as a member of a protected class.

Further, as the Lower Court noted, Appellant failed to allege "that he was qualified for the position." (Record p., 51) Rather, he alleges that he had an unblemished personnel/employment record The Lower Court correctly notes that "[t]his 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." (Record, pp. 51, 61, 119-120, 122, 157)

Appellant's own averments *and* the documentary evidence also establish that Appellant took several PFL leaves, and often at Defendant's urging. (Record, pp. 70-71,) In late-August 2020, Appellant applied for and was approved to take intermittent PFL in connection with amputation revision surgery for his son, Gavin. Appellant took PFL during the weeks of August 24, 2020; September 1, 2020; September 8, 2020; September 14, 2020; September 21, 2020; September 28, 2020; October 5, 2020; October 12, 2020; October 19, 2020; and November 2, 2020. (Record, 277, 278) Appellee never objected to the leave, or said anything negative about those absences. *Id.* There is no temporal proximity between the leave and the termination, nor is there any logical or reasonable inference that can be asserted about a grandfather objecting to care for his grandson. *Krause*, 40 Misc. 3d at 394, 965 N.Y.S.2d at 320.

Appellant failed to allege the requisite elements of a claim for employment discrimination, including the required allegation that he was qualified for the position, and fails to assert any plausible theory for the alleged discrimination. *Biondi v. Beekman Hill House Apt. Corp*., 257 AD2d 76, 81 (1st Dept 1999), affd 94 N.Y.2d 659 (2000); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Appellant's claim is not predicated based on his membership in a protected class, or even his being terminated from a job for which he was qualified.

A hearing was held before Administrative Law Judge Melissa Richburg on January 4, 2022 on Appellant's Workers' Compensation claim. Judge Richburg ruled against Appellant and dismissed his claim. (Record, p. 282) That decision was upheld by the Board On January 10, 2022. (Record, 186). These types of inherently incredible allegations must be rejected. *Biondi,* 257 AD2d at 81, affd 94 N.Y.2d 659 (2000); *Guggenheimer*, 43 N.Y.2d at 275.

Appellant fails to offer any substantive response—or even a single case in support—of his claim for Employment Discrimination. The dismissal of Count Nine should be affirmed.

I. The Lower Court Properly Dismissed the Tenth Cause of Action for Accounting.

To succeed on a claim for an accounting, a member or shareholder seeking an accounting must establish the following: first, 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 Dep't 2017)); second, that a fiduciary relationship existed and "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 Dep't 2017); and third, "[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 Dep't 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 (holding that the plaintiff's withdrawal from the LLC defeated his claim for an accounting).

The Lower Court dismissed the claim an Accounting on multiple, independent grounds:

> "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)."
>
> (Record, p. 52)

Appellant Jason Burns fails to adequately address any of the grounds relied upon by the Lower Court when it dismissed Count Ten. Appellant, by his silence, concedes that he failed to allege that he has no adequate remedy at law, a required

element. *Unitel Telecard Distribution Corp. v. Nunez*, 90 A.D. 3d 568 (1st Dep't 2011)(must allege no adequate remedy at law); *see also Peralta v. Figueroa*, 17 Misc. 3d 1128(A), 851 N.Y.S.2d 73 (2007), amended, N.Y. Sup. Ct. 2008 (granting motion to dismiss where plaintiff failed to address the legal sufficiency of claims in motion to dismiss). Moreover, Appellant failed to contradict the finding by the Lower Court that he demanded an accounting and was provided one. Finally, Appellant failed to address the finding that no fiduciary relationship existed and "a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." Since Appellant's claim appears to be centered around the alleged diversion of corporate funds or assets ("improper use of corporate assets"), it is derivative. Appellant is not currently a shareholder in CRB and was not a shareholder at the time this lawsuit was filed, and therefore has no standing to bring this derivative accounting claim. Dismissal was proper on any one of these grounds.

On appeal, Appellant simply contends that an "accounting" might be appropriate to establish "improper use of corporate assets." (Brief, p. 43) This assertion does not save his defective pleadings. He next raises receivership and contends that a "receiver" might be appointed where "there is danger that the property will be removed from the state, or lost, materially injured or destroyed." (Brief, pp. 43-44) Not only are receivership grounds not adequately alleged or

justified here, but the Lower Court specifically dismissed the receivership claim *with prejudice* because no supporting allegations ever were alleged. (Record, pp. 34-35).

Finally, Appellant points to paragraphs 204-206 of the Amended Complaint to support his claim for an Accounting. Those paragraphs, however, fail to allege any of the requisite elements for an Accounting or Receivership. They use generic language about Appellee Robert Burns exercising "complete control," (he is the majority shareholder) and "diverting funds" to deprive Appellant of his profits and fifteen shares. These generic allegations are not only fatally insufficient, they are also flatly refuted by Appellant's own allegations and attached exhibits. (Record, pp. 24, 48, 57, 76, 162, 172) Appellant specifically alleges that, during his employment, he was "… substantially involved with the financial record-keeping of CRB." (Record, p. 57)

Just as the Lower Court found, Appellant has always had access to CRB's books and records, and in fact, was quite familiar with them given that one of his duties as an employee of CRB was to make financial entries. (Record, pp. 57, 279) In addition, during the negotiation period when TSA was conducting its valuation of the company and of Jason's shares, Jason and his attorneys were given access to CRB's financials, including CRB's balance sheet, CRB's historical tax basis schedule, distribution entries, and schedules showing all distributions made to

Robert Burns dating back to 2009 and distributions made to Jason since 2010. (Record, 279). The process by which the accounting firm TSA calculated the purchase price was very transparent, and the accountants were made available to Jason and his attorney to answer any questions he may have had as it related to the valuation of his shares. (Record, pp. 279). Jason was even provided the opportunity to hire another independent accountant to perform a valuation to obtain a second opinion on the value of the shares. Appellant never did this.

On January 28, 2021, Jason, together with his attorney John DelMonte, participated in a videoconference with CRB's accountant, TSA, as well as CRB's counsel, Christopher Greene, to discuss the valuation of Jason's shares and to answer any questions that Jason still had in relation to the valuation of the Corporation or the calculation of the purchase price for Jason's shares. CRB again provided Jason the opportunity to inspect its books and records. (During the period between November 6, 2020 (the date Jason's employment was terminated) and June 25, 2021 (the formal closing date of CRB's purchase of Jason's shares), there were extensive, ongoing negotiations between CRB's counsel and Jason's counsel, John DelMonte, concerning the terms of Jason's separation and the purchase price of Jason's shares.

Appellant's claim is further belied by the fact that, during the period in question, Appellant himself was intimately involved in the business's financials,

which he also avers in the Amended Complaint. (Record, pp. 57, 279) and always had access to CRB's records of revenues and expenses, as well as his own profit figures. Appellant's conclusory allegations that he has demanded an accounting and Appellees have refused, are demonstrably false.

These tenuous, unsupported claims cannot withstand a motion to dismiss, especially where an accounting was provided, and Appellant had ample opportunity —with and without his counsel present—to ask questions or review all corporate financial records. The dismissal of Count Ten should be affirmed.

J. The Lower Court Properly Dismissed the Eleventh Cause of Action for Attorneys' Fees.

Attorneys' fees are "incidents of litigation" and are not recoupable by the prevailing party unless recovery is provided by a contract, statute, or court rule. *Sage Sys., Inc. v. Liss*, 39 N.Y.3d 27, 31, 177 N.Y.S.3d 525, 198 N.E.3d 768 (2022). The Lower Court properly dismissed Appellant's newest iteration of his claim for attorneys' fees. The Lower Court held that:

> [t]he 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])." (Record, pp. 52, 53).

Appellant Jason Burns does not dispute the finding that the 2014 Shareholder's Agreement does not provide for attorneys' fees. He also does not dispute the finding that he nowhere in the Amended Complaint asserts statutory grounds for recovering attorneys' fees.

Instead, Appellant offers a statutory theory not articulated in the Amended Complaint. On page 44 of his Brief, Appellant contends that he is entitled to fees under Business Corporation Law § 626 (e) because his claim is a shareholder's derivative lawsuit. This new, unalleged ground for attorneys' fees must be rejected. This new statutory ground appears nowhere in Count Eleven of the Amended Complaint. (Record, p. 104). Moreover, Appellant avers in the Amended Complaint that "[a]s a result of Defendant' actions, Plaintiff was forced to commence this action to protect *his* rights." (Record, p. 104)(*emphasis* added) Appellant's averments contradict his newest argument that the attorneys' fees claim is for a derivative lawsuit.

Finally, even if the Amended Complaint had alleged a claim for attorneys' fees under Section 626, to be entitled to an award of an attorney's fee under Business Corporation Law § 626(e), a plaintiff "must meet all of the requirements for standing to bring a derivative action on behalf of the corporation [internal citations omitted] … [t]hese requirements include that the plaintiff be a "holder of shares or of voting trust certificates of the corporation or of a beneficial interest in

such shares or certificates" (Business Corporation Law § 626[a]) at the time of the challenged transaction and at the time the action was commenced…." *Sakow v. Waldman*, 155 A.D.3d 1078, 1079–80, 66 N.Y.S.3d 23, 25 (2017). Appellant Jason Burns is not a shareholder in Appellee CRB, cannot maintain a shareholder's derivative lawsuit, and is therefore not in any way entitled to assert a claim for attorneys' fees pursuant to Business Corporation Law § 626(e). *Id*. Count Eleven was properly dismissed by the Lower Court. *Dune Deck Owners Corp. v. Liggett*, 85 A.D.3d 1093, 1096, 927 N.Y.S.2d 125 (2011)(rejecting cause of action to recover attorney fees "for the bringing of this action").

Conclusion

The Lower Court's judgment of dismissal should be affirmed in its entirety.

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