SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

BRETT WYNKOOP and KATHLEEN KESKE,

Plaintiffs,

Index No. 507156-2012

-against-

(Mtn. Seq. 50 and 52)

622A PRESIDENT STREET OWNERS CORP., KYLE TAYLOR, HILARY TAYLOR and RAJEEV SUBRAMANYAM,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW, AFFIDAVIT OF PLAINTIFF BRETT WYNKOOP, AFFIDAVIT OF KATHLEEN KESKE and ATTORNEY AFFIRMATION OF ANTONY HILTON

SUBMITTED IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT AND DEFAULT

Respectfully submitted by

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PRELIMINARY STATEMENT

1. Plaintiffs make this motion in accordance with this Court's order of Jul. 25, 2016 (Exh. 74), which denied Plaintiffs' motion for summary judgment without prejudice pursuant to CPLR §3212(f), as modified by the Appellate Division, Second Department, in is order of Feb. 27, 2019. The facts of this matter speak for themselves. The Defendants are the actual focal point for all issues, as their conduct of fraud, misrepresentation, manipulation, self-dealing, and, indeed, this and the previous action (under 6548-2012) was only ever about one thing, and one thing only: their personal profit.

2. It has been a long seven years of litigation, in which Defendants' counsel—who has been just as deceitful and manipulative as their clients—has caused delay after delay in these proceedings, pursuing scorched-earth motion practice for which they are known (see sanctions at Exh. 62), engaged in unethical conduct (such as false and misleading claims to the court, for which they are known, Exh. 63), and constant gamesmanship behavior (which includes flouting court orders with controversy-creation, something else they are known for, Exh. 64). All of opposing counsel's misconduct and sabotage of these proceedings, engaged by them to create the illusion that Plaintiffs are irascible wrong-doers to obfuscate the fact that they have no case, is described with detail in Plaintiffs' Affirmation of Good Faith (which has been previously filed with this Court).

3. The reality here is that this controversy revolves around Defendants misuse of the Court system and Administrative Agencies to try and wrest control of 622A President Street Owners Corp. (the "Coop") so that they can make (and have made) material changes to it, all for the purpose of increasing the value of their apartments. However, as their scheme to take control of the Coop grew, so did their ambitions, and they expanded their goals to also include an attempt to wrest control of Plaintiffs' private property—their cellar space contained in their Unit 1.

4. These ambitions took flight in the form of two litigations—the one at bar, and a previous litigation under Index No. 6548-2012, which was dismissed in part on lack of merit (breach of fiduciary duty claims), and in part without prejudice (breach of lease claims). All actions taken—the fraud, the

false complaints to DOB/HPD, the causing of fines to the Coop, the false and misleading statements, the improper use of Coop funds, the improper and unauthorized retainer of service providers to the Coop, and ultimately the violation of court orders—have been about personal profit, not the health, well-being and governance of the Coop. This comes through upon review of the Statement of Undisputed Material Facts offered with this Motion, and the voluminous compendium of exhibits referred to in support of each and every factual statement submitted by Plaintiffs.

5. In the end, Defendants' claims are completely without merit. This reality is beginning to finally come to the fore. Most recently, after 7 years of presenting evidence of the legality of Plaintiffs' possession, use and occupancy of the cellar, the Appellate Division has looked at this documentation and confirmed that it has established, as a matter of law, that Plaintiffs have not breached their Unit 1 lease (Exh. 44). What is left—breach of the Unit 2 lease for subleasing without consent, and breach of director/officer fiduciary duty to the Coop for personal use of Coop funds—has as much merit (which is to say none at all).

6. Plaintiffs begin their legal analysis first with a review of Defendants' remaining claims, and then will address their own claims. Thereafter, the Plaintiffs will present arguments in favor of default judgment against the Coop (permitted pursuant to the Court's prior order, Exh. 45, Schmidt, J.). Technically, the Plaintiffs have entered into a settlement with the Coop already (Ex. 53), which is why the Coop has become only a nominal party (*Id*. at p.5), However, the Appellate Division poses the question as to whether the Plaintiffs entered into this settlement on behalf of the Coop (Exh. 44). They did not—they recused themselves from the process. But even if the settlement is not valid, Plaintiffs are entitled to a default judgment because the Coop never timely answered the complaint, and the law and facts support a right to the claims made against it (some of which are to quiet their contract rights to the cellar, which has already been confirmed by the Appellate Division, at Exh. 44).

STATEMENT OF FACTS

7. The Court is respectfully referred to Plaintiffs' Statement of Undisputed Material Facts (incorporated herein by reference) for the facts offered in opposition to Defendants' statement of facts, and in support of Plaintiffs' cross motion. However, Plaintiffs address here the rebuttals as to the specifics of Defendants' asserted "facts".

8. At page 5-6 of Defendants' brief and "Statement of Facts", they allege that the court in this case, as well as the Appellate Division, confirmed a stipulation between the parties which allegedly placed the Defendants on the board of directors on Apr. 30, 2013. They cite as proof of this the Nov. 7, 2013 order of Justice Schmidt (D.Ex. C), as well as the decision of the Appellate Division made in February of this year, 2019 (D.Ex. E). While both Courts may be seemingly making this conclusion, neither has the power to do so, as this matter was already reviewed by a Court and enforcement was denied. This alleged stipulation was made in a prior action under Index No. 6548-2012. That stipulation was subject to the requirement that it be put to writing, signed by the attorneys, and then submitted to the Court in that case for review, approval and so-ordering (Exh. 76 at Tr.15:19-16:8). That never happened because the Defendants refused to sign (Exh. 75). Subsequently, a special meeting of the directors was held to remove the Defendants from the board, if they ever were on the board given that they would not sign the stipulation, and they were removed by a majority vote, and a new election was held. Subsequent to that, the Defendants made a motion to set aside that election and enforce the stipulation (Exh. 72, Exh. 78 Motion, Mtn. Seq. 11). That motion was denied by the Court in that case, obviously based on Defendants refusal to sign the agreement (Exh. 36). Notwithstanding all of this, the issue of that stipulation, the election, who was on the board, etc., is all irrelevant to Defendants' claims—breach of lease, and breach of director fiduciary duty for misuse of Coop funds for personal expenses.

9. At page 6 of Defendants' brief they assert that the prior action was dismissed in its entirety on a finding of lack of demand or pleading demand futility. This is incorrect and misrepresents the

decision. Defendants' claim for Breach of Director Fiduciary Duty was dismissed as not being derivative claims—because they were personal claims (Exh. 36 referring to Exh. 37 at Tr.3:24-5:6). Only the breach of lease claims against Units 1 and 2 were dismissed for failure to plead demand futility (Exh. 36), and all claims against Unit 1 have now been dismissed as well (Exh. 44).

10. At page 7, not only can Defense counsel not describe the facts in a manner that is not false or misleading, Defense counsel cannot even get them right—indicating a complete lack of any true knowledge of this case. Defendant, Hilary Taylor (then, Ms. Pinnington) accompanied an **engineer**, to inspect the entire building (see Exh. 3 P-271), not a broker. If the information were from a "broker", the input would have less relevance than if it were from an engineer, as having had an engineer's opinion, such expert reporting should have informed the Defendants that they had no claim at all with regard to Unit 1. *To wit*: Mrs. Taylor asserted facts in her affidavit (Exh. 3) in conclusory fashion allegedly based on personal knowledge, such as the presence of a bathroom. The obvious purpose of making such a factual representation was to bolster the credibility of her testimony that she entered a "bedroom"—because a room is more likely a bedroom if it has a bathroom within it. Yet her own evidence—coupled with the additional evidence offered by Plaintiffs at that time (Exh. 15) found sufficient to order summary dismissal—contradicted her factual assertion. This prompted her to step back her testimony, to concede her previously definitive assertion of elements to support the presence of a bathroom was not based on knowledge, merely supposition. Thus, she confirmed that she lied about the bathroom previously—she made it up to help her claim that she entered a "bedroom". More than this, she adds new evidence, declaring for the very first time—in a reply affidavit—that there was a "bed". What else can one make of all of this other than invention to substantiate a claim which never had merit?

11. At page 6 to 8 of Defendants' brief, they spend more time arguing than presenting fact. The facts regarding Taylor's fraud, they say, is that it is not fraud because of the elements of alleged "truth". However, the best lies are hidden among truths. It is the nature, context and presentation of Taylor's alleged "truths" that make it blatant fraud upon the court, and an attempt to manipulation of the

court with what are either self-serving assertions or half-truths.

12. The construct of Taylor's stated facts—that he reviewed an offering plan which did not contain a lease with Sec. 7A in it, and that he was offered Sec. 7A on its own without the lease—coupled with his use of the offering plan lease without Sec. 7A (Exh. 40), while concealing his true lease with Sec. 7A in it (Exh. 12), was to create a number of misleading understandings for the Court to obtain judgment in his favor. What he attempted to do was convince the Court that (1) Sec. 7A was a separate document (Exh. 3 P-8 ¶18 ref. to P-216) that was unenforceable, (2) that proprietary leases for the Coop do not contain a Sec. 7A (*Id.*), (3) that the leases assign the cellar as common space not private space for Unit 1 (*Id*. and Exh. 32 Amended Complaint at ¶¶24, 29, 47-50), and (4) that Plaintiffs simply took control of the cellar and altered it for their own use without any right (*Id.*). Defendants cannot rely on one kernel of truth in their statement to say the whole statement, and, indeed, the intent behind the statement, was true as well. Even to later admit that Sec. 7A *was* part of his lease does not rehabilitate Taylor, and it begs the question as to why he did not disclose this the first time? Had it been so disclosed, could Mr. Taylor's assertion that Sec. 7A was a separate document been supportable? Had Mr. Taylor offered his lease originally, would his claim of wrongful taking of the cellar been seen as viable? Mr. Taylor is an attorney (Exh. 51; Exh. 28 p.18 Tr.67:17-21), licensed to practice law in this State; he is a litigator who has appeared before the Courts in this state as well as the Federal Courts (*Id.*). He knows full well his obligation to present evidence which is not misleading, yet he did not present—and concealed—the most crucial evidence of all with regard to his representations to the Court: his lease. He also framed his statements to mislead the Court: Sec. 7A is a separate document, not in his lease, and therefore was never enforceable.

13. The clear intent was to deceive; to sandwich a single purported truth or half-truth with lies intended to misdirect the court. That is how con games work—the conman shows a little of his money going into the scheme to cause the sucker to put in a large amount of money that will be stolen. Here, the conman was Taylor, and the party he tried to sucker was the Court. Yet, there is one more question

to answer as it relates to Taylor's testimony: why is he talking about an offering plan? That document has long since expired—though the front page fails to state a date for the plan (again, Defendants offer a blank document), the document originates at least in April of 1986 (see Exh. 3 P-74), with the first lease executed in May of 1986 (Exh. 4). Pursuant to 13 NYCRR §21.3(a)(6), the term of the plan was no more than 12 months (because there has been no amendment). Taylor bought into the Coop in 2010 (Subramanyam 2006). His review of it is entirely irrelevant, as the offering plan had no valid relevance to his purchase as a void document—as his attorney would likely have explained to him. All that mattered was his lease that he signed. The fact that he relied on parole evidence, rather than his lease, to represent the form of his lease to the Court, was an attempt to deceive the Court into believing that the lease had no Sec. 7A, and made the cellar a common space.

14. Before moving on, it is respectfully requested that this Court take into consideration the aggregate of the conduct of Defendants to deceive. Arguably, each instance of fraud, deceit and use of altered documents, taken on their own, could be insufficient to sustain an action (though Plaintiffs would disagree and waive no rights). However, each instance, taken together in the aggregate, exposes a wide ranging scheme of fraud—to obtain advantage in litigation, to obtain control of the Coop, and to obtain benefits which aggrandize only the Defendants to personal fiscal benefit (increased value of their Units which they wanted to sell).

15. At page 9 of their brief, Defense counsel has represented that Mr. Hardin was retained by Plaintiffs for the Coop, for the purpose of the action that was brought under Index No. 504653-2013. That assertion is blatantly false, and the falsity of it is clearly established by the evidence (Exh. 24-B) Mr. Hardin was brought in as a colleague by the attorney for the Coop originally retained at the start of the action, Brian Murphy (Exh. 24-B). Mr. Murphy became ill—from 9/11 Syndrome (he was an emergency responder)—and Mr. Hardin began appearing on his behalf; and then eventually substituted him completely. Thus, Mr. Hardin's retainer was prior to bringing the action, for the purpose of representing the Coop in all matters (as Murphy was retained), and in particular for the joint motion to

dismiss the prior action that was ultimately successful for both the Coop and the Plaintiffs.

16. Concerning the Index No. 504653-2013 complaint itself, it was absolutely appropriate for the Defendants to be subjected to an action by the Coop, whether they were directors or not. *First*, the action was appropriately brought against them, because review of the claims shows that at least some would have been successful—*to wit*: Plaintiffs successfully defeated the breach of fiduciary duty claims made under BCL §717 (dismissed on merit as not being derivative, Exh. 36 p.7 referring to Exh. 37 Tr. Tr.3:24-5:6), which means that Plaintiffs' right to indemnification by the Coop arose under the bylaws at Art. VII (Exh. 16). Defendants' lease, in turn, indemnifies the Coop for those costs (Exh. 12 and 14, Sec. 28), making claims Eight and Twenty in that complaint (D.Ex. N) meritorious. The Coop also successfully defended Defendants' derivative claims, and therefore the Coop is indemnified for all costs per their leases (*Id.*), again making claim Twenty meritorious (*Id.*). Moreover, after 7 years of litigation, all derivative claims for breach of the Unit 1 lease have been dismissed as a matter of law, which makes the Coop liable to indemnify Plaintiffs for up to 60% of their legal fees (as those claims were three-fifths/sixty percent of all claims made against Plaintiffs). Again, such costs to the Coop are a consequence of Defendants' frivolous derivative claims, which means, pursuant to their lease, they must indemnify the Coop—again, making claim twenty of the complaint (D.Ex. N) meritorious. Finally, there is also the claim against Subramanyam, for the cost of repairing the roof pursuant to Sec. 7A of his lease, which he has claimed is not valid. The Appellate Division has determined it valid, therefore the Coop's Eleventh and Twenty-First Causes of Action meritorious (especially since Defendants have recently used Coop funds to make that repair, Exh. 47).

17. *Second*, Mr. Hardin was paid for his time on the action under Index No. 6548-2012. The court will note that Mr. Hardin's payments (Exh. 24-B) are each made on or about the days he appeared in Court for the Coop, almost universally to oppose Defendants' motions—*to wit*: Mar. 22, 2013 to oppose Defendants' summary judgment (Mtn. Seq. 1) and support the Coop's joint motion to dismiss Defendants' derivative action (which was successful); Apr. 30, 2013 to oppose Defendants' motion to

deposit monthly rent with the clerk (Mtn. Seq. 8, which was denied, Exh. 36) and to appoint a receiver for the Coop (Mtn. Seq. 7, also denied, Exh. 36); Jul. 16, 2013 to oppose another motion by Defendants' (Mtn. Seq. 10); Aug. 20, 2013 to oppose the several motion by Defendants by this time (Mtn. Seq. 8, 9, 10, all denied, Exh. 36); Sep. 10 and 13, 2013 to oppose a motion by order to show cause (Exh. 78) to enforce the stipulation they rely upon to say they were on the board (Mtn. Seq. 11, which was denied at Exh. 36); Oct. 22, 2013 to appear in the Appellate Division on a motion concerning the Court there and to appear to oppose another motion by Defendants (Mtn. Seq. 12); Nov. 22, 2013, to oppose another motion by Defendants (Mtn. Seq. 13, denied, Exh. 36); and Dec. 20, 2013, to oppose yet another motion by Defendants (Mtn. Seq. 14, denied, Exh. 36). (See Court Schedule and Motions, Exh. 77). On average, Mr. Hardin was paid $480 per appearance—hardly unreasonable for the time to prepare for an appearance and then appear. He was also paid for the time to prepare the written stipulation that would have put the Defendants on the board had they executed it and submitted for approval court approval as required by the Court (Exh. 76 Tr.15:19-16:8)—but they refused to sign (Exh. 77). Thus, what evidence are Defendants offering here that Mr. Hardin was paid at all for the complaint made against them by the Coop? How much of the $4,800 is attributable to that complaint under Index No. 504653-2013? Their failure to establish an accounting for that point establishes that they have no right to summary judgment, and further, they have no claim because it is beyond caval that Defendants do now owe the Coop a ***lot*** of money for all of the Coop's legal expenses—for their first failed derivative claim for breach of fiduciary duty on other grounds dismissed, and for dismissal of all claims against Unit 1 (even for the ECB trials and violations they caused and the Coop defeated).

18. *Third*, the complaint under Index No. 504653-2013 was made on Aug. 13, 2013, and then withdrawn before an answer on Sep. 20, 2013. They say the complaint was "ghost written", so did Mr. Hardin spend any time on it save to review and sign it? How much time was that and was there a charge? More importantly, how is it attributable as personal use if it was for the purpose of brining an action to recover damages to the Coop—damages currently owed by Defendants since 2013, plus

current new damages? It cannot be said that this was personal use at all. The money sought was to indemnify the Coop, and it was solely the Coop's interests at issue. That is not use of Coop funds for personal expenses.

19. *Fourth*, how exactly did Plaintiffs not have authority to cause the Coop to bring an action against the Defendants? Defendants insist that the board at that time was comprised of themselves and Plaintiffs. The Coop had legitimate claims against them for indemnification under their leases discussed above. Defendants were inherently conflicted as they would never have consented to the Coop suing them. That being said, why did Plaintiffs' not have the authority? A board resolution is not needed to prosecute a breach of lease. Only certain clauses of the lease require board approval, or shareholder approval. The rest is administrative—breach the lease, action begins.

20. Defendants continue their self-serving logic by asserting that Mr. Hardin had no right to bring an action against certain shareholders for the benefit of other shareholders. None of the claims made seek relief inuring to the benefit of other shareholders. All rights in the complaint were directed to the Coop's indemnification under Sec. 28 of their leases, and other damages to the Coop caused by Defendants' actions.

21. At page 11 of their brief, Defendants say that Plaintiffs ineffectively removed Defendants from the board. They have the Court's prior order that the removal of the Defendants was ineffective and that a stipulation was made on the record appointing them to the board (at Exh. 20), and refer to the Appellate Division's determination that the stipulation effective (Exh. 44). First, both this Court and the Appellate Division are incorrect in their assessment as to the effectiveness of the stipulation—as it was required by the Court to be first put in writing—however, notwithstanding this, the finding of Justice Schmidt and the Appellate Division are ineffective simply because a motion to invalidate that special director's meeting was made in the prior action—a motion to enforce the stipulation (Exh. 73)—and it was denied by the Court in that action (Exh. 36). Therefore, to invalidate that meeting, the Defendants were required to appeal that decision, and they never did. Thus, that is the law of that case, and this

Court—and the Appellate Division—were collaterally estopped from contradicting it. As such, Defendants removal, and election of Ms. Chester, was effective and confirmed by order of the Court. Notwithstanding all of this, it is completely outside the relevance of this matter.

22. Defendants assert that the injunction against them was completely removed. However, that is false. Review of the order they present (D.Ex.S) actually does not remove an injunction from them. Exh. 79 is the only order that addresses the injunction, and that order does not remove the injunction, it modifies it, requiring that, while Defendants may "act as a board" (as stated in the order they reference at D.Ex.S) they are still required to comply with the requirements set forth in the Apr. 13, 2015 order (Exh. 79). Defendants are not free to do as they please as the board. They have court imposed limits.

23. At pages 16-17 of their brief, Defense counsel conflates and misrepresents facts to create the appearance of controversy, though their legal arguments for summary judgment on breach of fiduciary duty do not address most of these false and misleading statements. However, to assure that there is no admission by Plaintiffs, those facts are directly addressed as follows:

24. Plaintiffs were in charge of the Coop from before the Defendants first brought an action under Index No. 6548-2012—as determined by Judge Schmidt (Exh. 20)—through and until May of 2015 during pendency of this action. Regardless of whether this Court or any court wishes to find that Defendants were (by stipulation) placed on the board on Apr. 30, 2013, Plaintiffs' retainer of the Coop's counsel—Mr. Murphy, replaced by Mr. Hardin, and replaced again by Mr. Fromartz—occurred prior to their placement. As such, Plaintiffs had the power to retain counsel as they were the board. Moreover, retainer of Coop counsel was necessary given that Defendants were engaging in bad faith conduct to cause violations and ECB trials (Exh. 38) which necessitated the Coop to have representation. Additionally, the Defendants made the Coop a nominal defendant in the action under Index No. 6548-2012, and therefore the Coop required separate representation there as well. Mr. Hardin's retainer in particular was as a substitute for Mr. Murphy (who became ill with 9/11 Syndrome); chosen by Mr. Murphy as his replacement. His role was to stand in for Murphy and represent the Coop through a

multitude of motions by Defendants he opposed (Exh. 35, 78), and in support of the Coop's own motion to dismiss the Defendants' action—which the Coop won (Exh. 36, 37). Mr. Fromartz replaced Mr. Hardin, who himself suffered from heart troubles that required him to withdraw, and he stood through the Coop's defense of Defendants post action motions to hold the Coop and Defendants in default of not answering a second amended complaint Defendants had no right or permission to file, as well as another motion for preliminary injunction on an already-disposed action (see Exh. 78, Mtn. Seq. 13 and 14); and his representation continued on into this case.

25. Whether Ms. Chester's installation as a board member was effective or ineffective, it is all irrelevant, because the Defendants have narrowed their cause action for breach of director fiduciary duty to only the one issue: whether Mr. Hardin's legal fees constituted a personal legal expense of the Plaintiffs. It was not, as discussed (and will be discussed), and Defendants offer no evidence to show that it was a personal legal expense.

26. Whether this or any Court finds that Subramanyam should not have been made to pay his arrears (though that seems unlikely) or additional assessment which were to repair his leaking roof and the hallway damaged by it (which is confirmed to be his responsibility, per the Appellate Division decision finding that Sec. 7A is enforceable, Exh. 44), it is irrelevant, as is the $10,000 for three fundamental reasons: *First*: The payments were received by the Coop during the pendency of this action (Exh. 80), therefore, the claims made are not referable to this money[1]—which is likely why the Defendants do not use it in their arguments for breach of director fiduciary duty.

27. *Second*: The funds were not Coop funds. Per Justice Schmidt's order of Apr. 13, 2015 (Exh. 45), this money was Subramanyam's property—i.e. it was his refund. The Defendants have already conceded this point. *To wit*: they made a motion for contempt (Mtn. Seq. 15) where they alleged that "Wynkoop should be held in contempt for failing to immediately **pay $10,000.00 to Subramanyam**" (Order dated Nov. 15, 2015, Exh. 81 p.9). Thus, Defendants confirm that this was not

[1] It also bears noting that this money was not "withdrawn" from an account, it was paid by HSBC and then charged back to Subramanyam as an additional fee, on top of his normal monthly loan payment (see invoices at Exh. 80).

Coop money, but Subramanyam's money—making it a private matter unrelated to the Coop.

28. _Third_: The Court already held a trial regarding this Plaintiffs submission of this $10,000.00 to the Clerk—the motion for contempt just discussed (*Id*.). Its conclusion as a matter of law was that this action "was not unreasonable" as it was "acted in accordance with his counsel's advice and reading of the statute." (*Id*.) That is the law of this case. If Defendants did not like it, they should have appealed. That time for appeal has expired.

29. _Fourth_: Plaintiffs needed no "authority" from the board to pursue rent arrears. Such is not a board matter, it is a Coop matter. Defendants insist they were on the board per the purported stipulation of Apr. 30, 2013 (which Plaintiff continue to deny as being effective given the writing requirement imposed by the Court), and in so doing they concede that this stipulation created a 4-member board on which Plaintiffs were directors. Therefore, as directors, Plaintiffs had authority to pursue rent arrears as representatives of the Coop. No document—not the lease or the bylaws—require such efforts be subject to board resolution, as such efforts are the standard day-to-day business of a Coop. Thus, Plaintiffs were authorized. It just so happens that the parties from whom arrears were sought happen to be Defendants, who were in litigation with Plaintiffs. But that is irrelevant as pursuing rent arrears is the proper action of any landlord, and, again, does not require a board resolution.

30. Finally, in this portion of their brief, Defendants cite the Appellate Division's decision that Subramanyam was entitled to recover his $32,670.06. However, Subramanyam was to receive this amount LESS HIS RENT OWED, according to Justice Schmidt's order (Exh. 45). Yet, Subramanyam took it *all* back (Exh. 48). Thus, he not only violated the order, he stole money from the Coop—and Taylor helped him as the signatory on the check. Just as a note, Justice Schmidt's order of Apr. 13, 2015 would have prevented this had Defendants complied with it, and submitted the check for co-signature by Plaintiffs as directed. This shows Defendants' motivations all along—to take control and use the Coop however they please, in violation of Plaintiffs' shareholder rights and Defendants fiduciary duty to Plaintiffs.

STANDARD OF REVIEW

Summary Judgment

31. Plaintiffs seek summary judgment on Defendant-Shareholders' derivative counterclaims. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman*, *Id*.).

32. On a motion for summary judgment, the court's role is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). In assessing the record, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the movant (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). When appropriate, the court may search the record and grant summary judgment in favor of the non-moving party as to claims that are the subject of the motion (*Dunham v Hilco Construction Co.*, 89 NY2d 425, 429-430 (1996); *Sobczynski v Langlaise*, 289 AD2d 324 [2d Dept. 2001]; CPLR 3212[b]).

Landlord-Tenant Status As Applied To Shareholders In A Cooperative Corporation.

33. Under New York State law, any claim concerning breach of lease is not a shareholder dispute, nor is it a claim involving director or officer conduct in breach of any fiduciary duty to the subject Corporation. "[T]he 'cooperative tenants, cooperative corporation, and third parties do not now, if they ever did, treat co-operative tenancies as chattel real." (*Matter of Carmer*, 488 N.Y.S.2d 801, 111 A.D.2d 171 [2 Dept. 1985]; quoting *Matter of State Tax Comm. v Shor,* 43 N.Y.2d 151, 400 NYS2d 805, 371 NE2d 523 [Court of Appeals]). Generally, "[t]he ownership interest of a tenant-shareholder is

sui generis… the co-operative corporation owns the land and building." (*Shor, Id*., 400 NYS2d at 807). Shares purchased by a shareholder-tenant in a Coop only "entitle[s] the shareholder to a long-term apartment 'proprietary lease'." (*Id.*, citing 4B Powell, Real Property (Rohan-rev. ed.), Par. 633.4). Therefore, "the proprietary lease given to the tenant is not different from any other type of lease and it creates [nothing more than] a landlord-tenant relationship between the stockholder and the co-operative corporation" (*Saurez v Rivercross*, 107 Misc. 2d 135, 137 [1st Dept. 1981]; citing *Shor*, *Id*.; see also *Hauptman v 222 East 80th St. Corp*., 100 Misc.2d 153; *Carden Hall v George*, 56 Misc.2d 865; Rasch, 1 New York Landlord & Tenant, Summary Proceedings [2d ed], § 82).

Default Judgment

34. CPLR § 3215 governs motions for default judgment against a non-appearing party.[2] The movant for default judgment must provide proof of: (1) service of the summons and complaint; (2) the facts constituting the claim for a certain or ascertainable sum; and (3) default, and (4) move within a year of the default.[3]

35. In addition to the facts set forth herein and in Plaintiffs' affidavit, Plaintiffs offer evidence of their right to default judgment. Although the "standard of proof is not stringent" for a motion for default judgment, "there must be some firsthand confirmation of the facts." (*Feffer v. Malpeso*, 210 AD2d 60, 61 [1st Dept. 1994]). Some proof of liability is also required to satisfy the court as to the *prima facie* validity of the uncontested cause of action. (*Id*., at 61 ["[P]laintiff submitted no substantiation of the alleged [cause of action] .... unsupported by any other form of documentary or testimonial evidence."]).[4] "While the factual allegations found in the complaint... are deemed admitted, the court must nonetheless examine whether these facts give rise to the causes of action asserted.".[5]

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[2] *IMG Int'l Mktg. Grp. v. SDS William St., LLC*, 32 Misc.3d 1233(A), (Sup. Ct. NY 2011)
[3] *Id*.; CPLR § 3215(a)
[4] *IMG Int'l Mktg*, *supra*; quoting *Manhattan Telecom Corp. v. H & A Locksmith, Inc.*, 82 AD3d 674 [1st Dept. 2011].
[5] *IMG Int'l Mktg.*, *Id*.

ARGUMENTS

I. Final Judgment Should Be Made And Entered By This Court With Regard To Unit 1.

36. Plaintiffs respectfully request that Final Judgment be made and entered as against Unit 1. Defendants' counterclaims for breach of the Unit 1 lease were (1) wrongful taking of the cellar; (2) installation of an illegal spiral staircase in the cellar; and (3) illegal occupancy of the cellar (Exh. 42). The Appellate Division has determined that Plaintiffs were entitled to judgment as a matter of law on these claims, resolving all issues of controversy with regard to the Unit 1 lease. Thus, Plaintiffs should be provided Final Judgment in their favor with regard to Unit 1 and its Proprietary Lease.

37. Given the foregoing, Plaintiffs respectfully request that the Court order the Clerk to enter Final Judgment concerning Unit 1. Annexed hereto as Exh. 82 is a Proposed Final Judgment (2 copies so that the Court may remove one and use it for execution, if its form is acceptable).

II. Defendants' Claims Must Be Dismissed Pursuant to CPLR §3212; Defendants' Motion For Summary Judgment must be Denied.

38. Defendants' "counterclaims" or third-party claims distill down to Breach of Lease and Breach of Director/Officer Fiduciary to the Coop under BCL §717. These claims fail given the evidence presented in Plaintiffs' Statement of Undisputed Material Facts, and the facts set forth herein. The same evidence also defeat Defendants' motion for summary judgment, yet that motion should also be dismissed for failure to include a Statement of Material Facts, as well as a failure to provide affidavits from the Defendants, themselves.

A. Defendants' motion for summary judgment must be denied in its entirety.

39. Defendants' motion must be denied as they do not provide an affidavit from their clients to support the motion. CPLR §3212(b) requires that a motion for summary judgment must be supported by an affidavit. Defendants could not be bothered to provide any affidavit, save reusing a prior affidavit of Subramanyam addressing facts entirely unrelated to the claims of Breach of Lease for Unit 2, or Breach of Fiduciary Duty. As this affidavit has no relevant testimony related to the claims as either set out in the complaint or the arguments made in the Defendants' motion, their motion must be dismissed,

and all facts alleged by Plaintiffs in the Statement of material Facts, and in their affidavits, must be deemed admitted (*Berger v Pavlounis* 2011 NY Slip Op 50973(U)), and Plaintiffs' motion for summary judgment granted.

40. For the same reason, as they offer no affidavit in opposition to Plaintiffs' affidavits, summary judgment must be granted in favor of Plaintiffs as Defendants offer no facts from a party with personal knowledge in opposition to Plaintiffs' allegations in their affidavits. Absent any affidavits from the Defendants, "this court must deem the factual assertions in the Plaintiff's Statement admitted for purposes of the instant motion for summary judgment" (*Berger*, *supra*; citing *Callisto Pharm., Inc. v Picker*, 74 AD3d 545, 546 (1st Dept 2010) (affidavit "bereft of citations" to evidentiary support was ruled "inadequate" to contravene statement of undisputed facts).

41. Defendants motion must also be dismissed because they failed to provide a Statement of Material Facts, as required under Kings County's Commercial Division Rules (Exh. 77, "Motions"), and Uniform Rules, § 202.70(g), Rule 19-a. Rule 19-a requires "a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." "[F]ailure to file a responsive statement could be deemed an admission of the assertions made in the other party's properly filed Rule 19-a statement" (*Berger*, *supra*; citing *Moonstone Judge, LLC v Shainwald*, 38 AD3d 215, 216 [1st Dept. 2007]). Plaintiffs have offered their material facts, and all of them supported by evidence as referenced. Thus, the Defendants have admitted to all of the facts set forth (*Id.*).

42. Additionally, for the same reasons set forth in the following subsections of this Section II of this brief (incorporated herein by reference), Defendants' motion for summary judgment should be denied.

43. As a final note, the Defendants motion should be denied for failure to append a necessary document—Plaintiffs' Reply (Exh. 43) to the "counterclaims" (CPLR §3212[b]), which gave all of Plaintiffs' denials and defenses to Defendants' claims.

B. Summary dismissal of all breach of lease claims (Counts One to Four) is warranted.

44. Defendants offer no argument for why they are deserving of summary judgment in favor of their derivative claim for Breach of Lease. Nonetheless, their claims are set out in their counterclaims (Exh 42) which are addressed for summary judgment in favor of Plaintiffs. Defendants' breach of lease claims are divided between the lease Plaintiffs hold on Unit 1 (Exh. 7) and the lease they hold on Unit 2 (Exh. 9). All claims on Unit 1 have been summarily dismissed pursuant to the order of the Appellate Division, Second Department (Exh. 44). Pursuant to that decision, Plaintiffs' right to the cellar, as well as the lawfulness of their use and occupancy of the cellar, is confirmed. As no claims remain on Unit 1, Plaintiffs focus on the breach of lease claims on Unit 2.

i. Dismissal the claim for Breach of Lease—Unit 1

45. The Second Department has concluded that "plaintiffs established their prima facie entitlement to judgment as a matter of law dismissing the counterclaims alleging breach of contract based on the improper use or occupancy of the cellar within the corporation's building" (Exh. 44). Given this, Defendants' Counterclaims Counts One through Four are ostensibly dismissed as against Unit 1. Thus, Plaintiffs request Unit 1 be severed from the action, and Final Judgment on all claims against Unit 1 be entered in Plaintiffs' favor. A proposed Final Judgment is annexed hereto as Exh. 82.

ii. Dismissal the claim for Breach of Lease—Unit 2

46. Defendants offer no argument why they should be entitled to summary judgment on their breach of lease claims for Unit 2. To the extent that any part of their motion can be interpreted as a motion for summary judgment on this claim, Plaintiffs set forth as follows why summary judgment should be denied, and dismissal for this claim is warranted based.

47. Denial of summary judgment and dismissal of the claims is warranted for: (1) lack of subject matter jurisdiction (Exh. 43, defense 38); (2) lack of standing (*Id*., defense 35); (3) statute of limitations (*Id*., defense 4); and (4) various contract rule exceptions and because the condition has abated (*Id*., defense 10, 35 and 36).

Subject Matter Jurisdiction.

48. Defendants have failed to establish the Court's jurisdiction over the claim for Breach of Lease of Unit 2. As a matter of law, a tenant cannot be held in default of a lease under any of the terms and provisions thereunder unless and until the tenant is provided with written notice of default and an opportunity to cure (*Equinox Hudson Inc. v Hudson Leroy, Inc.*, 2015 NY Slip Op 30653[U]). The purpose of a notice to cure is "to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time." (*3170 Atl. Ave. Corp. v Jereis*, 2013 NY Slip Op 50235[U]; *ShopRite Supermarkets, Inc., v Yonkers Plaza Shopping, LLC.*, 29 AD3d 564, 566 [2nd Dept. 2006], quoting *Filmtrucks, Inc. v Express Indus. & Terminal Corp.*, 127 AD2d 509, 510 [1st Dept., 1987]). If, by its terms, the lease requires notice be given before any action may be taken, then the landlord has no claim until the lease terms are met. (*Mendez & Schwartz Wholesale Distributing Corp. v. 4701 Second Ave. Corp.*, 412 N.Y.S.2d 175, 67 A.D.2d 680 [2nd Dept., 1979]).[6]

49. Pursuant to Plaintiffs' Unit 2 lease (Exh. 9), the Coop is required to notice Plaintiffs by certified mail of default for the sublease at bar (*Id*. at Sec. 27, 30 and 30[c]). No notice has ever issued,[7] therefore, the Defendants have not established the jurisdiction of this Court as a matter of law.

50. Defendants will argue that "there was no board to issue such a notice", or complain that Plaintiffs were in power and would not be expected to serve notice on themselves. However, Art. 78 was available—and not just available, but required to cause the Coop to perform this ministerial act before an breach of lease claim could be made (*Maas v. Cornell Univ.*, 699 N.Y.S.2d 716, 719 [N.Y. 1999] ["when litigants fail to avail themselves of the CPLR article 78 avenue, courts may justifiably

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[6] When scrutinizing a cooperative's conduct in terminating a tenancy, the courts will, *inter alia*, examine the corporate rules, bylaws and leases to determine whether the action was authorized, whether the cooperative followed its own procedures for terminating a tenancy, and whether the cooperative acted in good faith and in the corporate interest to terminate the tenancy for the reasons alleged (*40 W. 67th St. v. Pullman*, 100 N.Y.2d at 156, 760 N.Y.S.2d 745, 790 N.E.2d 1174; *1050 Tenants Corp. v. Lapidus*, 39 A.D.3d 379, 383, 835 N.Y.S.2d 68 [2007]).

[7] Defendants fail to plead that a notice of default was served, and Defendants admit to no notice having been issued in Plaintiffs' Notice to Admit (Exh. A, Notice to Admit dated Feb. 14, 2014 ["Feb. NOA"] at ¶¶33-34).

dismiss plenary claims"]). Thus, respectfully, the claim against Unit 2 must be dismissed.

Correction of the Condition Causing the Alleged Breach of Lease.

51. Ostensibly, Defendants claim for breach of lease is an enforcement action; they seek eviction from Unit 2 upon the grounds of breach of lease Sec. 15 (Exh. 9). However, the condition causing breach has ended—subleasing has stopped since Q1, 2014 (Wynkoop Aff. ¶10; Keske Aff. ¶4)—a fact conceded by Defendants. As such, the breach has been cured, therefore the matter must be dismissed as it has become academic.

52. Trial on the issue of the sublease would lead to no resolution. Pursuant to RPAPL §753(4), "[i]n the event that [a] proceeding [to recover possession of premises in the City of New York occupied for dwelling purposes] is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a ten day stay of issuance of the warrant, during which time the respondent may correct such breach." If a trial were to proceed and breach of lease found thereafter, RPAPL §753(4) would impose an automatic stay to allow Plaintiffs to remedy. The breach has already been remedied, therefore dismissal is required by law.

The Claim Has Become Time Barred.

53. "[S]tock allocated to and the proprietary lease for a cooperative apartment are personalty, [making] a contract for the sale of the stock and proprietary lease [] governed by UCC Art. 2. Accordingly, the contract herein is governed by the four-year statute of limitations set forth in UCC 2-275(1)" (*Measom v Greenwhich and Perry St. Hous. Corp.*, 227 AD2d 312 [1st Dept. 1996]). Borland left in the first quarter of 2014 (Wynkoop Aff. ¶10; Keske Aff. ¶4). That is more than 4 year ago. Thus, the time to bring a claim for breach of lease has expired pursuant to UCC 2-275(1).

54. Defendants will argue this action tolls the statute of limitations. However, as the Defendants failed to comply with the notice requirement under Plaintiffs' lease (Exh. 9), they never invoked the Court's jurisdiction for the tolling rule to apply (*3170 Atl. Ave. Corp., supra*; *ShopRite, supra*; *Mendez & Schwartz, supra*). Thus, the statute of limitations was not tolled.

Right to Sublease Pursuant to BCL §501(c).

55. BCL §501(c) "prohibits unequal treatment of shareholders holding the same class of shares" (*Bergman v 111 Tenants Corp.*, 2011 NY Slip Op 50372 [NY Sup. Ct. 2011]; citing *Matter of Green [Republic Steel Corp.-Levine]*, 37 NY2d 554, 558 [1975], and *Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204 [1st Dept. 1997]). Subletting rights "must be applied equally to similarly situated shareholders (*Bergman*, *Id*., citing *Spiegel*, *Id*.; *Wapnick v Seven Park Ave. Corp.*, 240 AD2d 254 [1st Dept. 1997], and *De Soignes v Cornasesk Gouse Tenants Corp.*, 2003 WL 25514873).

56. Plaintiffs began subleasing Apt. 2 at-will because all other shareholders were doing the same (Wynkoop Aff. ¶9, 11, 13, 51, 72; Keske Aff. ¶4-5; Exh. 5, 21). At-will leasing was not just exercised by Plaintiffs for themselves, but agreed to by Plaintiffs in conjunction with all other shareholders, including Subramanyam, who consented to former shareholder Chris Sahm subleasing at will (Wynkoop Aff. ¶73, Keske Aff. ¶5; see Exh. 3 P-20 ¶16). Under BCL §501(c), Plaintiffs cannot now be treated differently just so Defendants can change the rules and obtain advantage in litigation.

The Lease Terms Gave Plaintiffs Right to Sublease to Borland.

57. The lease provides at Sec.15 that there is no limit to how consent can be granted – *to wit*: the lease specifically states as follows:

> *"There shall be no limitation on the right of [] Lessees to grant or withhold consent, for any reason or no reason, to subletting."*

As such, the lease terms provide the right of the shareholders to ascribe any condition to their consent to sublease. Here, Plaintiffs received shareholder consent to sublease until they elected to connect Unit 1 to Unit 2 (Exh. 21). Thus, Plaintiffs acted in accordance with their lease.

58. Moreover, Plaintiffs' sublease was in accordance with the Coop's lease in any event. Renewed consent from the Board or the Shareholders is only required where the sublease is renewed, or a new sublease is made (Exh. 9 Sec.15). Here, the sublease to James Borland had not ended. There was no written sublease agreement between Borland and Plaintiffs (Wynkoop Aff. ¶10, Keske Aff. ¶4). It was an ongoing month-to-month sublease, subject to a clear understanding and agreement between

Borland and Plaintiffs that the rent would change whenever the maintenance obligation for Plaintiffs would change (Wynkoop Aff. ¶10, Keske Aff. ¶4; Exh. 22). Such a tenancy arrangement is called an "indefinite month-to-month lease"—where the tenancy is month-to-month, subject to a reservation of rent change inuring to the benefit of the landlord—which is recognized and entirely enforceable under NYS law (*Gerolemou v. Soliz*, 184 Misc 2d 579, 710 NYS2d 513 [N.Y. Sup. Ct., 2000]). Thus, Plaintiffs never breached the lease under these circumstances.

Exceptions to the Contract Rule.

59. Plaintiffs are exempt from liability under the doctrine of "mutual mistake". "A 'mutual mistake' occurs when 'both ... parties to a bilateral transaction share the same erroneous belief and their acts do not in fact accomplish their mutual intent.'" (*Healy v. Rich Products Corp*, 981 F. 2d 68 [2d Cir. 1992], citing 21 N.Y.Jur.2d Contracts § 121 [1982]). As stated, Plaintiffs did nothing more than what they were told they could do, and did nothing more than what every other shareholder who granted the consent was doing – subleasing at will (Wynkoop Aff. ¶11, Keske Aff. ¶5; Exh. 5 and 21). Plaintiffs cannot now be held in breach of the lease for conducting themselves as they were told they could, and as the shareholders and Coop permitted for all other shareholders.

60. The doctrines of Collateral and Promissory Estoppel also apply. Both doctrines require "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Williams v Eason*, 49 AD3d 866, 868 [2008]). Prior shareholders granted Plaintiffs unambiguous consent to sublease at will without need to renew consent (Exh. 21). Plaintiffs reasonably relied upon this representation (bolstered by their similar conduct). Even Subramanyam consented to such conduct by prior-shareholder-Sahm (Wynkoop Aff. ¶¶11, 72, Keske Aff. ¶5; Exh. 3 P-20 ¶16). Defendants are therefore collaterally estopped from claiming a breach of the lease.

61. Also applicable is the Doctrine of Laches. Under New York law, laches is defined as "such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great,

and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.'" (*In re Estate of Barabash*, 31 N.Y.2d 76, 81, 286 N.E.2d 268, 271, 334 N.Y.S.2d 890, 891 [1972] [quoting 2 Pomeroy, Equity Jurisprudence § 419, at 171-72 [5th ed. 1941]). The essential element of the equitable doctrine is delay which is prejudicial to the opposing party. (*Id.*; *Eastern Shopping Centers, Inc. v. Trenholm Motels, Inc.*, 33 A.D.2d 930, 306 N.Y.S.2d 354 [1970]; *Kearns v. Manufacturers Hanover Trust Co.*, 51 Misc.2d 34, 272 N.Y.S.2d 535 [1966]). Plaintiffs had been subleasing with permission for 20 years before Borland was forced to move out. To allege now a breach of lease, without even a notice of defect, is self-serving. Laches must apply.

Defendants Now Lack Standing.

62. When Defendants brought their derivative claims, they did so because they were not in power, and had no control over the Coop. Now, they are in power, and thus have lost standing to maintain this action. Derivative claims are brought on behalf of all other absent shareholders, therefore a derivative "plaintiff must [] demonstrate that [he] will fairly and adequately represent the interests of the shareholders and the corporation, and that [he] is free of adverse personal interest or animus" (*Steinberg v. Steinberg*, 106 Misc. 2d 720, 721 [Sup. Ct. N.Y. County 1980] [citation omitted]; see also *Gilbert v. Kalikow*, 272 A.D.2d 63 [1st Dept. 2000]). As fully described in the arguments in favor of Plaintiffs' claims for breach of shareholder fiduciary duty (Sec. II herein), the Defendants' motivations are only their own—not all shareholders, or the Coop. With that said, as they are now purportedly "the board", they have come into conflict with the Coop's interests. If their claims are meritless, they will not withdraw them, or take any action to confirm their validity. That has proven true, given the dismal list of grounds for continuing them.

63. Defendants are no longer in a position to bring a derivative claim for the Coop, because they are now the Coop—it is a conflict. Therefore, they have no standing.

C. Summary dismissal of Defendants' Conversion claim (Count Six) is warranted.

64. Defendants allege in this counterclaim that Plaintiffs used Coop funds for "personal use and

enjoyment", which they generally describe as payments to attorneys retained to represent the Coop (*Id.* p.47). This claim must be dismissed as duplicative of the Breach of Director Fiduciary Duty claim (Count Five). (*Torrance Constr., Inc. v Jaques* 2015 NY Slip Op 02813).

65. Just as Defendants describe it, "Conversion" is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights (*Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 288-289 [2007]). Where the property alleged converted is money, conversion occurs when funds designated for a particular purpose are used for an unauthorized purpose (see *Meese v Miller*, 79 AD2d 237, 243 [1981]). Proof of a demand for the return of the subject property "is an essential ingredient in a conversion action" (*Scharge v Waterview Nursing Care Ctr., Inc.*, 2010 NY Slip Op 50353(U), 26 Misc 3d 1232[A]; citing *Tache-Haddad Enters. v Melohn*, 224 AD2d 213 [1996]).

66. Defendants fail to state anywhere in their Answer (Exh. 42) that any demand for the return of the money was made by the Coop—because there has never been such a demand (Wynkoop Aff. ¶60; Keske Aff. ¶7). They fail to even assert this in their motion for summary judgment. Thus, the claim must be dismissed. To the extent that Defendants may argue demand futility, and/or that they were without knowledge of the alleged "conversion" to be able to demand return to the Coop, or that the Coop had no board, or that they were without power to make the demand on behalf of the Coop, procedure was still available to them. Under BCL §624, Defendants could have demand books and records. Moreover, once again, Art. 78 was available, if the Books and Records were not forthcoming, and to compel a demand letter to be issued for the return of the property (*Maas, supra*). Thus, procedure was available to them, and, again, they did not use it. Instead, they skipped right to the claim of conversion (which repeats their claim of breach of fiduciary duty).

67. Notwithstanding the foregoing, Defendants' conversion claim still fails on the facts and evidence. At the outset, the money was used to pay an attorney for the Coop, to represent it in trials before the ECB (Exh. 38) and the last action under Index No. 6548-2012 (Exh. 36), which were

substantially successful; and the evidence shows no funds were used for personal purposes at all. Also, there is an ECB fine which is related to Plaintiffs' property, but that is covered by the lease. To the extent that Defendants are alleging that payments to Corey Hardin, the attorney for the Coop who replaced the prior attorney, Brian Murphy, who needed to retire from law due to suffering 9/11 Syndrome, his retainer was (a) an extension of Mr. Murphy's retainer; (b) his payment was for representing the Coop in all matters; (c) with regard to the other action made under Index No. 504653-2013, not only does Defendant fail to show where or in what amounts he was paid for that action, but the check payments to Mr. Hardin all coincide with appearances on a multitude of Defendants' motions in the action under Index No. 6548-2012 (as further described in the arguments against Breach of Fiduciary Duty; see also Exh. 24-B with the Court Schedule, Exh. 78); and (d) of the claims brought in the Complaint (annexed to Defendants' papers as D.Ex. N), the Eighth, Eleventh, Twentieth and Twenty-First Causes of Action—all of which sought recovery and/or enforcement of the leases between the Coop and Defendants, to repay the Coop its legal costs and expenses incurred by the Coop as a consequence of Defendants' actions—would have been successful if prosecuted. *To wit*:

Claim 8 (D.Ex. N p.50) sought indemnification from Defendants for the Coop's obligation to indemnify the Plaintiffs under Art. VII of the bylaws (Exh. 16). The Defendants claim for breach of director fiduciary duty had already been dismissed in March of 2013 (Exh. 37)—it just had not been put in a written order as yet (which occurred Nov. 7, 2013, Exh. 36). The Coop was already obligated to repay Plaintiffs, and the Coop sought indemnity for the cost, a requirement under their leases at Sec. 28 (Exh. 12 and 14). That claim would be successful because the Defendants are contractually obligated to repay the Coop its legal costs incurred as a consequence of their actions.

Claim 11 (D.Ex. N p.55) seeks recovery from Subramanyam of costs to repair the roof, based on Subramanyam's contractual obligation to repair it himself, at his cost, as per Sec. 7A of the lease (Exh. 14). The Appellate Division has determined Sec. 7A enforceable (Exh. 44). Defendants have used Coop funds to pay for the repair of Subramanyam's roof (Exh. 47). There can be no doubt

that the Coop would have been successful on this claim, and now must recover the funds misappropriated by the Defendants collectively.

Claim 20 (D.Ex. N p.69), like Claim 8, sought, pursuant to Sec. 28 of the Defendants' leases (Exh. 12 and 14), indemnification of all legal costs incurred by the Coop as a consequence of Defendants' conduct, therefore, it would have been successful.

Claim 21 (*Id.*) sought declaratory judgment of all of the foregoing. Likely successful, if the purpose was to declare, as a matter of law, a right of the Coop—such as the right to hold Subramanyam bound by Sec. 7A and obligated to repair the roof and pay for it.

68. If the claims brought would be successful, and, in fact, have indirectly become successful (such as the enforcement right of Sec. 7A against Subramanyam, a consequence of the Appellate Division decision at Exh. 44), it cannot be said that the action brought was inappropriate. If money was spent on it by the Coop to Mr. Hardin as its attorney, it was money properly spent to pursue the Coop's rights against the Defendants. To the extent that the Defendants argue that there was no authority to bring the claim, that is a question for Breach of Fiduciary Duty, which makes conversion duplicative of that claim necessitating dismissal. That said, there was due authority, as will be discussed in the following section with arguments for dismissal of Breach of Fiduciary Duty (all of which are incorporated here by reference for why conversion should be dismissed).

D. Summary dismissal of Defendants' Breach of Fiduciary Duty claim (Count Five) is warranted.

69. Directors and officers in a closely held corporation owe the corporation a fiduciary duties of care and loyalty (*Stavroulakis v Pelakanos*, 2018 NY Slip Op 50180[U]; citing *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept. 2007]; *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]; see also BCL §717[a]. The duty of loyalty imposes on directors an obligation not to "assume and engage in the promotion of personal interests which are incompatible with the superior interests of their corporation " (*Foley v D'Agostino*, 21 AD2d 60, 66-67 [1st Dept 1964]).

70. Defendants fail to plead a breach of the duty of care because, in either their complaint or

their motion for summary judgment, they do not "plead facts [that Plaintiffs] has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome'" (*Matter of New York City Asbestos Litig.*, 89 NY2d 955, 957 [1997]). Thus, there is no breach on the duty of care grounds.

71. Defendants' Answer with Counterclaims, however, plead a breach of loyalty in an overly generalized, barebones and vague manner, in the form of alleged misuse of Coop funds. Separating the breach of lease claims, which cannot be co-mingled with business tort claims[8], their allegations are:

a) Plaintiffs acted as directors without authority;
b) Spent Coop funds without authority;
c) Refused to permit shareholder meetings per the Bylaws;
d) "Squandering" Coop funds to defend actions made on a personal capacity;
e) Failing to repair the roof; and
f) Failing to keep the units properly heated.

(Exh. 42, p.46).

72. Roof repairs and heating are not derivative claims. They are obligations of the Coop, and a director's failure to institute proper building management is a BCL §717 claim, and both are subject Multiple Dwelling Law, Housing Maintenance Code, and Art. 78 proceedings—thus, they are personal claims and cannot be brought derivatively against a director[9]—as the Court concluded in the previous action under Index No. 6548-2012 (*res judicata*) concerning claims that Plaintiffs "did not permit" shareholder meetings (Exh. 36 p.7, referring to Exh. 37 at Tr.3:24-5:6). Moreover, the Appellate Division, having confirmed (at Exh. 44) the validity of Sec. 7A of the parties' leases (Exh. 7, 9, 12 and 14), has confirmed that liability for the roof runs only to Subramanyam.

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[8] Business torts which are covered under contract are considered duplicative of a contract claims, and are therefore subject to dismissal (*Retty Financing, Inc. v. Morgan Stanley Dean Witter & Co.*, 293 A.D.2d 341, 740 N.Y.S.2d 198; *Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 417, 694 N.Y.S.2d 424; *Sutton Park Development Corp. Trading Co., Inc. v. Guerin & Guerin Agency, Inc.*, 297 A.D.2d 430, 432, 745 N.Y.S.2d 622.

[9] Similarly, claims including the "denial of access to the corporate books and records" of a cooperative and the "withholding of financial information" have been held to be individual (see *Roy v Vayntrub*, 15 Misc 3d 1127[A], 2007 NY Slip Op 50868[U] [Sup Ct, Nassau County 2007]; *Arfa v Zamir*, 2008 NY Slip Op 33348[U], *5 [Sup Ct, NY County 2008]).

73. With regard to "taking action as directors without authority", Defendants essentially argue that anything and everything the Plaintiffs did was "unauthorized". Effectively, Plaintiffs paying a bill was "unauthorized"; paying taxes was "unauthorized"; filing registration and other papers for the Coop with the City was "unauthorized"; hiring vendors to repair the building was "unauthorized"; executing Defendants' paperwork for their loans and their purchase of shares, and their leases was "unauthorized". Even assuming that such acts were "unauthorized" (which they were not), none of this harmed the Coop—it benefited the Coop, and even Defendants. Nonetheless, this Court already determined that Plaintiffs assumed the roles of, and continued as, directors from the day they became shareholders (law of the case, Exh. 20 p.6-7), and through Defendants' shareholder/tenancy (*Id.*), until recently replaced by (an erroneous) court decree. For Plaintiffs' acts to be ultra vires, they must have known that their actions exceeded their or the Coop's authority, and placed it in liability (*Simon v Socony-Vacuum Oil Co., Inc.*, 179 Misc. 202; 3 Fletcher Cyclopedia Corporations [Perm. Ed.] §1039). As Plaintiffs had been acting in the capacity of director and officer for 20 years (Exh. 20 p.6-7), they had no such knowledge—they acted in same fashion as always, since they became shareholders (*Id.*).

74. Notwithstanding this, Defendants seem to have narrowed their breach of director fiduciary duty down to one allegation of purported use of Coop funds for Plaintiffs' "own personal use and enjoyment" (D.Br. p.34): the use of Coop funds for the payment of legal fees to the Coop's attorney, Corey Hardin, bringing an action against the Defendants on behalf of the Coop under Index No. 504653-2013 (annexed to Defendants' papers as D.Ex. N).[10] Put another way, in the context of the law which guides the review of this assertion, Defendants' are essentially claiming that Plaintiffs "assume[d] and engage[d] in the promotion of [Plaintiffs alleged] personal interests which are incompatible with the superior interests of their corporation " (*Foley, supra*). Yet, analysis of the complaint shows that the claims within were not only legitimate rights and interests of the Coop, they were not "incompatible" with Plaintiffs' rights.

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[10] It must be pointed out that Defense Counsel's segregated reference "including Defendants' maintenance" is a manipulation. It implies that money was taken from Defendants and used by Plaintiffs. That is false.

75. Defendants failed to establish how the complaint filed by the Coop (D.Ex. N) promoted an "incompatible" interest between the Coop and Plaintiffs. As discussed in the above rebuttal to Defendants' Conversion arguments, review of the Coop's complaint shows at least four claims which were not only meritorious, but likely to succeed given the facts and current decisions made by the Appellate Division. *To wit*: Causes of Action Eight, Eleven, Twenty and Twenty-One

76. Cause of Action Twenty (D.Ex.N) sought to enforce the Coop's right to indemnification of legal costs and fees from Defendants pursuant to their lease (at Sec. 28, Exh. 12 and 14). The Appellate Division has concluded, as a matter of law, that there is no illegal condition or taking of the cellar, therefore no breach of the Unit 1 lease (Exh. 44)—those claims are now dismissed. Plaintiffs are now entitled to recover from the Coop their legal fees under their lease for Unit 1 (Exh. 7, Sec. 28, in view of RPL §234). Claim Twenty sought indemnity from Defendants for this due expense because it was incurred by the Coop as a consequence of "defending, or asserting a [claim and] counterclaim" (Exh. 12 and 14, Sec. 28) caused by Defendants' frivolous derivative action on its behalf. Therefore, per their lease, "the expense thereof to the [Coop], including reasonable attorneys' fees and disbursements, shall be paid by the [Defendants] to the [Coop]". Yet, even if the lease did not apply, the Coop would still have right to indemnity from the Defendants simply because the Coop's liability is a consequence of Defendants' frivolous claim made on the Coop's behalf.

77. Similarly, the Coop's Eighth Cause of Action, seeks from Defendants indemnity for the Coop's obligation to repay the Plaintiffs for the dismissed breach of fiduciary duty claims in the action under Index No. 6548-2012. Art. VII of the bylaws states that "the [Coop] ***shall*** indemnify any person, made a party to an action by or in the right of the [Coop] to procure a judgment in its favor by reason of the fact that he [or she]… is or was a director or officer of the [Coop] against the reasonable expenses, including attorney's fees, actually and necessarily incurred by him [or her] in connection the defense of such action, or in connect with an appeal therein" (Exh. 16, emphasis added). Repayment is Plaintiffs'

contractual right.[11] Defendants sued Plaintiffs on behalf of the Coop for Breach of Director Fiduciary Duty, and the lost—those claims dismissed on their merits (Exh. 36 and 37). Thus, Plaintiffs are indemnified by the Coop per the bylaws. As the liability is due to Defendants' frivolous claim, the Coop is entitled to seek from them indemnification for it. These Claims were no incompatible.

78. With regard to the Coop's Eleventh Cause of Action, it sought to enforce Sec. 7A of the Proprietary Lease as it applies to the roof. The Appellate Division confirmed Sec. 7A (Exh. 44). Thus, the Coop, in seeking to repair the roof, sought from Subramanmyam—who refused to repair at his own cost—his obligation to pay for the repair per Sec. 7A. That claim would have succeeded given the Appellate Division's enforcing Sec. 7A (Exh. 44). Thus, this Claim was not incompatible. In fact, the Coop must now recover that cost presently because Taylor and Subramanyam conspired to use Coop funds to pay for a recent repair of Subramanyam's roof (Exh. 47).

79. As for the Twenty-First Cause of Action of the complaint filed by the Coop, declaratory judgment was sought as to the Coop's various rights, which included its rights under the lease, its rights to disbursements per the lease and the bylaws, etc. That Claim is not incompatible.

80. The ultimate point with regard to the foregoing four claims is that they were, likely to succeed (given the current state of affairs), and not "incompatible" with Plaintiffs' interests (*Foley, supra*). In fact, all of the remainder of the claims made in the complaint were not "incompatible" with Plaintiffs' interests—even if the claims were similar or the same to those made by Plaintiffs. It becomes a breach of the duty of loyalty only if the interests advanced are incompatible with the Coop's "superior interest" (*Id.*), and since none of the claims indicate an interest of Plaintiffs placed above the interests of the Coop, there is no breach of fiduciary duty. In actuality, all of the claims brought by the Coop protect the Coop's pecuniary interests (prevent it from bearing the cost burden caused by Defendants), and all other legal interests (including recovery of costs and damages to the Coop) as when a party

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[11] Coop bylaws constitute a contract with the shareholder-tenants (See *Lesal Assoc. v Board of Mgrs. of the Downing Ct. Condominium*, 309 AD2d 594 [1st Dept. 2003]; *Benjamin v Madison Med. Bldg. Condominium*, 2008 WL 5478708, 2008 NY Misc LEXIS 10726 [2008], *affd* 66 AD3d 510 [1st Dept. 2009]; *Mishkin v 155 Condominium*, 2 Misc 3d 1001[A]; see also *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]).

brings an action on a set of facts, all possible claims must be brought lest they are waived.

81. Defendants argument seems really to assert that the Coop complaint (D.Ex.N) was "unauthorized" (D.Br. p.34) because it was brought against them. The authorization they seem to assert was needed was their own—i.e. Defendants had to consent to the Coop suing them. THAT is an incompatible interest. It is beyond caval that the Defendants would never have approved the Coop to sue themselves. As such, Plaintiffs were the only authorized parties to have the Coop pursue litigation to enforce its rights under contractual and common law. After all, the Defendants concede that Plaintiffs were directors at the time—they insist that there was a stipulation made on Apr. 30, 2013, which placed all parties on the board of directors (D.Br. p.3, 25)—and they have also argued that Plaintiffs were directors with power and authority to spend Coop funds to repair building damage (to repair the façade, see D.Br. p.25). Why, then, do they not have authority to bring a lawsuit in the right of the Coop against tortfeasors? It is not that the lawsuit was brought, it is that it was brought against Defendants. It is Defendants' "personal interests [that are] incompatible with the superior interests of [the Coop] " (*Foley, supra*), making this derivative claim for breach of director fiduciary duty improper and without merit (incurring greater cost to the Coop to the Plaintiffs per Art. V of the bylaws, Exh. 16).

82. Finally, though addressed in detail already in the Statement of Facts above, Defendants' continued assertion that Coop counsel—Mr. Hardin—was not validly retained is wrong, and the Court agreed. As described in the Statement of Facts herein above, contrary to Defendants' continued assertion that he was not validly retained, Mr. Hardin's retainer has been confirmed by the Court twice. As stated earlier, Mr. Hardin's retainer was in conjunction with the retainer of Mr. Murphy, who chose Mr. Hardin to replace him when he was incapacitated by 9/11 Syndrome. Yet, as also pointed out earlier, Messrs. Murphy and Hardin would never have been retained if not for Defendants' conduct (Wynkoop Aff. ¶59, Keske Aff. ¶11). Also, his retainer was prior to Apr. 30, 2013 (Exh. 24-B)—Defendants' all-important date to (incorrectly) say they were on the board—while Defendants were still directors with authority to hire him (law of the case, Exh. 20 p.6-7), and was retained to represent the

Coop in ECB matters and in the prior action (Index 6548-2012) to defend the Coop against Defendants' misuse of governmental administrative agencies (Exh. 38), Defendants' numerous motions (Exh. 72, 78), and to argue in support of the Coop's joint motion with Plaintiffs (Exh. 60) to dismiss Defendants' the frivolous derivative complaint founded on fraud. And it is important to remember that the retainer resulted in success in ECB (Exh. 38), success in the last action on the breach of fiduciary duty claims (Exh. 36 p.7 referring to Exh. 37 Tr.3:24-5:6), and would have led to success on the Unit 1 lease claims (Exh. 44). Moreover, Mr. Hardin was tasked by the Court to draft the stipulation that the Defendants assert was made between the parties (Exh. 76)—the stipulation the Defendants refused to sign (Exh. 75). And ultimately, Defendants made a motion in that action to disqualify the Coop's counsel on the assertion that it was "unauthorized" (Exh. 72), which was denied (Exh. 36); and they made the same motion in this action (Mtn. Seq. 13), on the premise that the retainer was "unauthorized", and it was denied again (Exh. 45). How many different ways can the Court say the retainer was proper?

83. It bears noting here that the Coop's legal costs are mounting at a far greater rate than when Plaintiffs were in charge. This Court concluded that neither side should have the right to retain an attorney (Exh. 45 at p.5). The costs to the Coop were minimal up to that point (a total of $4,800). Then Defendants obtained (wrongful) control of the Coop and hired two sets of attorneys in violation of the Court's order (Adam Leitman Bailey PC, and Ganfer and Shore). The Coop's legal costs were over $36,000 by end of 2016 (Exh. 49). Imagine what they have mounted to as of today, especially with the federal claim they have brought as well (Exh. 49).

III. Defendants' Motion For Summary Judgment Should Be Denied; Summary Judgment In Favor Of Plaintiffs' Claims Is Warranted.

84. Plaintiffs respectfully request leave to withdraw, without prejudice, their claims for tortious interference with contract (Twenty-First Cause of Action) and slander of title (Twenty-Second Cause of Action).

A. Defendants' arguments for Summary Judgment dismissing Plaintiffs' claim for breach of shareholder fiduciary duty fails, while the evidence supports a grant of Summary Judgment in favor of Plaintiffs on this claim.

85. "Shareholders in a close corporation owe each other a duty to act in good faith" (*Patti v. Fusco*, No. 10717-05, 2005 WL 3372976, at *2 [Nassau County 2005], citing *Matter of Cassata v. Brewster-Allen-Wichert, Inc.*, 248 A.D.2d 710 [2d Dept.1998]). "'The relationship of such shareholders is a fiduciary one." (*Fusco*, *Id*., at *2; citing *Brunetti v. Musallam*, 11 A.D.3d 280 [1st Dept.2004]). The duty also requires "an extreme measure of candor, unselfishness and good faith" (*Harger v. Price*, 204 F.Supp.2d 699, 707 [S.D.N.Y.2002], citing *Kavanaugh v. Kavanaugh*, 226 N.Y. 185, 193 [1919]). A shareholder "may not act for the aggrandizement or undue advantage of the fiduciary(ies) to the exclusion or detriment of the shareholders." (*Harger*, *supra* at 707 [internal quotes omitted]; citing *Alpert v. 28 Williams St. Corp.*, 63 N.Y.2d 557 [1984]).

86. At the outset, Defendants argument that "there is no record evidence of who complained to the [DOB] about Wynkoop's bicycle" is a grossly misleading statement. First, there is a record of the complaints that led to the violation involving Wynkoop's bike—at Exh. 3 P-259, the Defendants annexed to their motion for summary judgment in the prior action (Index 6548-2012) an "Exhibit U" which was a complaint to HPD (dated Apr. 19, 2012, *after* Defendants brought their derivative claims about the cellar Exh. 32) and it identifies Mr. Taylor as the complainant; Defendants' counsel confirmed that Defendants contacted HPD and DOB at Exh. 3 P-59; and Defendants also TESTIFIED that they contact HPD and DOB about "Wynkoop's and Keske's illegal occupancy of the cellar" at Exh. 3, P-14 ¶59—an affidavit Defendants also annexed to their own papers for this motion as D.Ex.L. Not only is there no affidavit from Defendants asserting what Defense Counsel has alleged in their Brief, but **Defense Counsel has made a blatantly false and misleading statement to this court**—implying with their statement that Defendants did not commit the act they most assuredly did commit. This is in keeping with Defense Counsel's conduct of record before this and other courts (see sanctions for various misconduct at Exh. 62-64), and this Court should consider sanctions against Defendants for this

unethical conduct here.

87. Next, the fine for Plaintiffs' bike occurred only because the Defendants were attempting to manufacture evidence to substantiate an otherwise meritless derivative claim of an illegal cellar. They do not even deny in their papers (and fail to offer an affidavit) that this violation and fine occurred because they were trying to use the DOB and HPD to create evidence of a condition that did not exist; that the fine did not occur the first time because the ECB determined that Plaintiffs' bike in the hallway was not a violation; that the fine resulted from repeated efforts to obtain some violation (Exh. 38)—ANY violation—that they could use against Plaintiffs for purposes of litigation; or that the violation and fine resulted in a one-sided effort by Defendants for a condition they, themselves, were creating as well (Exh. 3 P-265). The disingenuousness of this argument is undeniable, and the argument is insufficient to warrant dismissal of Plaintiffs claims.

88. With regard to their arguments concerning their withholding of rent, they allege that such withholding was authorized by order of the court in the prior action, Index No. 6548-2012, and further assert that the conduct only harms the Coop, and therefore is not available as a claim for breach of shareholder fiduciary duty. First, Defense Counsel knows full well that the Court did not order or authorize withholding of rent past the dates of Arp. 30, 2012 or Nov. 7, 2013; and Defense Counsel knows that it was not a permanent right Defendants could exercise until they decided they did not want to anymore. Defense Counsel refers to orders allegedly "authorizing" the diversion of Coop rent to the clerk, but does not offer the orders. They are attached herewith at Exh. 34, and not only were they self-expiring, but the same judge clarified them in the order included in this exhibit, stating that the order were unequivocal on their face. Once again, Defense Counsel is giving limited and misleading information which should be sanctioned. Notwithstanding this, assuming these orders granted the right to Defendants to divert their rent to the clerk, they continued to do it after that action was dismissed, during the pendency of this action, until Oct. of 2015 (Exh. 69)—essentially Defendants are now in violation of the order they claimed gave them the right because they decided to stop without an order to

vacate the order they relied on. The argument is disingenuous, false and misleading, and sanctionable.

89. As to their argument that the only harm is to the Coop, this misunderstands breach of shareholder fiduciary duty. As described above, a shareholder has breached a duty to another shareholder when they take actions to aggrandize themselves, for a personal benefit. Defendants withholding of rent was (1) based on a false assertion that a court order gave them the right, (2) to support a false claim that Plaintiffs were stealing money, and (3) to deprive the Coop of its income as a means to pressure and harass Plaintiffs (with the façade leaks, Exh. 52) and gain advantage in litigation (either to pay out of pocket for Coop expenses and deplete their funds to defend the action, or to put them in fear of losing their home while Defendants lived elsewhere safely).

90. The remainder of Defendants' arguments are nonsensical or misinterpret the law. As the authority above provides, where the Defendants act to aggrandize themselves—even if they are directors—and such conduct is in bad faith, to disadvantage Plaintiffs, it is actionable. Generally, Defendants have engaged in a series of misdeeds, all aimed at taking control of the Coop and of Plaintiffs' cellar, for the singular purpose of selling their apartments at top dollar. As described by Wynkoop and Keske in their affidavits (Wynkoop Aff. ¶33, Keske Aff. ¶28), the Defendants were making preparations to sell their apartments and move to homes larger than 570 square feet. Real estate agent brochures were seen circulating the hallways of the Coop at the mail boxes (*Id.*), and Defendants were entering into marriage to grow families of three to five (Exh. 25 Tr. 22:5-17; Exh. 28 Tr. p. 12 42:2-12, 45:23-46:47:9).

91. In contemplation of this sale, the Defendants first pursued the repair of a roof (Wynkoop Aff. ¶25-33, Keske Aff. ¶29), but by seeking repayment for the majority of the cost through the Coop and from the shareholders (*Id.*; Exh. 3 and 32), though the responsibility was Subramanyam's alone (per his lease at Exh. 14). Once the repair was completed, when Plaintiffs were not paying the alleged "share" of the cost, the Defendants used the Coop to cajole it from them—they each threatened to withhold Coop rent unless they were repaid (Exh. 32 p.27 and 30). Once wrongfully recovering their

money from Plaintiffs, they then started making noise about the Coop finances in reference to making cosmetic improvements to "ensure the building is viewed positively by lenders for the future" sale of their apartments (*Id*. at p.24).

92. The situation then deepened. Never mind that, after requests to meet about the finances, Plaintiffs agreed to such a meeting once the Coop finances were completed by the accountant (*Id*. at p.34), this was not fast enough. In fact, meeting to discuss Coop finances and "other issues" (which was only the damage caused by Subramanyam's roof, *Id*. at P-30 [email dated Nov. 6, 2011] and P-34) was no longer enough at all. Instead, the Defendants wanted full control over the Coop, or else they would sue (Exh. 33 P-57).

93. Unabashed in their effort to force Plaintiffs to give them total control (*Id*.), when Plaintiffs refused, the Defendants were good to their word, they sued the Plaintiffs—alleging for the first time claims of wrong-doing as directors which only affected their personal rights, and claiming for the first time that Plaintiffs' sublease was a breach of lease—a sublease had for 15 years, with shareholder consent (Exh. 21), a consent Plaintiffs and Subramanyam gave to other shareholders (Chris Sahm), *and* without so much as a word (or notice) of protest of the sublease before the action, ever (Wynkoop Aff. ¶9-11, Keske Aff. ¶4-6; Exh. 21), shared not just with Plaintiffs, but by Plaintiffs and Subramanyam, their sublease allegedly violated the lease. However, their ambitions expanded beyond just using litigation to pressure Plaintiffs into ceding control. Now they sought to revoke Plaintiffs' leased right to their cellar space in Unit 1 (Exh. 32). Suddenly, and for the first time, Defendants alleged that Plaintiffs cellar was illegally held and occupied by them (*Id*.); that Plaintiffs should be evicted from the cellar and pay to have it turned into storage space for their Units. This would absolutely and greatly increase the value of Defendants' Units—after all, as they complained, they incurred an additional $136/mo in offsite storage fees. How much more valuable would their Units become if they could offer storage?

94. Of course, the Defendants had nothing to support their claims concerning the cellar, so they set about manufacturing evidence. After they filed their complaint against the Plaintiffs (*Id*.), they tried

to prove their claim that the cellar was illegal by calling in a complaint to HPD/DOB, falsely alleging that there was an apartment in the cellar (Exh. 38 p.1)—there has never been a separate apartment in the cellar (Wynkoop Aff. ¶40, Keske Aff. ¶25; Exh. 15). They were merely looking to create the evidence to substantiate claims the knew could not be proven, and stated as much through their lawyer (at Exh. 3 P-59 – "There is absolutely nothing wrong with my clients contacting agencies of the City…when they have every reason to believe there are violations of the laws"; prima facie evidence showed that there never were any violations of the law and that Defendants were fishing, see Exh. 44).

95. A violation to the Coop resulted (*Id.*) because Plaintiffs would not let a government agent into their private residence without a warrant—as is their constitutional right. Upon its occurrence, they began using this violation as proof of Plaintiffs misconduct—breach of fiduciary duty as directors/officers—notwithstanding that the violation was the result of Defendants' unclean hands (resulting from their actions to cause the breach of law and lease to support their claim of misconduct).[12]

96. Yet, the violation was not what Defendants wanted—it was only for non-entry. Defendants wanted more, so, when the inspector was going to leave without any violation for a defect, Mr. Taylor harassed that inspector to violate anything he could, and he chose to violate the Coop because Plaintiffs' bike was in the hall (Exh. 38 p.2-3).

97. The violations were to go to trial before the ECB. The Coop needed representation—the Defendants made certain of that. In fact, separate representation was necessary because Defendants' attorney showed at the ECB trial claiming to be the Coop's attorney (Wynkoop Aff. ¶44, Keske Aff. ¶12). They caused the violation, they wanted the violation, but they had their attorney appear to defend the Coop from the violations? Absurd. Separate counsel was needed, and Plaintiffs hired an attorney to

[12] The doctrine of unclean hands is a bar to the grant of equitable relief to a party who is "guilty of immoral, unconscionable conduct … related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct (*Green v. Le Beau,* 281 App. Div. 836; 2 Pomeroy on Equity Jurisprudence [5th ed.], § 399, p. 99); *Weiss v. Mayflower Doughnut Corp.*, 1 NY2d 310, 316; see 32 Boston U. L. Rev. 66 et seq.; *National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]; see *Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396 [2011]; *Columbo v Columbo*, 50 AD3d 617, 619 [2008]).

represent the Coop under a general retainer. A trial was had, and the Coop was defended by the Coop's counsel. Both violations were dismissed. Yet, this did not stop the Defendants from trying to continue to use DOB and HPD to create evidence against the Plaintiffs. The bike violation did not succeed. They still called in another complaint about Plaintiffs' bike—this time because it was hung on the wall. Another violation issued, a different JHO was assigned, and a different result arose from trial—a fine to the building (Exh. 38 p.4). The Coop was fined because Plaintiffs hung their bike on a wall in the hall to their second front door. This fine was the result of Defendants trying to create evidence of alleged misconduct against the Plaintiffs. Yet, while they called in a complaint to HPD/DOB about Plaintiffs' bike hung on a wall on the first floor, they never made a complaint to DOB/HPD about Subramanyam's bike, also stored in the hall, but hung on hooks from a glass skylight and above the main stairwell to the entire building on the fourth floor (Exh. 3 P-221; Exh. 25 Tr. 123:17-128:10). The motivation here is clear from their acts, but clearer in their words when they looked to use the litigation to force Plaintiffs to sell out to them (Exh. 3 at P-58).

98. Next, in an effort to win their action in evicting the Plaintiffs in the prior matter under Index No. 6548-2012, the Defendants made a motion for summary judgment (Exh. 3) offering as false testimony and false evidence that Plaintiffs' exclusive control over the cellar was a breach of the lease, and that their occupancy was illegal under state law and city codes. Defendants concealed their true leases (Exh. 12 and 14) from the Court in that action—documents that had a 21-year-old rider entitled "Section Seven A to the Proprietary Lease" ("Sec. 7A", *Id*., after p.PL12). In its place, they offered the Court an old, outdated and invalid Offering Plan (Exh. 3 at P-66), with a never-used version of the lease, signed by nobody at all (Exh. 40, found in *Id*.), that was without Sec. 7A, and represented to the Court that this was their lease, and that the rider, Sec. 7A (annexed to their motion by itself, *Id*. at P-215), was a separate document from the lease and therefore not a valid instrument (*Id*. at P-8 ¶18). This was a blatant attempt to trick the Court into believing that Sec. 7A was not part of the lease they actually

signed, and therefore Plaintiffs were controlling the cellar illegally and in violation of the lease.[13]

99. To compound that Plaintiffs were also violating the law and therefore the lease by occupying the cellar, they tried to offer more false testimony from a witness. Neither Subramanyam or Taylor had been in the cellar and had no knowledge as to how it was being used (Exh. 3 P-8 ¶15, P-21 ¶24), so they introduced testimony from Mrs. Taylor (who was still Ms. Pennington at that time), because she had actually entered Plaintiffs' cellar two years earlier for a pre-purchase inspection (Exh. 3 P-23 ¶2). However, the testimony was false.

100. Mrs. Taylor described entering into a two-room cellar with no windows, that was dark. She called it a bedroom, without any detail that would identify it as such, except to say that there was a bathroom to bolster the claim that it was a bedroom. However, when challenged with both her own evidence (the inspection report, at *Id.* P-271, which did not report any illegal conditions) and DOB documents gathered to defend these frivolous claims (Exh. 15), she admitted that she invented the claim that there was a bathroom, and then tried asserted for the first time in reply that she apparently saw a bed with linens (Exh. 33 P-29 ¶25-26). Moreover, the DOB documents revealed that there *was* a window in the cellar (Exh. 15).

101. The claims that Plaintiffs were allegedly "misusing" money was never alleged in the prior action (Exh. 32). They began making this claim only after Plaintiffs revealed to the Defendants evidence of their perfidy and fraud upon the Court—copies of their leases (Exh. 12 and 14), obtained from the lending banks, exposing that they used false evidence and made false claims about their leases. In response, the Defendants wanted to settle and prevent further court scrutiny on this point (Exh. 33 P-103-172). When their offers were rejected, and the matter proceeded to hearing, that is when the Defendants invented the claim that Plaintiffs were using Coop funds for personal expenses (Exh. 33 P-20 ¶77-78)—to counterbalance and obfuscate their perfidy. The allegation was an invention, and they admit that they invented it (*Id.*).

[13] Defendants admit that the Offering Plan was not an example of their actual, signed lease (Exh. 33 P-15 ¶44), but offers no explanation as to why they concealed their actual leases from the Court.

102. Once the action was dismissed, the Defendants still pushed to force Plaintiffs to give them full control of everything. They threatened continued litigation if they were not given control (Wynkoop Aff. ¶49), and so Plaintiffs brought this action.

103. Since litigation began anew, all of the bad faith intentions of Defendants have been made manifest. They sought control, and they were given it by the Court. And their intent to grab that power and keep it has occurred again and again through gerrymandered elections which "deadlock" the vote so that they may never be removed from power (Exh. 46); they have used Coop funds to make further repairs to the roof, and repairs to the damage caused by the roof (Exh. 47), though Subramanyam is solely responsible for both (per the determination of the Appellate Division, Exh. 44); and they have conspired to take Coop funds for themselves, as exhibited by the check at Exh. 48 (allegedly paid per the order of the Court at Exh. 45, but this amount was to be reduced by rent owed by that time).

104. There are numerous other examples of bad faith and breaches of fiduciary duty by the Defendants—including the installation of spy to eaves-drop on Plaintiffs (Exh. 57), efforts to force their way into Plaintiffs home under a claim of a "board right" (prompting the police to be called, Exh. 55), harassing default notices assessing defaults for years-old late payments of rent by Plaintiffs (Exh. 66) though no consideration is given to Subramanyam's late payments (Exh. 58-59), retaliatory assessments (Exh. 66), permitting the exterior of the building to deteriorate and cause damage to the interior of Plaintiffs apartments (Exh. 52), and improper housing court actions (Exh. 70-71) to recover rent properly deposited into the Coop's account per the order of this Court (Exh. 45). Respectfully, to keep this memorandum brief, further example and explanation is found in the Plaintiffs' affidavits, which are incorporated herein by reference.

105. Given the foregoing, the affidavits of the Plaintiffs, and all of the evidence (Exh. 1 through 77) referenced, Plaintiffs have set forth a clear basis for denying Defendants' motion for summary judgment, and a basis for a finding of summary judgment in Plaintiffs' favor for breach of shareholder fiduciary duty. Defendants' motivations in their action are made quite clear, but their own admission

and by action and deed. No other conclusion can be made than they have acted in bad faith with the motivation of self-aggrandizement and personal profit.

B. Summary Judgment for a finding of Nuisance (Sixth Cause of Action) should be granted.

106. A private nuisance requires a showing of an intentional and substantial interference with the right to use or enjoyment of land (see *Copart Inds. v Consolidated Edison Co. of NY*, 41 NY2d 564, 570 [1977]; *Weinberg v Lombardi*, 217 AD2d 579 [2d Dept. 1995]). The elements of the tort of private nuisance are: (1) an interference substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with plaintiff's right to use and enjoy land; (5) caused by defendant's conduct in acting or failing to act (see *Copart Inds.*, *Id*. at 570).

107. A leak was entering into Plaintiffs apartment from the exterior of the Coop building, because the building façade needed pointing. Defendants knew that the façade needed servicing (Exh. 67, meeting minutes created by Taylor). The leak from the façade damaged Plaintiffs' Units 1 and 2 at the windows (Exh. 52). Not only did Defendants do nothing to address the façade, but they withheld rent for three years until they obtained control of the Coop (Exh. 35), depriving the Coop of money needed to repair the façade, on a self-serving and disingenuous assertion that they had the right to withhold their rent by court order (referring to Exh. 34). Not only did this create dust and debris that needed to be continually cleaned in Plaintiffs' Units (Wynkoop Aff. ¶66, Keske Aff. ¶19), but Plaintiffs had to pay to repair the deteriorating condition.[14] But for the Defendants interference, the damage would not have occurred and could have been either prevented or abated. Summary judgment on this claim is warranted.

108. Amazingly, the Defendants argue that nuisance should be dismissed on the premise that Plaintiffs carry equal blame for the nuisance to Plaintiffs. However, the reason that Plaintiffs could not move forward with the façade repairs was due to the fact that Defendants were withholding their rent

[14] Payment for the repair caused by the building façade leaks was due to a settlement made with the Coop (Exh. 53). Of course, if that settlement is not valid, then the Coop owes Plaintiffs a refund of the cost given that the damage (Exh. 52) was due to Coop property—and the amount of that cost is more than the fine (Wynkoop Aff. ¶66, Keske Aff. ¶19-20).

leaving the Coop without sufficient funds to pay for the repair (Wynkoop Aff. ¶66). Notwithstanding this, the Defendants are actually arguing that Plaintiffs had power to act without Defendants' consent as co-board members. This negates their entire argument that paying the Coop attorney at that time to pursue an action against them (D.Ex.N) was entirely within Plaintiffs' power.

109. As to their argument that this nuisance harms the building, the damage, debris and incursion was in Plaintiffs' apartments (Exh. 52) and the result of Defendants' conduct. In fact, it is entirely due to Defendants' conduct—their withholding of rent (Wynkoop Aff. ¶66), and their refusal to pursue the issue as they agreed (Exh. 67). In fact, this latter point—that they agreed as purported board members—results in the Defendants making the Coop liable as well. They are jointly and severally liable for the nuisance because the Coop is responsible for the repair, but the Coop could not because Defendants withheld the funds (their rent) needed to make the repairs, and Defendants refused to act to make the Coop make the repairs.

110. Defendants' final argument, that an Art. 78 was required rather than a private nuisance claim, this argument disregards Defendants' personal interests being served by their misconduct. Moreover, damage was already suffered—disrepair because of the misconduct (Exh. 52). Art. 78 is a proceeding brought to mandate or prohibit conduct by a Coop. It is not a judicial procedure for the recovery of damages.

111. Defendants' arguments do not support summary judgment on this claim in their favor. Their motion should be denied, and summary judgment should be granted in Plaintiffs' favor on this claim.

C. Summary Judgment for a finding of Economic Duress and Constructive Trust (Seventh Cause of Action) should be granted.

112. "Economic duress exists when a party is forced to agree to a contract by means of a wrongful threat which precludes the exercise of its free will." (See *Finserv Computer Corp. v Bibliographic Retrieval Services, Inc.*, 125 AD2d 765, 766 [2d Dept. 1986]). "The law in New York is clear that in order to have a situation involving economic duress' there must have been some sort of

obligation on the part of the party to perform." (*Bethlehem Steel Corp. v Solow*, 63 AD2d 611, 611 [1st Dept. 1978]).

113. "A constructive trust may be imposed in favor of one who transfers property in reliance on a promise originating in a confidential relationship where the transfer results in the unjust enrichment of the holder" (*Rogers v Rogers*, 63 NY2d 582, 585-586 [1984], citing *Sharp v 53 Kosmalski*, 40 NY2d 119 [1976]). To establish a constructive trust, a party must prove: (1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment (see *Simonds v Simonds*, 45 NY2d 233, 241- 242; Sharp, 40 NY2d at 121).

114. The parties are shareholders and partners in a closely held corporation. That makes them fiduciaries to one another (*Fusco*, *supra*). Plaintiffs were told by both Defendants that if they did not pay 50% of the cost of the repair of the roof, both would withhold rent from the Coop, which endangered Plaintiffs' home with default in financial obligations and possible foreclosure. Plaintiffs transferred their money to the Defendants under the belief that they had no choice, lest they risk losing their home (Wynkoop Aff. ¶30, Keske Aff. ¶21).

115. Even if economic duress would not be available, constructive trust still is because Mr. Taylor has been unjustly enriched. Constructive trust will be applied where there is a promise between fiduciaries which induces a transfer in reliance on the promise that unjustly enriches the recipient (*Gottlieb v Gottlieb*, 166 AD2d 413, 414 [2d Dept 1990]). Unjust enrichment occurs a defendant was enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Defendants are fiduciaries to Plaintiffs (*Fusco, Id.*) asserted ("promised") that Plaintiffs had an obligation to repay the , they threatened to withhold rent (another "promise") if they were not repaid, Plaintiffs relied on both, and Defendants were unjustly enriched because Sec. 7A of the Proprietary Lease (Exh. 12 and 14) required only Subramanyam to pay. Plaintiffs are entitled to repayment.

D. Summary Judgment for a finding of Trespass (Twentieth Cause of Action) should be granted.

116. A trespass is an intentional physical entry onto the property of another without justification or permission (*Woodhull v. Town of Riverhead*, 46 AD3d 802, 804 [2d Dept 2008], *lv to app denied*, 10 NY3d 708 [2008]; *Corsello v. Verizon NY, Inc.*, 77 AD3d 344, 357 [2d Dept 2010]). Liability lies where the alleged tortfeasor, without justification or permission, either intentionally entered another's property" (*Long Is Gynecological Servs, P.C. v. Murphy*, 298 AD2d 504 [2d Dept 2002], citing *Rager v McCloskey*, 305 NY 75, 79 [1952][internal quotation remarks omitted]).

117. Subramanyam states that he entered into Plaintiffs' private property with a meter reader (Exh. 3 P-21 ¶21). This occurred sometime in 2012, before they brought their action under Index No. 6548-2012 (Wynkoop Aff. ¶71, Keske Aff. ¶22). He was not given permission to access Plaintiffs' private residence with the meter reader (Wynkoop Aff. ¶71, Keske Aff. *Id*.). Defendants may argue they have a right to access the building utilities pursuant to their lease or some other theory. The lease allows access only upon reasonable notice and scheduling or if there is an emergency (Exh. 7, Sec. 25), not pursuant to self-help.

118. On order of the Court, the Defendants were commanded to arrange for the repair of Plaintiffs' bathroom (Exh. 54). A plumber arrived, as did Defendant Taylor. Defendant Taylor attempted to force his way into Plaintiffs' private home, pushing Wynkoop and gaining some entry before being pushed out (Wynkoop Aff. ¶71, Keske Aff. ¶22). The police were called as a result (Exh. 55). Summary judgment against the individual Defendants on this claim is warranted.

119. In their brief for summary judgment on this claim, they point out that Keske did not know how the cellar was disrupted. However, Wynkoop describes in his affidavit how the cellar was ransacked to cause it to be in disarray, and how thereafter a complaint was called to HPD/DOB that there was "rubbish" in the cellar by Mr. Taylor (Wynkoop Aff. ¶70) which the Defendants confirmed was a complaint made by Taylor (Exh. 3 P-14 ¶59, P-59 and P-259) who could only know of the "rubbish" if he entered Plaintiffs' cellar without permission. The evidence strongly establishes that Mr.

Taylor entered Plaintiffs' cellar, ransacked the area to cause a "rubbish" condition that he called in as a complaint to HPD. How could Mr. Taylor know of the "rubbish" unless he entered the cellar without consent of Plaintiffs?

120. Defendants' arguments fail, their motion should be denied, and Plaintiffs should be granted summary judgment in their favor.

E. Summary Judgment for a finding of Defamation (Nineteenth Cause of Action) should be granted.

121. The elements of defamation are: 1) a false statement, 2) published to a third party without privilege or authorization, 3) with fault amounting to at least negligence, and 4) that caused special harm or defamation per se.[15] A false statement constitutes defamation per se when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession (*Geraci v Probst*, 2009 NY Slip Op 02971, 61 AD3d 717 [2d Dept. 2009]; *Liberman v Gelstein*, 80 NY2d 429 [1992]; *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2007]).

122. Defendants have accused Plaintiffs of stealing money from the Coop. They alleged it in the prior action (alleging that Plaintiffs "spent $10,000 of the Co-op's money…" "to pay for their personal legal fees", Exh. 33 P-20 ¶77-78) immediately when their frauds upon the Court were raised. They continued these false claims into *this* action, defining the alleged conduct as "pilfering money belonging to the Co-op" (Exh. 42, 37 ¶45). These assertions constitute crimes. Black's Law Dictionary (8th ed. 2004) defines "pilferage" as "the act or instance of stealing; the item or items stolen." The act of which the Defendants have accused Plaintiffs is formally known as "embezzlement". Embezzlement is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." (*OnBank & Trust Co. v. Siddell [In re Siddell]*, 191 B.R. 544, 552 [Bankr. N.D.N.Y. 1996]) (citation omitted). "Embezzlement is a crime as well as a civil wrong." (*Huggins v. Moore*, 94 N.Y.2d 296 [1st Dept. 1999]).

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[15] *Dillon v. City of New York*, 261 A.D.2d 34, 38 [1st Dept. 1999]; see also *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept. 2009]

123. Defendants immediately assert that their allegations in court are protected by "litigation privilege". Normally there is an immunity from liability for spoken or written statements that are otherwise defamatory, however, that immunity is not absolute.[16] If the defamatory statement(s) is/are both irrelevant to the litigation at hand and also "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame", it is justiciable (*Id*.; *Lacher v. Engel*, 33 AD3d 10, 12-14 [1st Dep't 2006]; *Finkelstein v. Bodek*, 131 AD2d 337, 338 [1st Dep't 1987]). The last action made no sound whatsoever of any "embezzlement" or "pilfering" of Coop funds (see Exh. 32)—not until after the Plaintiffs first drew attention to the fact that the Defendants were attempting to defraud the court with fraudulent documentation and false and misleading statements about the lease, Sec. 7A and the legality/condition of the cellar and the staircase that connects it to the first floor of Unit 1. Suddenly, Plaintiffs were thieves of Coop funds, the only possible claim that could counterbalance their own frauds.

124. The fact that Defendants now extend this allegation as a claim in this action should not afford them the ability to grandfather the immunity (if it applies)—especially now that evidence shows the claims were never true (Exh. 24). Defendants point to only one act they allege constituted a misuse of Coop funds for personal purposes—the payment of the Coop attorney to bring an action against them for indemnification and other claims of damage. Yet, this was no a "pilfering" of Coop funds for a personal use, and the interests promoted in the complaint was only that of the Coop—and certainly no interest incompatible with the Coop. And it must be stated again, the Coop would never had needed counsel if not for Defendants causing legal issues for the Coop in the ECB (Exh. 38) to manufacture evidence for their claims (brought before complaints to HPD/DOB, Exh. 32). Moreover, the allegation was made in Jan. of 2013, long before the Aug. 2013 complaint (D.Ex.N), and Defendants admitted that they invented the (see Exh. 33 P-20 ¶78—Taylor says he "assumes" that the money is being stolen).

125. Yet, in their arguments to try and prove that Plaintiffs did, in fact, embezzle money,

[16] *Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 170 [1st Dep't 2007]

Defense Counsel misleadingly conflates matters which occurred in this litigation as applying to the allegations originally invented, conflates Coop funds with Subramanyam's personal money, and further attempts to mislead this Court into believing that any of it is relevant to the allegations made by Defendants. As already stated earlier in the Statement of Facts, the $10,000 Justice Schmidt ordered refunded to Subramanyam is not Coop funds. Therefore, it was not a theft of Coop funds. Moreover, it was not even a "theft" of Subramanyam's funds, because the payment was voluntarily made by his lending bank as a business decision (Exh. 80), based on true statements that Subramanyam was in arrears of rent and assessments for the repair of his roof. Moreover, Subramanyam's refund was to be less his rent owed (Exh. 45). Yet, he took it all back (Exh. 48). It also bears noting—yet again—the money paid by HSBC was not "withdrawn" from Subramanyam's bank account, it was paid by HSBC for him and then charged back to him in an invoice as additional costs under his loan agreement (Exh. 80)—which was subject to an agreement made by him with Wynkoop and HSBC (Exh. 26).

126. In furtherance of this $10,000 argument, Defendants contend that the fact that Wynkoop deposited with the court clerk the $10,000 this Court ordered be repaid to Surbamanyam immediately (Exh. 45). That action was taken pursuant to CPLR §5519, and already reviewed by this Court and determined an appropriate action (Exh. 81).

127. As for all of Defendants' repeated arguments that Plaintiffs used Coop funds to pay an attorney to sue them in the name of the Coop, rebuttal to those arguments have already been presented in opposition to their claim for Breach of Director Fiduciary Duty, above, and it has been established that said funds were not misused; they were appropriately used for the Coop's interests, in an action that asserted Coop rights that were not incompatible or inferior for Plaintiffs' rights.

128. As for their arguments that Plaintiffs are "erratic or hostile", they base this on Justice Rivera's recusal, as he established on the record, but not in his order. Justice Rivera states that Plaintiffs conduct had been "unsettling", "disturbing" and "frightening", but he does not really state how. The only example he offers is that he was served legal papers in his home driveway. How is that unsettling,

disturbing or frightening? Defense Counsel's continued use of this is entertaining. However, it also has nothing to do with this claim, as the defaming statement was to call Plaintiffs thieves.

129. Defendants have argued in the past that Plaintiffs have not pleaded special damages. As already described by Wynkoop in his affidavit, their claim of theft has spread across the internet and affected his ability to obtain work, especially in the area of security where he has a specialty (Wynkoop Aff. ¶61-63). As Wynkoop describes in his affidavit, their claim has a particular impact upon his ability to find work, given the sensitive nature of his work in security (Wynkoop Aff. ¶61).

130. However, special damages are not necessary where the defamatory statement is one that is per se. Under New York law, if the defamatory language charging only a single instance of misconduct imputes general incompetence, lack of integrity, or lack of fitness, the special harm requirement is obviated.[17] Here, the Defendants impugned Wynkoop's most crucial asset for his profession—his integrity (Wynkoop Aff. ¶61-63). These accusations, so easily obtainable upon a simple search on Google (Exh. 61), have hindered his ability to find work in his particular profession of trust (Wynkoop Aff. ¶61-63). That is the special damages incurred by Wynkoop.

131. Whether the Defendants wish to acknowledge Plaintiffs as board directors or not, they have accused them of acting in the capacity of a board, and have brought a derivative claim pursuant to BCL §717 which applies to directors and officers, and have accused them in that capacity of control of stealing, or "pilfering", Coop funds for non-Coop purposes—for personal purposes. When a plaintiff establishes that the defendant's statements amount to defamation per se, there is no need to prove special damages (*Infra fn*. 17).

132. There is no mischaracterization of the Defendants' words. They accuse Plaintiffs either expressly or impliedly of stealing. Terms such as "scam" "con artist" and "robs" imply actions approaching criminal wrongdoing (*Id*.). Had the Defendants stated that he simply "misappropriated" or "diverted" the funds from the Coop for unauthorized and non-Coop purposes, those would simply allege

[17] *Technovate LLC v Fanelli* 2015 NY Slip Op 51349[U]; citing *November v Time Inc.*, 13 NY2d 175 [1963]

a misuse not arising to a crime (*Id*.).

133. Given the foregoing, there can be no defense to the claim of defamation, and therefore summary judgment for a finding of defamation is warranted.

F. Summary Judgment for a finding of Prima Facie Tort (Sixteenth Cause of Action) should be granted.

134. At the outset, this is not a duplication of the defamation claim, as Defendants argue. It is an alternative claim to defamation. Therefore, it must stand on its own merits as an alternative.

135. The elements of a cause of action grounded in prima facie tort are (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful.[18] Its genesis is founded in "disinterested malevolence"[19].

136. Defendants' submitted false documents, made false and misleading statements to the Court, concealed evidence from the Court, and made false allegations of a crime to obfuscate the foregoing. The impact upon Wynkoop's reputation is particularly troublesome given the high security nature of his work—i.e. access to sensitive trading, banking and governmental information (*Id*.). It has hampered his ability to continue to find work in his profession, especially with the high security organizations (as he discusses, *Id*.). Other than their legal costs and damage to their reputations (as described in the discussion of defamation, above; see also Wynkoop Aff. ¶61-31), Wynkoop and Keske have been accused of a crime, which is a per se damage[20].

137. It is unlawful to submit false documents to a court. It was also unlawful for the Defendants to state that Plaintiffs were thieves—asserted for the first time on Jan. of 2013 (Exh. 33), after settlement discussions broke down (*Id*. at P-98-114, P-166-189)—when they did not use any monies of the Coop for anything other than Coop costs. This satisfies the fourth prong of the above test, given that it would be anomalous to deny this cause of action on the ground that the injurious act was unlawful

[18] *ATI, Inc. v Ruder & Finn*, 42 N.Y.2d 454, 458; see *Wehringer v Helmsley- Spear, Inc.*, 91 A.D.2d 585, *affd*. 59 N.Y.2d 688, 2 NY PJI 624.
[19] *American Bank & Trust Co. v Federal Bank*, 256 U.S. 350, 358; see *Squire Records v Vanguard Recording Soc.*, 25 A.D.2d 190, *affd.* 19 N.Y.2d 797
[20] *Technovate, supra*

(see the balancing analysis espoused Restatement of Torts [Second] §870, Comment e). The act was also born of disinterested malevolence, for the pure motive advantage in litigation, to gain control of the Coop (Exh. 33 P-57) and of Plaintiffs' home through abuse of the judicial process, fraud, deceit and defamatory allegations of theft—and is beyond the litigation privilege the Defendants invoke[21].

138. Such an action "constitute[s] injury or pecuniary damage to an individual or group of shareholders." (Isaac v. Marcus, 258 NY 257, 264 [NY Court of Appeals 1932]). The claims brought were not "one[s] in which a shareholder or member suffers damages which are distinct from those sustained by the business entity" (*Id.*). Thus, the allegations that were made, and the conduct of the Defendants, constitute actions that were both irrelevant to the litigation and also "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame." (*Sexter*, *supra*, at 173). Thus, the privilege afforded litigants does not extend to the Defendants here.

G. Summary Judgment for a finding of Abuse of Process (Eighteenth Cause of Action) should be granted.

139. First, Defendants' argument that this claim is duplicative of the defamation claim is nonsensical. Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective.[22] It is the multiple frivolous filings that are actionable, where they are premised on the intent to harm Plaintiffs with false assertions and fraudulent documents as a means to gain control of the Coop and Plaintiffs' cellar. It was their continued misuse of process to manufacture evidence and bolster a claim they knew was false, misleading, or otherwise invented that is actionable as a separate claim—not the defamatory act itself. Therefore it is not duplicative.

140. Defendants' prior action was, itself, frivolous. Though filing a claim is not an abuse, it was all the process thereafter, in pursuit of claims they knew were without merit. The breach of fiduciary

[21] *Lacher* et. seq., *supra*
[22] *Board of Educ. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397 [1975]

duty claims were all personal claims (as adjudged by the Court at Exh. 36 and 37); the breach of lease claims were similarly frivolous, to the extent that the claims regarding the cellar were false—possession, use and occupancy were not illegal as a matter of law (Exh. 44)—and the claims regarding the sublease were not only disingenuous (given Defendants consented to other shareholders subleasing at will, without renewing consent, Wynkoop Aff. ¶75, and Exh. 3 P-20 ¶16), they were not ripe given no notice with time to cure was ever issued to Plaintiffs.

141. "[T]he misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process" (Hoppenstein v Zemek, 62 A.D.2d 979 (1978) began with Defendants' motion for summary judgment (Exh. 3). It was founded on false documents (as described earlier, *Id*.), false statements of fact (as described earlier, *Id*.), and the concealment of relevant and exculpatory evidence (Exh. 12 and 14) which would have contradicted the claims in the complaint as well as in the motion itself—*to wit*: they lied about their lease, and hid it from the Court with knowledge that Sec. 7A would have been found within and expose their cellar claims as frivolous; they made effort to manufacture evidence using government agencies (Exh. 38) to support claims they invented (given the DOB documents at Exh. 15, which the Appellate Division determined prima facie proof, Exh. 44).

142. The abuse of process continued with Defendants filings of newly formed, false accusations of theft of Coop funds (Exh. 33) which they now admit was an invention for the purpose of hiding their fraud and gaining advantage in litigation (as discussed more thoroughly in the arguments for defemation).

143. Every motion made by Defendants thereafter (Exh. 72 and 78) was motivated to mislead the court and substantiate claims they knew were not based on fact. The intent of Defendants' use of process was made abundantly clear at Exh. 33 P-57—Plaintiffs were to give them complete control of the Coop and allow Defendants to do whatever they wanted with the Coop and its funds, or else they will sue. Then, in bringing the claims derivatively, they failed utterly to make a demand for any of the relief they wanted; they also failed to give notice of any breach of the lease being alleged. They

dredged up whatever claim they could conceivably make and then went about trying to create evidence to support it. Why? To gain control of the Coop, and of Plaintiffs' cellar, and make changes and improvements to increase the value of their Units so they could be sold.

144. In the process of all of the above, they dragged Plaintiffs through useless litigation for seven years (delayed by their antics), damaged Plaintiffs reputations and harmed their ability to find work (as discussed herein), caused legal expenses in the hundreds of thousands of dollars, and now, having control, have started draining the Coop of its funds to pay themselves (Exh. 48), repair personal property within the building (Exh. 47), and harass the Plaintiffs (Exh. 66) in an effort to circumvent this Court and have them removed from the building without having to come to account for their misdeeds in this action (Exh. 70 and 71).

145. Plaintiffs have met their burden for Abuse of Process and respectfully request that the Court grant summary judgment in their favor on this claim.

H. Summary Judgment for a finding of one or more of the following claims for fraud should be granted.

146. First, Defendants assertions that the fraud claims are duplicative of the defamation claims are entirely incorrect. As described above, Plaintiffs' defamation claim is addressable only to the publicly made claim by Defendants that Plaintiffs stole money from the Coop. This is not mentioned in any of Plaintiffs' Claims 8, 9, 11, 12, 13, 14, 15 and 17. While the defamatory statement is mentioned in Plaintiffs' Claim 10, it is only one of five allegations of fraud in Claim 10. Thus, if it is duplicative in that regard, it can be severed.

147. As for Defendants arguments as to why each of the fraud claims should be dismissed on summary judgment, the discussions to follow on each claim support why Defendants' motion should be denied, and why Plaintiffs should be entitled to summary judgment on one or more of their fraud claims.

148. Defendants have committed fraud, in the form of multiple court filings presenting fraudulent documentation and false statements. The specific acts of fraud and deceit include:

a. Falsely claiming that Plaintiffs took wrongful possession of the cellar in violation of the

lease (Exh. 3, 32, 33);

b. Falsely claiming that the cellar is in an illegal condition (*Id*.);

c. Using fraudulent and altered documentation to support the claim that Plaintiffs took the cellar in violation of the lease (Exh. 40);

d. Making false and misleading statements regarding material issues of fact concerning the claims to the Court (Exh. 3 P-8 ¶17-18); and

e. Filing false complaints with government agencies in order to gain access to Plaintiffs' private residence for the purpose of a fishing expedition to see if evidence exists for a claim (Exh. 38; Exh. 3 P-259-261).

Even if the frauds are ones committed in the process of litigation, they are still actionable for a lawsuit.

149. "In this jurisdiction, 'fraud upon the court' is a term used to describe the perversion of the judicial process as a result of misconduct by a party or counsel" (*CDR Créances S.A. v Cohen*, 2012 NY Slip Op 09189 [Decided on December 27, 2012], citing *Baba-Ali v State of New York*, 19 NY3d 627, 634 [2012]; see also Black's Law Dictionary 686 [8th ed. 2004]). "Actions for fraud upon the court are rare", but where there exist "acts of deceit and fraud committed to suborn the judicial process," an action will lie, because "[t]he paramount concern of this Court [becomes] the preservation of the integrity of the judicial process" where such fraud is found (*CDR*, *Id*., citing *Koschak v Gates Constr. Corp.*, 225 AD2d 315, 316 [1st Dept. 1996] [venue "designated as a result of duplicity . . . amounts to a fraud upon the court and will not be permitted to stand"]).[23] It has been long held for almost a century and a half, since *Verplanck v. Van Buren* (76 N.Y. 247 [1879]), that an "action lies against parties who, in pursuance of a conspiracy or combination, fraudulently make use of legal proceedings to injure another party." (*Newin Corp. v Hartford Acc.*, 37 N.Y.2d 211 [Court of Appeals 1975], citing *Verplanck, Id*; see also *Odlam v McRoberts*, 37 Misc.2d 979 [1962], *affd.* 18 A.D.2d 773, *lv. den.* 18

[23] "[A] [party]'s purposeful failure to reveal information which [t]he[y] know[] would engender a different judgment can be as much a fraud upon the court as is an affirmatively stated falsehood intended to conceal such dispositive information. (*People v. Barnes*, 160 A.D.2d 342, 553 N.Y.S.2d 413 [1st Dept.1990]).

A.D.2d 884; *Ross v. Preston*, 292 N.Y. 433 [Court of Appeals 1944]; Actionability of Conspiracy to Give or to Procure False Testimony or Other Evidence, Ann., 31 ALR3d 1423, 1438).[24] As such, though not traditional fraud, this action still lies under the law.

i. Fraud and Deceit, Fraudulent Misrepresentation, and Conspiracy to Commit Fraud and Deceit and Fraudulent Misrepresentation (Eighth, Tenth, Fourteenth and Fifteenth Causes of Action)

150. Defendants are jointly and severally liable for fraud per se pursuant to GBL §352-C(c) and §352-D. GBL §352-C(c) prohibits "any person, partnership, corporation, company, trust or association, or any agent or employee thereof, to use or employ any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made; where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted."

151. Defendants' complaint (Exh. 32) was a derivative action. A derivative action is brought "to enforce a corporate cause of action" (*Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 95 [1991]), which makes the company the real plaintiff, and the shareholder serves as an agent of the company.[25] Defendants were the agents of the Coop in their action. Defendants submitted fraudulent documents they knew were not representative of their lease (and concede as much, Exh. 33 P-15 ¶44);

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[24] *Verplanck*, addressed the viability of an action for a fraud upon the court for false testimony produced in a prior judicial proceeding. According to *Verplank*, the issue to be reviewed is whether fraud upon the court in a prior proceeding is barred from being the subject of litigation under *res judicata* . However, that limitation is overcome where the acts of the party upon the prior trial were but a part of an entire transaction. (*Id.*) – such as acts to obtain control of a corporation with purpose to sell equity interest at a greater profit. Thus, New York courts recognize that a civil action for fraud and deceit based upon a conspiracy where the fraud is brought by false testimony produced upon a prior trial.

[25] *Lehrman v. Godchaux Sugars*, 138 N.Y.S. 164, 166 [N.Y. Sup. Ct. 1955].

Defendants concealed their real leases (Exh. 12 and 14); Defendants offered altered, fraudulent documents (i.e. Sec. 7A without the lease in which it was contained, Exh. 3 P-215) asserting that it was a different and separate document from the lease; they made false representations about their lease, about Sec. 7A and about Plaintiffs stealing money from the Coop for personal use; they made false statements about the illegality of the cellar (Exh. 3 P-23-25; Exh. 33 P-12-21); and they made false complaints (Exh. 38) in order to induce a fishing expedition for the purpose of drumming up any evidence which could either support their claims to any degree, or provide other claims to use against the Plaintiffs. Defendants either knew or could have known with minimal due diligence that all of the claims and documents were false; also, now that they are purportedly "the board", they have had every opportunity to learn the truth and have made no such effort (Exh. 25 Tr. 143:16-149:2, Exh. 28 Tr. p.98 386:4-9). Finally, Defendants committed these fraudulent acts as a means to use the judicial system (Exh. 32) for the purpose of negotiating the revocation and resale of Plaintiffs' shares within the state. The claim for fraud and deceit are satisfied under the GBL.

152. Concerning conspiracy to commit fraud and deceit described above, "a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme." (*Anesthesia Assoc. of Mt. Kisko, LLP v Northern Westchester Hosp. Ctr.*, 59 AD3d 473, 479, 873 NYS2d 679 [2d Dept. 2009]). "[T]o establish a claim for civil conspiracy, the plaintiff 'must demonstrate the primary tort, plus the following four elements: 1) an agreement between two or more parties; 2) an overt act in furtherance of the agreement; 3) the parties' intentional participation in the furtherance of a plan or purpose; and 4) resulting in damage or injury." (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474, 905 NYS2d 585 [1st Dept. 2010], quoting *World Wrestling Fed'n Entm't v Bosell*, 142 F.Supp. 2d 514, 532 [SDNY 2001]). Here, all of the foregoing elements exist for conspiracy. Based on the facts and applicable law for fraud by these Defendants, the underlying claim is established. The fact that Defendants submitted affidavits, each articulating some or all portions of the various frauds involved,

and did so in support of the underlying briefs (or themselves) referencing the various fraudulent documents, shows a united effort of all Defendants named to agree to pursue the fraud, the filings are the overt acts, in pursuit of an overall plan to gain control of the Coop (Exh. 33 P-57), and the resultant damage has been seven years of litigation, invasions of Plaintiffs privacy (in the form of trespass described earlier, and of unwarranted inspections and entries into Plaintiffs' private home, and eavesdropping, Exh. 57, etc.). Conspiracy is satisfied.

153. Given all of the foregoing, Plaintiffs respectfully request that their motion for summary judgment on Fraud and Deceit, and a Conspiracy in pursuit therefrom, be granted.

ii. Constructive Fraud
(Ninth Cause of Action)

154. Constructive fraud refers to "'an act done or omitted, not with actual design to perpetrate positive fraud or injury upon other persons, but which, nevertheless, amounts to positive fraud, or is construed as fraud by the court because of its detrimental effect upon public interests and public or private confidence'" (*Bank v Bd. of Educ. of City of New York*, 305 NY 119, 123 quoting Eaton on Equity, §125). "The elements of a cause of action to recover for constructive fraud are the same as those to recover for actual fraud with the crucial exception that the element of scienter . . . is dropped and is replaced by a requirement . . . [to] prove the existence of a fiduciary or confidential relationship warranting the trusting party to repose his or her confidence in [a] defendant and therefore to relax the care and vigilance he or she would ordinarily exercise in the circumstances" (*Levin v Kitsis*, 82 AD3d 1051, 1054 [2011] [internal quotation marks, brackets, ellipsis and citations omitted]; see *Sears v First Pioneer Farm Credit, ACA*, 46 AD3d 1282, 1286 [2007]).

155. Plaintiffs have established their right to a finding of fraud under their earlier arguments for Fraud and Deceit, as they are established under the GBL. Plaintiffs have also already established that the Defendants are fiduciaries to Plaintiffs under their earlier arguments for breach of shareholder fiduciary duty. Respectfully, Plaintiffs have therefore established their right to summary judgment for constructive fraud, and such should be granted.

iii. Negligent Misrepresentation and Omission (Thirteenth Cause of Action)

156. A claim for negligent misrepresentation requires a showing of: (1) carelessness in imparting words (the information was incorrect or withheld); (2) on which others were expected to rely; (3) on which they did justifiably rely; (4) to their detriment; and (5) the author expressed the words directly, with knowledge they be acted on, to one whom the author is bound by some special relation or duty of care.[26] A claim for negligent misrepresentation exists where there is a special relationship of trust and confidence which imposes a duty on a person to impart correct information to another.[27]

157. As already established, the parties, as shareholders, are fiduciaries, establishing the special relationship element. As to the remainder of the elements, Plaintiffs have satisfied their burden that the words and deeds are careless in that the Defendants could have learned their veracity and accuracy with due diligence under the GBL requirements described above—they could have or should have known their words and deeds were false. They have further satisfied their burden to establish the remainder of the elements based on the other arguments set forth in this Sec. II(I) of this brief under the earlier headings of fraud. Therefore, summary judgment is warranted here as well.

iv. Fraudulent Concealment and Conspiracy to Commit Fraudulent Concealment (Eleventh and Twelfth Causes of Action)

158. Fraudulent concealment occurs when a defendant engages in the concealment of a material fact which defendant was duty-bound to disclose, scienter, justifiable reliance, and injury.[28] "Instead of an affirmative misrepresentation, a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information" (*Kaufman*, *Infra fn*. 28). Therefore, to state a claim of fraudulent concealment, a plaintiff must plead all of the elements of fraud and allege

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[26] *Allen v. Westpoint-Pepperell, Inc.*, 11 F. Supp. 2d 277 [S.D.N.Y. 1997]; *Kimmell v. Schaffer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 675 N.E.2d 450 [1996]; *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 [1931]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 144 at 180, quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; see *Stilianudakis v Tower Ins. Co. of N.Y.*, 68 AD3d 973 [2009]
[27] *Kimmell*, *Id.*, 652 N.Y.S.2d at 718–19; *United Safety of Am., Inc. v. Consolidated Edison Co.*, 213 A.D.2d 283, 623 N.Y.S.2d 591 [1st Dep't 1995]
[28] *Kaufman v. Cohen*, 307 AD2d 113, 119 [2003]; and see *Ozelkan v. Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d 877 [2006].

that the defendant had a duty to disclose material information and failed to do so.[29] Although a cause of action for fraud may be predicated on acts of concealment, there must first be proven a duty to disclose material information.[30] "Concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of the same legal effect and significance as affirmative misrepresentations of fact" (Nasaba Corp. v Harfred Realty Corp., 287 NY 290, 295 [1942]).

159. As already described earlier in this sub-section, in addition to all the necessary elements of fraud satisfied in view of the GBL, Plaintiffs have shown that the Defendants concealed their signed lease form the Court in making their application for a judgment finding that Plaintiffs breach their lease for taking and occupying the cellar. This critical piece of evidence, had it been include with their papers, would have invariably resulted in dismissal of the claim that Plaintiffs took the cellar, and occupied it, in violation of the lease

160. As for conspiracy to fraudulently conceal, again, “a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme.” (*Anesthesia Assoc., supra*). The same elements provided earlier, and the support offered, apply here as well.

161. Given the foregoing, Plaintiffs have established their right to summary judgment on the claim of fraudulent concealment, and the conspiracy to commit this tort, therefrom.

I. Summary Judgment for a finding that Kyle Taylor Taylor committed Attoreny Fraud in violaiton of JDL §487 (Seventeenth Cause of Action) should be granted.

162. Section 487 prohibits “deceit or collusion” or consenting “to any deceit or collusion” by an attorney or counselor “with the intent to deceive the court or any party.” (N.Y. Jud. Law §487 [McKinney 2015]). It applies to attorney misconduct in New York courts as well as courts in other states (*Cinao v. Reers*, 27 Misc.3d 195, 202, 893 N.Y.S.2d 851, 857 [Kings Co. 2010]). The overarching purpose of Section 487 is “‘to enforce an attorney’s special obligation to protect the

[29] *P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept. 2003].
[30] *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept. 2006].

integrity of the courts and foster their truth-seeking function' with a related 'concern for curbing and providing redress for attorney overreaching vis-à-vis clients'" (*Id*.; citing *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 (NYCA 2009); *Liddle & Robinson v. Shoemaker*, 276 A.D.2d 335, 336, 714 N.Y.S.2d 46 [1st Dept. 2000]).

163. According to the NY Court of Appeals, in answer to certified questions from the Court of the Southern District of New York, determined that Section 487 does not track the common law tort of fraud or misrepresentation, and thus does not require the complaining party or the court to actually rely upon the attorney's misrepresentation (*Amalfitano*, *Id*., at 428 F.Supp.2d 196, 209). Such an approach would neglect the statute's intent to enforce an attorney's obligation to protect the integrity of the courts (Id.). Therefore, the courts have found attorney deceit actionable in such circumstances as attempts to deceive the court with false, fraudulent or misleading documents (*Facebook v DLA Piper*, 2015 WL 2179836, *2 [2015]).

164. Plaintiffs are entitled to summary judgment on this claim, as against Kyle Taylor, because Mr. Taylor is an attorney, and intentionally offered fraudulent documentation in support of a motion seeking summary judgment in favor of his claims, and further made false and misleading statements to the Court regarding such documentation and the facts surrounding them. Specifically, as detailed in the arguments in favor of a finding of breach of shareholder fiduciary duty and the various frauds, Mr. Taylor offered to the Court a document which he represented to be an example of his lease (Exh. 3 P-66), and another document (Sec. 7A) he represented was separate and distinct from his lease (*Id.* at P-215). Mr. Taylor knew and understood that the evidence he offered (the offering plan for 622A President Street, Brooklyn, New York—created in 1982) was not his lease, yet he represented in his papers the implication that the document represented his lease (Exh. 3 P-8 ¶16-18); Mr. Taylor also knew that Sec. 7A was a part of his lease, and contained in his lease, yet he did not offer his lease, and instead asserted that Sec. 7A was some separate document delivered to him and not part of his lease (*Id*.). Simultaneously, Mr. Taylor withheld and concealed his true lease (Exh. 12) from the Court,

failing to show his lease with Sec. 7A in it. Had he presented his true lease, there could have been no other determination by the Court other than the fact that Plaintiffs had a leased right to exclusive and private use and control of the cellar (as determined by the Appellate Division, Exh. 44).

165. Mr. Taylor is a practicing attorney, with experience litigating before the Courts of the state of New York for over seven years (Exh. 51; Exh. 28 Tr. p.14 52:7-11). He is well aware of his obligations as an attorney under New York's rules for ethical and professional conduct, and he is also well aware of New York's laws governing disclosures and submission, not the least of which includes the Best Evidence Rule. Yet, he concealed exculpatory evidence which would have shown his claim of wrongful taking of the cellar to have been false *ab initio*.

166. Further to this fraud, Mr. Taylor committed further fraud when he represented to the Court that Plaintiffs used Coop funds for personal legal expenses (Exh. 33 P-20 ¶77-78). He represented this to the court, and then continued the claim into this action, even though he had no knowledge to support his claim, and now evidence has surfaced to show that his claim was entirely false *ab initio* (Exh. 24). Evidence further shows that he invented this claim only because his perfidy has been exposed, and Plaintiffs were not accepting of his woefully inappropriate offers of settlement (Exh. 33 P-103-172). Taylor has been shown to have committed attorney fraud and is worthy of summary judgment against him under JDL §487.

167. With regard to Defendants' argument in their brief (D.Br. 31-32) that the claim should be directed to Taylor's attorney, this asks the Court to ignore the fact that it was Mr. Taylor who made the sworn-to representations by affidavit that were expressly and impliedly false (Exh. 3 and 33). He is the proper person against whom the claim should be made because he is an attorney, and he made the false representation to the Court. Moreover, to suggest that he is not liable because the case was dismissed, this reasoning fails for two reasons. *First*, whether the case was dismissed or not is irrelevant. All that is relevant is whether the alleged perjury or fraud in the underlying action was "merely a means to the accomplishment of a larger fraudulent scheme" (*Newin Corp. v Hartford Acc. & Indem. Co.*, 37 NY2d

211, 217). That larger scheme was to take control of the Coop, not redress alleged misconduct; and the larger scheme was to obfuscate the fraudulent documentation and false representations to gain control of the cellar. *Second*, Defendants have brought the same claims into this case, and have attempted to use the same documents, the same claims, and the same invented accusations. As for the representation that the Appellate Division upheld their claims in this action, such is so absurdly false and misrepresentative of the decision it deserves sanction. The Appellate Division did not find so (which is probably why Defendants do not cite any of the decisions annexed as an exhibit to their motion). At best, the Appellate Division has remanded the matter back for review now that CPLR §3212(f) has been removed from the equation (by completed discovery).

168. With regard to the measure of damages, such are civil penalties that include the actual legal fees expended as a result of the action in which the fraud was made (*Amalfitano*, *supra*). In addition to this, an attorney in violation of Sec. 487 permits a wronged plaintiff to recover treble damages. (JDL §487).

169. Defendants will argue that an action made pursuant to Section 487 must be brought in the action in which the misconduct occurred. However, it is well established that Section 487 "does not require that the claim be asserted in the same action in which the violation occurred. Rather, the section simply provides that an attorney who has practiced a deception will be liable for treble damages to be recovered in a civil action." (*Melcher v. Greenberg Traurig LLP*, 2016 NY Slip Op. 00274 [1st Dept.]). A separate action may be brought separately from the action in which the deceitful conduct took place (*Amolfitano*, *supra*).

170. Plaintiffs are entitled to summary judgment in their favor, as against Defendant Kyle Taylor, for damages and treble damages pursuant to JDL §487.

IV. Plaintiffs Are Entitled Either To Default Judgment Against The 622A President Street Owners Corp., or Summary Judgment On Their Claims Against It.

171. Summary judgment has already been entered by the Second Department, finding that Plaintiffs exclusive right, use and occupancy of the cellar is legal and proper under their lease and as a

matter of law. This resolve the claims under the First Cause of action for declaratory judgment for (a) Sec. 7A is a valid part of the lease, (b) Sec. 7A is enforceable, (c) that Plaintiffs have a legal right per their lease to the cellar, (f) that the cellar's construction was a pre-existing condition, and (g) the cellar construction is legal. As such, default judgment is not necessary, therefore Plaintiffs respectfully request an immediate Entry of Judgment on these claims.[31] What follows are the argument for either default or summary judgment on the remaining claims against the Coop.

172. At the outset, Plaintiffs assert their rights under the settlement (Exh. 53). The Appellate Division questioned whether the settlement (Exh. 53) was one entered into while the parties were enjoined from taking any action on behalf of the Coop (Exh. 44). This suggests that the Plaintiffs themselves acted on behalf of the Coop to settle. They did not. As recounted by Plaintiffs in their affidavits, they recused themselves and left the matter to the Coop President, Charmaine Chester, to instruct the Coop attorney on settlement (Wynkoop Aff. ¶68; Keske Aff. ¶15; Chester Aff. Exh. 53). The settlement has already been challenged twice. First, by the individual Defendants in opposition to Plaintiffs' first Motion for Default. The result of that motion was the order of Apr. 13, 2015 (Exh. 45), which determined that at that point, which was subsequent to settlement, the Coop had become a nominal party—a determination to Plaintiffs' motion and the Coop's opposition (Exh. 53).

173. The second challenge came in the form of a motion made by Defendants against Plaintiffs for contempt of court for having entered into the Settlement. That motion (Exh. 73), sought to establish that Plaintiffs had acted on behalf of the Coop for that settlement, and sought to have the settlement invalidated, voided, as invalid and an act on behalf of the Coop. The motion further sought a determination that the Defendants were prejudiced by that settlement. That motion was denied in its entirety on July 25, 2016 (Exh. 74). As such, the law of the case establishes that the Settlement is valid, enforceable, and fair.

174. Notwithstanding this, if the settlement is not given enforcement as it should, Plaintiffs are

[31] Plaintiffs' Fourth Cause of Action has been mooted by the summary judgment on Unit 1.

still entitled to default judgment on their claims against the Coop.

175. The claims against the Coop are for Declaratory Judgment pursuant to CPLR §3017 (First Cause of Action), a Permanent Injunction from making an increase of Plaintiffs' maintenance (including assessments) to pay for legal fees incurred by the Coop for the Defendants derivative actions (Second Cause of Action), Indemnification for any costs to remedy any illegal conditions in the cellar which may have been conveyed with the cellar when Unit 1 was leased to Plaintiffs (Third Cause of Action), Nuisance as a consequence of the leak caused by the building's exterior façade (Sixth Cause of Action), Enforcement of Contract, per the Bylaws, for the issuance of additional shares for Plaintiffs' cellar space (Twenty-Third Cause of Action), and Indemnification for legal expenses in defending the derivative claims, per the bylaws (Twenty-Fourth Cause of Action).[32]

A. Default judgment is warranted.

176. Pursuant to the Court's order of Apr. 13, 2015 (Exh. 45), Plaintiffs' prior motion for default judgment as against the Coop was denied, but without prejudice to bringing it again. Plaintiffs do so here, however, Plaintiffs still take the position that the issues between the parties are settled pursuant to the Settlement Agreement annexed as Exh. 53. If the settlement is deemed null or invalid, Plaintiffs are still entitled to default judgment.

177. As indicated in the affidavits of service upon the Secretary of State dated Dec. 26, 2013, and personally on the Coop on Dec. 23, 2016 (see end of Exh. 39), the Coop was served papers no later than Dec. 26, 2016. According to the NYSCEF case details (*Id.*), the Coop's attorney appeared in the action on Jan. 14, 2014.[33] The Coop was personally served via the Secretary of State on Dec. 26, 2013

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[32] Given the determination of the Second Department to find that Plaintiffs' have a leased right to the cellar (Exh. 44), Plaintiffs' Fourth Cause of Action has become moot, and Plaintiffs previously requested leave to withdraw their slander of title claim against the Coop.

[33] Defendants will argue, as they have previously to no avail, that Mr. Fromartz was not the attorney for the Coop. Mr. Fromartz was retained during the pendency of the prior action under Index No. 6548-2012 (he was replacement counsel for Mr. Hardin who withdrew due to heart troubles, while he himself was replacement counsel for Mr. Murphy who had to withdraw due to health complications resulting from 9/11 Syndrome). He represented the Coop in its victory against Defendants, obtaining dismissal of the action with Plaintiffs. His disqualification was sought twice (on the same claim that he was not properly retained), and denied (see Exh. 45 at p.5). Therefore, he was the properly retained counsel for the Coop.

(Exh. R). Answer to the Complaint was due twenty days after, at least from Dec. 26, 2013 (CPLR §320[a]). No Answer was served on Plaintiffs from the Coop.[34]

178. Plaintiffs offer their affidavits of service (Exh. 39), proof of the Coop's appearance in this action (*Id*.), their verified complaint for the facts (*Id*.), and their affidavits in support of default judgment.

179. Plaintiffs are entitled to default judgment for the First Cause of Action (*Id*. at p.41), which seeks declaratory judgment that (d) Plaintiffs were granted consent to sublet to Borland, (e) the consent to sublease has not expired, (h) Plaintiffs are entitled, per the bylaws, to indemnification for their legal fees for the prior derivative action, and (i) that Plaintiffs are entitled to additional shares, per the bylaws, for the assignment of the cellar under their lease (*Id*. at p.42-43). They further seek default judgment in their favor on the Second Cause of Action (*Id*. p.43-44), which seeks a permanent injunction preventing the Coop from increasing Plaintiffs' maintenance or assessing them for additional rent to pay for the cost of the failed derivative action under Index No. 6548-2012; default judgment in their favor on the Third Cause of Action (*Id*. p.45) seeking indemnification for any fines, violations or liabilities which may result from the pre-existing condition of the cellar as conveyed to Plaintiffs ; default judgment in their favor on the Sixth Cause of Action (*Id*. p.51-52) for Nuisance based on the damage caused to Plaintiffs' Units 1 and 2 caused by the leaking façade of the building; default judgment in their favor on the Twenty-Third Cause of Action (*Id*. p.78-79) seeking indemnification for legal expenses incurred from defending the last derivative claims brought against them, which was dismissed, per the bylaws at Art. VII; and default judgment in their favor on the Twenty-Second Cause of Action (*Id*. p.78) seeking specific performance in the form of the issuance of additional Coop shares to reflect the additional space apportioned to Unit 1, as required under the bylaws per Art. V Sec. 7.

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[34] The attorney currently purporting to represent the Coop, Ganfer, Shore Leeds & Zauderer may represent that they put in an answer for the Coop back in August of 2018. That Answer was made almost 5 years after the Complaint was made and served; moreover, that answer was also made almost 3 ½ years after they were retained by Defendants to represent the Coop (see Special Shareholder Election Transcript dated May 27, 2015, Exh. 46, Tr.3:12-16). There is no excuse for waiting so long, and there was no motion made to ask for leave to make a late Answer. That Answer was rejected by Plaintiffs as untimely, and as being subject to a settlement.

180. Plaintiffs have shown in their complaint, and now with evidence (Exh. 21) and testimony from Plaintiffs (Wynkoop Aff. ¶8-11; Keske Aff. ¶4-5) that they received prior consent to sublease to Borland, and that this consent was an open-ended right to sublease at will (until Plaintiffs joined Units 1 and 2 together). The Coop offers no pleadings or evidence to contradict this. The lease may provide that renewed consent is required for any sublease, however, as also established with evidence, the sublease to Borland was, in any event, an indefinite month-to-month tenancy with the established condition that the rent would change as the Plaintiffs' maintenance obligation changed (Exh. 22). Default judgment is proper on the remainder of Plaintiffs' First Cause of Action for declaratory judgment.

181. Plaintiffs right to indemnification as sought under both the First and Twenty-Second Causes of Action must be granted on default as well because the bylaws provide at Art. VII (Exh. 16) provide that a director, officer, or a person voluntarily acting on behalf of the Coop shall be indemnified for all legal fees if they succeed at defending a derivative claim made against them pursuant to BCL §717. Defendants' BCL §717 claims were dismissed in the prior action (Exh. 36 referring to Exh. 37). The breach of lease claims are not BCL §717 claims. Plaintiffs are entitled to recover their legal expenses per the bylaws, therefore default judgment is proper and should be granted.

182. Finally, with regard to Plaintiffs' right to additional shares representing the apportionment and assignment of the cellar to Unit 1, this is an obligation set forth in the Bylaws at Art. V Sec. 7 (Exh. 16). According to this part of the Bylaws, when the Coop takes common space and adds it under the lease of a Unit, it ***"SHALL"*** issue additional shares representing the additional space. This is a contractual right, as a Coop's bylaws constitute a contract with the unit owners, and are, as all contracts, to be construed in a manner giving effect to all of their terms.[35]

183. There is a series of case law—no doubt to be offered by Defendants and the attorney for the

[35] *Lesal Assocs. v Board of Mgrs.*, 309 AD2d 594 [1st Dept 2003]; *Benjamin v Madison Med. Bldg. Condominium*, *supra*; *Mishkin v 155 Condominiums*, 2 Misc 3d 1001(A), 784 NYS2d 921 [Sup. Ct., NY County 2004]; see also *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002].

Coop—which has denied reallocation of shares sought by a shareholder based on the calculation of shares to square feet. In all of the authority they will present this Court, there are two significant factors that distinguish them from this case. The first is that in all instances they will likely present, the shareholder sought a downward reallocation, reducing their shares and burdening the other shareholders with higher maintenance as a consequence. In this instance, the shareholder seek an upward reallocation which will increase their monthly maintenance burden, and reduce the monthly maintenance burden of the Defendants (who are looking to sell their Units in any event). The second distinguishing factor of the authority they will present is that in all instances, the shareholders seeking downward reallocation of shares were given material to make them aware of the share-to-square footage disparity. Here, Plaintiffs were unaware that the number of shares issued on their Unit was under a different configuration of Unit 1 *without* the cellar when it was originally formed and shares were first issued (Wynkoop Aff. ¶¶4-6, 68, 73; Keske Aff. ¶16).

184. *Goodman v. 225 East 74th Apartments Corp.* (NYLJ, Aug. 19, 1997, p. 22, col. 3 (Sup. Ct. N.Y. County 1997) is instructive here. The apartment owner sued to reform their proprietary lease and reduce the shares allocated to an apartment purchased in 1985 from the sponsor, claiming that in 1995, they first learned they had purchased a studio apartment, not a two-bedroom apartment as described in the offering plan. The court denied the co-op's motion to dismiss the lawsuit as time-barred, holding that the co-op's failure to correct the sponsor's 1985 mistake was a continuing wrong which tolled the statute of limitations and permitted a reformation claim to be asserted in 1997. In this case, there is a similarity. As stated by Plaintiffs in their affidavits (Wynkoop Aff. ¶5-6; Keske Aff. ¶16), when they purchased their shares, there were never provide an offering plan. They were not made aware that the Unit 1 was originally constructed as a single-floor apartment and issued only 55 shares on that original configuration, and that the cellar was later added to Unit 1, but no additional shares were issued. Plaintiffs purchased under the belief that Unit 1 was always a duplex apartment, and issued only 55 shares under that configuration.

185. Also instructive is *Square-Arch Realty Corp. v Polsinelli* (2015 Slip Op 32228[U]). In that case, the owner of a Coop apartment entered into an agreement with the Coop in 2000 to purchase additional common space to be part of his apartment. He paid, renovated to incorporate the space, but the Coop failed to issue the additional shares. The apartment owner sued in 2014 to recover the shares under a claim for specific performance. The court enforced the agreement and ordered the shares issued.

186. The Plaintiffs' have sued for specific performance on their contractual right to additional as set forth in the Bylaws at Art. V Sec. 7 (Exh. 16). A plaintiff seeking specific enforcement of a contract of sale must demonstrate that he or she was "ready, willing and able to perform ... on the original law day or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter." (*Id.*, quoting *Gindi v. lntertrade Internationale Ltd.*, 50 A.D.3d 575, 575 [1st Dep't 2008]). While the question of what constitutes a reasonable time to perform the plaintiffs remaining obligations is usually a question of fact, "where the facts are undisputed, what is a reasonable time becomes a question of law." (*Id.*, quoting *Hegeman v. Bedford*, 5 A.D.3d 632, 632 [2d Dep't 2004]; *DiBartolo v Battery Place Assoc.*, 84 A.D.3d 474, 475 [1stDep't 2011] ["As a matter of law, [the plaintiffs] unexplained delay in tendering performance is unreasonable"]). The equitable remedy of specific performance "is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique." (*EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, 52 [1st Dep't 2004]). Plaintiffs were ready, willing and able to perform, and did perform—they paid for the additional cellar space (Exh. 17), which was approximately 60% above the cost of other apartments in the building (see Unit 2 price, Exh. 17).

187. Plaintiffs have demonstrated a right to default judgment on this claim.

B. Alternatively, summary judgment is warranted.

188. For the same reasons set forth in the arguments for default judgment, Plaintiffs have established a right to summary judgment on their claims against the Coop.

189. Evidence has been shown that establishes that the Plaintiffs were given open-ended consent to sublease (Exh. 21), that Plaintiffs have been subleasing to Borland for 15 years, including through the Defendants' tenancy who never once expressed an issue with it (Exh. 25 Tr. 191:19-193:20; Exh. 28 Tr. p.64, 252:25-253:18). Moreover, no notice of default had ever been served on Plaintiffs, as required under their lease at Sec. 27, 30 and 30[c] (Exh. 9). The breach cannot be claimed without adherence to this contractual right (*3170 Atl. Ave. Corp., supra*; *Mendez & Schwartz, supra*). Thus, it cannot be said that Plaintiffs are in breach of their lease, at least, until this obligation is met. Notwithstanding this, if it is a breach, it cannot be a breach due to the unilateral action of the Plaintiffs. Their conduct was based upon what ***all of the other shareholders told them they could do*** (Exh. 21), and based upon what ***all of the other shareholders were themselves doing*** (Exh. 5; Wynkoop Aff. ¶9-11; Keske Aff. ¶4-5); and similar conducted perpetrated by the current shareholders (i.e. the consent to at-will, continuous sublease, to prior shareholder, Chris Sahm (Exh. 3 P-20 ¶16, Wynkoop Aff. ¶¶11, 74; Keske Aff. *Id*.). Equity will not result if Plaintiffs are held in breach of a term which they were led to believe had been waived by both the word and conduct of the Coop and all shareholders. Nonetheless, Plaintiffs are not in breach until they have been given notice, and have not remedied in the lease-prescribed time to cure. As the breach has already been remedied (Wynkoop Aff. ¶10, and Keske Aff. ¶¶4, 17), there can be no finding of breach at all.

190. With regard to damages for the sublease, there are none. To the extent that other Defendants have derivatively claimed right of disgorgement, they would still have to establish the jurisdiction of this Court to claim them. Notwithstanding this, all remedies are limited to the terms of the lease, and the terms set forth that the Coop is only entitled to the set monthly maintenance. It is established law in New York that damages for breach of a covenant against unauthorized subletting may under no circumstances include any of the rental fees collected by the tenant from its subtenant (see, Rasch, Landlord & Tenant § 9:98, at 444 [4th Ed 1998]; citing *Erwin v Farrington*, 132 N.Y.S.2d 20 [Sup Ct Steuben Co 1954], *revd on other grounds* 285 App Div 1212; see also 74A NY Jur 2d,

Landlord & Tenant § 728).

191. As for the remedies available under the Bylaws (Exh. 16)—the right to indemnity under Art. VII, and the right to additional shares under Art. V Sec. 7—these are contractual rights. As authority provided earlier establishes, bylaws are considered a contract with shareholders (*Infra fn.* 35).

192. Plaintiffs were successful in defeating the breach of fiduciary duty claims in the prior action (they were dismissed, Exh. 36 and 37). As this claim was made pursuant to BCL §717, Art. VIII states that such victory shall be indemnified by the Coop. Thus, Plaintiffs are entitled to summary judgment of their Twenty-Third Cause of Action enforcing this contractual obligation per the Bylaws. So, too, are Plaintiffs entitled to summary judgment on their Second Cause of Action which seeks to permanently enjoin the Coop from raising their maintenance, or assessing Plaintiffs additional rent, for the purpose of repaying them their legal fees. Failure to impose such an injunction would result in the Defendants (who have proven themselves devious and manipulative) to cause Plaintiffs to pay themselves for their own legal fees.

193. With regard to Art. V Sec. 7, it clearly states that when there is additional common space assigned under the lease of a Unit, new shares shall be issued based on that assignment. No such issuance took place here (Exh. 18), except pursuant to the settlement with the Coop (Exh. 53). If that settlement is not enforceable, then summary judgment in favor of Plaintiffs becomes necessary, and is shown to be warranted. As provided earlier, authority establishes that when the Coop errs in not providing full information about the shares and leased apartment, the right to an alteration of the lease and of share issuance is not waived (*Goodman*, *supra*). So long as the Plaintiffs were ready, willing and able to perform their contractual obligations for the acquisition of the additional space, the obligation for the Coop did not end (*Square Arch Realty Corp. v Polsinelli*, 2015 NY Slip Op 32228(U)). Plaintiffs have established that they were ready, willing and able to perform by evidence of actual performance—the purchase of the Unit shares for a greater amount than the purchase price of the same type and amount of Unit shares for other apartments in the same building (Exh. 17).

194. Moreover, summary judgment becomes mandate by statute per BCL 501(c). This statute provides that shareholder cannot be treated differently from another. In this case, the amount of square feet assigned per share to the Defendants has been approximately 10 square feet per share; in contrast, for Unit 1, Plaintiffs have received only approximately 5 square feet per share. That level of disparity in share issuance is contrary to BCL §501(c).

195. Finally, Plaintiffs are entitled to summary judgment granting them indemnity for any fines, violations or illegal conditions that may exist in Unit 1 based on any pre-existing condition conveyed to Plaintiffs with Unit 1, by the Coop. Standard landlord-tenant laws apply between Plaintiffs and the Coop (*Matter of Carmer*, *supra*; *State Tax Comm., supra*; 4B Powell, *supra*; *Saurez, supra*). If it is ever discovered that the conditions alleged to be illegal in the cellar are shown to be illegal, Plaintiffs are entitled to summary judgment indemnifying them from liability where they had no role in the conditions.

CONCLUSION

196. Given the foregoing, Plaintiffs respectfully request that their motion be granted in its entirety, whereby summary judgment is granted in their favor on Defendants counterclaims, summary judgment is granted in their favor on all claims made against the individual Defendants, and that either default judgment be entered as against the Coop, or, alternatively, summary judgment on the claims against the Coop be granted in favor of Plaintiffs.

Dated: New York, New York
May 3, 2019

Respectfully submitted,

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