To Be Argued By:
Rory G. Greebel
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2023-02815

1650 BROADWAY ASSOCIATES, INC., ELLEN STURM, GST EXEMPT STURM FAMILY TRUST, GST NONEXEMPT STURM FAMILY TRUST, ELLEN STURM, GST EXEMPT STURM FAMILY TRUST, GST NONEXEMPT STURM FAMILY TRUST,

Plaintiffs-Appellants,

against

KENNETH STURM, GETZEL SCHIFF & PESCE, LLP, JOHN DOES 1-10, ABC CORPORATIONS 1-10,

Defendants-Respondents.

BRIEF FOR DEFENDANT-RESPONDENT GETZEL SCHIFF & PESCE LLP

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Defendant-Respondent Getzel Schiff & Pesce LLP ("Getzel") which respectfully requests that this Court affirm in all respects the order of the Supreme Court, New York County (Borrok, J.) entered on April 26, 2023, which granted Getzel's motion dismissing the amended complaint of Plaintiffs-Appellants Ellen Sturm, GST Exempt Sturm Family Trust, GST Non-Exempt Sturm Family Trust, Derivatively on behalf of 1650 Broadway Associates, Inc. (d/b/a/ Ellen's Stardust Diner), 1650 Broadway Associates, Inc. (d/b/a Ellen's Stardust Diner), Ellen Sturm, GST Exempt Sturm Family Trust and GST Non-Exempt Sturm Family Trust, Individually (collectively "Plaintiffs").

Plaintiffs commenced this action on March 12, 2021 alleging multiple causes of action against Getzel purportedly stemming from Getzel's engagement as the outside accounting firm for Plaintiffs. Plaintiffs alleged several causes of action against Getzel all of which were dismissed by Justice Borrok on April 22, 2022. However, Plaintiffs were afforded a lifeline by being allowed to amend the complaint. The amended complaint ("AC") was filed on July 1, 2022 and alleged only two causes of action against Getzel; malpractice and aiding and abetting a fraud. Getzel moved for dismissal of the AC. On April 19, 2023, oral argument was held. Justice Borrok then issued a decision and order dismissing the AC as to Getzel without any opportunity for Plaintiffs to replead (R.4-6).

The Motion Court properly dismissed Plaintiff's AC, as Getzel did not commit malpractice nor did Getzel aid and abet a fraud.

QUESTIONS PRESENTED

Question: Did the Supreme Court properly dismiss the Plainitff's AC as it pertains to Getzel, where in opposition to Getzel's motion to dismiss pursuant to CPLR 3211(a)(1), (3)(5) and (8), Plaintiff failed to successfully oppose dismissal on any of those grounds?

Answer: Yes.

Getzel's Response to Plaintiffs' Questions Presented

Plaintiffs' Question: Did GSP's admission that Ellen never knew of Kenneth's loans at the time they were taken warrant denial of the GSP's motion to dismiss?

Getzel's Answer: No. No such admission exists.

Plaintiffs' Question: Did Plaintiffs' FAC sufficiently state a cause of action for accounting malpractice based on GSP's conflict of interest in representing both Plaintiffs and Kenneth where Kenneth's "loans" were known to GSP and admittedly never disclosed to Ellen?

Getzel's Answer: No.

Plaintiffs' Question: Did Plaintiffs' FAC set forth sufficient allegations to survive a CPLR §3212[1] motion to dismiss of Plaintiffs' aiding and abetting fraud cause of action where GSP was aware of the loans taken by Kenneth and his use of monies from the Diner to fund his other business interests and failed to take any action, including

[1] Plaintiffs likely meant to type CPLR 3211.

advising Ellen of such conduct, which allowed Kenneth's fraud to continue unabated for seven years?

Getzel's Answer: No.

Plaintiffs' Question: Did Ellen's causing the Diner to forgive Kenneth's loans release or waive any claims Plaintiffs may have against GSP for the damages incurred by the improper loans?

Getzel's Answer: Yes.

COUNTER STATEMENT OF FACTS[2]

A. Affidavit of Jeffrey Getzel

Plaintiff 1650 Broadway first engaged Getzel in 2002 and continued with year over year engagements thereafter. R. 152, ¶4, 6. According to the AC, Plaintiffs' allegations date back to 2012, and, at that time, Getzel only performed two services for Plaintiffs; tax preparation and compilation of Plaintiff 1650 Broadway's annual financial statements. R.152, ¶6. The year over year nature of the engagements meant that Plaintiffs signed new engagement letters every year, confirming that the engagements were not continuous R.152, ¶6. Throughout the course of these year over year engagements, Plaintiff Ellen Sturm demonstrated a keen financial savvy, was incredibly hands on no matter her role, and was directly

[2] Getzel does not waive any arguments against or opposition to Plaintiffs' Statement of Facts which are not directly addressed. To be clear, Getzel disputes the entirety of Plaintiffs' Statement of Facts as it pertains to any of the claims and/or allegations Plaintiffs assert against Getzel.

involved in all matters. R.152-153, ¶7. Throughout each engagement, Plaintiff Ellen Sturm maintained a significant role in the company and with respect to her interactions with Getzel. R.152-153, ¶7.

Plaintiffs never engaged Getzel for audit work and the engagement letters clearly confirmed that Getzel was not engaged to assess fraud risk. R.153, ¶10, 12. The tax preparation, compilation and review engagements had different professional standards of care, none of which rose to the level of audit. R.153, ¶10-12. Accountants, like Getzel, do not maintain any requirements for independent verification or fraud risk assessment. R.153, ¶11. Getzel never performed any business management work for Plaintiffs and was not involved in the day-to-day operations of the business, financial strategy, bookkeeping (meaning Getzel did not book information), corporate governance or handling of corporate affairs. R.153, ¶13. Getzel was not the bookkeeper and *did not* have any responsibility to book shareholder loans. R.153, ¶14. Getzel was not the financial advisor for Plaintiffs and certainly did not maintain any fiduciary obligations to monitor money coming in or going out. R.153, ¶14.

Getzel met with Plaintiffs every year to go over the tax returns and financial statements in order to address questions Plaintiffs might have about those documents. R.154, ¶16. Plaintiffs were involved in every discussion, asked pointed questions, and knew everything going on with the business, particularly

Plaintiff Ellen Sturm who was directly involved with the business. R.154, ¶17. To that end, Plaintiffs and Kenneth Sturm were provided the work Getzel prepared. R.154, ¶18. Getzel only held itself out as outside accountants and never indicated or held itself out as responsible for the maintenance and/or protection of Plaintiffs' financial health. R.154-55, ¶20-21.

Plainly, Getzel did not have a conflict of interest. R.155, ¶22. Getzel maintained objectivity and under no circumstances was professional judgment compromised under any applicable standards of professional services. R.155, ¶22. In the accounting profession, it is entirely common (and often expected) and standard practice to prepare returns for a corporation and its shareholders. R.155, ¶23. Plaintiffs cannot and have not cited to a statute to refute that fact. R.155, ¶23. Getzel did not have any ethical or accounting practice obligations beyond documenting shareholder loans on the corporate returns and corporate financial statements (R.155, ¶24) which Getzel did year over year. R.155, ¶25. For example, on the 2018 tax return and amended tax returns, the Loans to Shareholders were documented R.155, ¶26. The same loans were documented on the other year's corporate returns. R.156, ¶28. The Loans to Shareholders were also documented on the corporate financial statements. R.156, ¶29.

Beyond the above, with respect to other allegation asserted, Getzel never communicated with Citibank or Kenneth Sturm regarding a purported Citibank

loan taken by Kenneth Sturm. R. 156, ¶31. Getzel did not have any role in the alleged forging of Ellen Sturm's signature. R. 157, ¶34.

Plaintiffs forgave Kenneth Sturm for his debts and ultimately released Getzel through the forgiveness and the tax deduction taken. R. 157, ¶36. Plaintiff Ellen Sturm's statement on January 27, 2021, "to maintain harmony within the family, I am forgiving the approximately $12 million dollar loan balance you owe to the Diner…" served as the release. R. 157, ¶37, R.221-22. Plaintiffs took this release one step further when they issued a 1099-C (R.224) confirming the intention to take a substantial tax benefit from the loan forgiveness. R.157, ¶38. To demand damages now after the full release, would be an improper double tax benefit for Plaintiffs. R.157, ¶36.

Finally, no taxing authority, whether federal or state, has ever called into question the tax returns prepared by Getzel for Plaintiffs. R. 158, ¶40. Plaintiffs' S-Corporation classification has never been called into question by a taxing authority. R.158, ¶40, 41.

B. <u>Getzel Schiff & Pesce LLP Engagement Letters</u>

The Getzel engagement letters were executed year over year and confirmed what work would be performed by Getzel. R.304-328. These engagement letters were prepared every year by Getzel for Plaintiff 1650 Broadway to sign. The first page of the engagement letter dated February 27, 2012 includes a very clear

disclaimer that "**You are responsible for: preventing and detecting fraud.**" R.304. That same engagement for compilation work, confirms that a compilation does not "**contemplate obtaining an understanding of the entity's internal control; assessing fraud risk**…" R.304. On the next page, Getzel further disclaimed that **Getzel could not be relied upon to disclose "fraud or illegal acts that may exist."** R.305.

On the very next engagements dated February 8, 2013 and March 10, 2014, Plaintiff 1650 Broadway was once again informed that it was "responsible for preventing and detecting fraud." R.307, R.310. Furthermore, the engagement letter confirms that "a compilation does not contemplate obtaining an understanding of the entity's internal control; assessing fraud risk…" R.307, 310. The engagements also make clear that Getzel will discuss with the officers and directors of the Company (Plaintiff 1650 Broadway), the financial affairs of the Company. R.308, 311. Getzel confirmed that these meeting with Plaintiffs occurred every year. R.154, ¶16

The next engagement letter dated March 13, 2016 which Getzel issued confirms yet again that Getzel is not responsible for preventing and detecting fraud and that the compilation and tax return preparation work both do not assess fraud risk. R.313. Like in the prior years' engagements, Getzel once again noted that Getzel would meet with the officers and directors of Plaintiffs to discuss the

financial affairs of the business. R.314. Getzel averred that those meetings occurred. R.154, ¶16.

For the February 7, 2018 Getzel engagement letter, Getzel informed Plaintiffs that under the review engagement Getzel did not have audit responsibility and that it was not responsible for assessing fraud risk and that Plaintiffs could not rely upon Getzel for same. R. 316. Getzel also reaffirmed that Plaintiffs were responsible for their own prevention and detection of fraud. R.317.

Finally, the last engagement letter for tax return preparation, which is dated February 23, 2019, Getzel informed Plaintiffs that they are responsible for detecting errors fraud and theft. R.320.

C. Plaintiffs' Tax Returns Document the Shareholder Loans

Getzel prepared the tax returns for Plaintiffs' during the time period which Plaintiffs claim Getzel committed malpractice and aided and abetted a fraud. Getzel demonstrated before the Motion Court that the tax returns all noted the loans to shareholders on each year's returns. It was not hidden, but instead documented in plain sight. Getzel fastidiously prepared the tax returns and abided by all applicable standards of care to document the status of the loans to shareholders ("Loans to Shareholder") during each tax year.

Tax Year 2012

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2012 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that at the beginning of 2012 tax year, the Loans to Shareholders amounted to $245,167 and at the end of the year, it totaled, $191,669. R.621.

Tax Year 2013

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2013 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that at the beginning of 2013 tax year, the Loans to Shareholders amounted to $191,669 and at the end of the year, it totaled, $0. R.726.

Tax Year 2014

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2014 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that at the beginning of 2014 tax year, the Loans to Shareholders amounted to $0 and at the end of the year, it totaled, $0. R.840.

Tax Year 2015

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2015 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that the beginning of 2015 tax year, the Loans to Shareholders amounted to $0 and at the end of the year, it totaled, $2,519,659. R.953.

Tax Year 2016

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2016 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that at the beginning of 2016 tax year, the Loans to Shareholders amounted to $2,519,659 and at the end of the year, it totaled, $4,965,005. R.1069.

Tax Year 2017

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2017 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that at the beginning of 2017 tax year, the Loans to Shareholders amounted to $4,965,005 and at the end of the year, it totaled, $9,927,305. R.1181.

Tax Year 2018

Getzel averred that the prepared tax returns documented the shareholder loans made by the company. R.155, 156. For the 2018 tax return for Plaintiff 1650 Broadway, on Schedule L, Line 7, titled Loans to Shareholders, Getzel documented that the beginning of 2018 tax year, the Loans to Shareholders amounted to $9,927,305 and at the end of the year, it totaled, $11,658,577. R.351, 493.

All of Plaintiff 1650 Broadway's tax returns during the 2012 through 2018 time period confirm that Getzel documented the Loans to Shareholders. The Loans to Shareholders were input at the same location (Schedule L) on the same line (Line 7) and noted the beginning of the tax year Loans to Shareholder and the end of the tax year Loans to Shareholders. As the tax preparers, Getzel did not have any additional obligations regarding the nature of the loans or any conflicts of interest preparing the corporate tax returns.

D. Plaintiffs' Financial Statements

In addition to the tax returns, Getzel compiled and for two engagements reviewed Plaintiff 1650 Broadway's financials and prepared a report. Each year, the financial statements, like the tax returns, documented the Loans to Shareholders. Getzel was not required under its ethical standards or accounting principles to do more than it did.

2012 Financial Statement

Getzel prepared the 2012 financial statement report pursuant to a compilation engagement. The report documented that as of December 31, 2013, the shareholder loan receivable was $191,669. R. 1316. This information is documented under Assets, Current Assets, Shareholder Loan Receivable. R. 1316. This is the exact same information as was documented on the 2012 tax returns. R.621. Supplementary information is not required for this engagement. R.1315.

2013 Financial Statement

Getzel prepared the 2013 financial statement report pursuant to a compilation engagement. The report documented that as of December 31, 2013, the shareholder loan receivable was $0. R. 1325. This information is documented under Assets, Current Assets, Shareholder Loan Receivable. R. 1325. This is the exact same information as was documented on the 2013 tax returns. R.726. Supplementary information is not required for this engagement. R.1324.

2014 Financial Statement

Getzel prepared the 2014 financial statement report pursuant to a compilation engagement. The report documented that as of December 31, 2014, the shareholder loan receivable was $596,612. R. 1334. This information is documented under Assets, Current Assets, Shareholder Loan Receivable. R. 1334. Supplementary information is not required for this engagement. R.1333.

2015 Financial Statement

Getzel prepared the 2015 financial statement report pursuant to a compilation engagement. The report documented that as of December 31, 2015, the shareholder loan receivable was $2,519,659. R. 1343. This information is documented under Assets, Current Assets, Shareholder Loan Receivable. R. 1343. This is the exact same information as was documented on the 2015 tax returns. R.953.

2016 Financial Statement

Getzel prepared the 2016 financial statement report pursuant to a compilation engagement. The report documented that as of December 31, 2016, the shareholder loan receivable was $4,965,005. R. 1353. This information is documented under Assets, Current Assets, Shareholder Loan Receivable. R. 1353. This is the exact same information as was documented on the 2015 tax returns. R.1069. Supplementary information is not required for this engagement. R.1352.

Review Report on 2017 Financial Statement and Compilation Report on 2016 Financial Statement

Getzel prepared the 2017 financial statement report pursuant to a review which did not place any fraud detection responsibility on Getzel. The compilation report for the 2016 financial statement also did not place any fraud detection responsibility on Getzel. The reports, in both instances, noted the Loans to Shareholders. As of December 31, 2017, the shareholder loan receivable was

$9,927,305 (which matches the figure on the 2017 tax returns, R.1181). R. 1283. This information is documented under Assets, Current Assets section under Shareholder Loan Receivable. R. 1283. As of December 31, 2016, the shareholder loan receivable was $4,965,005 (which matches the figure on the 2016 tax returns, R.1069). This information is documented in the Current Assets section under Shareholder Loan Receivable.

Moreover, Getzel included Notes to Financial Statements December 31, 2017, specifically Note 3, titled Shareholder Loan Receivable, which stated the following, "One of the shareholders of the Company (1650 Broadway) has made borrowings from the Company throughout the year. Interest is charged at a rate of 2.5% per annum on the annual average outside balance. As of December 31, 2017 and 2016, the outstanding balance was $9,927,305 and $4,965,005." (R. 1289). In multiple places, the shareholder loans were dutifully noted by Getzel. Note 3 is not required for purposes of the engagement, but was prepared by Getzel as additional analysis. R. 1282.

Review Report on 2018 Financial Statement

Getzel prepared the 2018 financial statement report pursuant to a review which did not place any fraud detection responsibility on Getzel. The financial statements noted the Shareholder Loan Receivable under Current Assets. As of December 31, 2018, the Shareholder Loan Receivable was $11,658,577, an

increase from $9,927,305. R.1300 (which matches the amount noted on the 2018 tax returns R.351, 493). Additionally, under 1650 Broadway Associates, Inc., Notes to Financial Statements, Note 3, Getzel documented, "One of the shareholders of the Company has made borrowings from the Company throughout the year. Interest is charged at a rate of 2.5% per annum on the annual average outstanding balance. As of December 31, 2018 and 2017, the outstanding balance was $11,658,577 and $9,927,305 respectively." R.1306.

Note 3 is not required for purposes of the engagement, but was prepared by Getzel as additional analysis. R. 1298-1299.

E. Plaintiffs' Release and Tax Deduction

On January 27, 2021, Plaintiffs wrote Kenneth Sturm an email. R.221-222. In that communication, Plaintiffs forgave the nearly $12 million Loans to Shareholders. R.221-222. Specifically, the release said as such, "To maintain harmony within the family, I am forgiving the approximately $12 million dollar loan balance you to owe the Diner. Based on the records you have provided, I have determined that you are insolvent and unable to repay the balance. I had the accountants prepare the required forms and have forwarded a copy to you (Form 1099C)…" Plaintiffs' email sent by Ellen on behalf of the Plaintiffs forgave approximately $12 million in shareholder loans and confirmed the desire to take

advantage of a tax deduction vis-à-vis this release. It should be noted that Getzel was not the accountant referenced in the email.

Plaintiffs formalized the intention to take the tax deduction by preparing and filing a Form 1099-C, which is a form submitted to the IRS for a Cancellation of Debt greater than $600. R.224. The full amount of debt discharged on the Form 1099-C for tax year 2020 is $11,905,061.00 which is described as a "Note Receivable." R.224. According to the Form 1099-C, the Debtor, Kenneth Sturm, was personally liable for the debt. R.224. Pursuant to the final review engagement with Getzel, Getzel confirmed the Loans to Shareholders as $11,658,577. R.1306.

Therefore, Plaintiffs discharged, forgave and released the entirety of Loans to Shareholders. The Form 1099-C combined with the email of January 27, 2021 confirms the full release of any claims related to the Loans to Shareholders.

F. <u>Ellen Sturm's Affidavit and Amended Complaint</u>

Ellen Sturm's affidavit notes that Ms. Sturm made the affirmative decision to move the Diner to its current location at 1650 Broadway. R. 2427, ¶8. Moreover, Ms. Sturm further confirmed that she decided to incorporate the business in New York. R. 2427, ¶8. Ms. Sturm averred that since 1992, she has been the Vice President of the corporate entity, 1650 Broadway Associates, Inc. Ms. Sturm verified that Plaintiffs engaged Getzel to perform certain accounting work. R.2428, ¶16-18. On an annual basis, Plaintiffs met with Getzel to discuss

Plaintiffs' financial affairs. R. 2428, ¶19. Plaintiffs were not prevented from looking at any financial information related to them individually or the company. See R.151-159. Plaintiffs did not indicate that the Loans to Shareholders were not documented on both the tax returns and the financial statements or that Plaintiffs did not have access to this information See R.151-159.

Plaintiffs admit in their AC that the Diner's "books and records (and tax returns) included all of the Loans to Shareholder information. R.124, ¶38. Plaintiffs also admit that Ellen did not review any of the documents; tax returns or financial statements despite her being the Vice President of the Company. R.124, ¶40, R.138, ¶108. The AC also includes direct reference to the email dated January 27, 2021 in which Plaintiffs fully released and forgave the entirety of the Loans to Shareholders. R.127, ¶54. Plaintiff also alleged that all claims for damages are entirely speculative and not known. R.131 ¶76.

G. <u>Court Decisions on Motions to Dismiss</u>

The Plaintiffs have had multiple bites of the apple. The first motion to dismiss filed by Getzel was granted on April 22, 2022. R. 112-115. At that oral argument, the Court noted Getzel did not maintain a duty beyond doing what they were engaged to do as accountants. R.90, 35:18-22. Plaintiffs ignored the books and records and that Getzel had no reason to know otherwise. R. 90, 35:6-12. The Court agreed that the Loans to Shareholders were documented every year on the

tax returns and financial statements (R.89, 34:24-35:5) and that Getzel did not have any role with the alleged Citibank loan/forging signatures. R. 85, 30:9-12, 15-22. However, despite the dismissal of the Complaint, Plaintiffs were given a chance to replead.

The Order Appealed From

Getzel moved for dismissal of the AC and oral argument was held on April 19, 2023. On April 24, 2023, the Motion Court granted Getzel's motion dismissing the AC as to Getzel. R.4-6. In that Decision and Order, the Motion Court dismissed AC as to Getzel, specifically, dismissing both causes of action asserted against Getzel. R.4-6.

Most importantly, the Court dismissed the AC as to Getzel without providing Plaintiffs the opportunity to replead.

ARGUMENT

A. Standard of Review[3]

A motion to dismiss pursuant to CPLR 3211(a)(1) is properly granted when the documentary evidence resolves all issues as a matter of law and conclusively disposes of Plaintiff's claim(s). *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.,* 737 N.Y.S.2d 40, 40-41 (1st Dept. 2002) *quoting Scadura v. Robillard*, 683 N.Y.S.2d 108, 109 (2d Dept. 1998). A motion to dismiss based on documentary evidence is appropriately granted where the documentary evidence utterly refutes a plaintiff's factual allegations. *Guido v. Orange Reg'l Med. Ctr.*, 102 A.D.3d 828 (1st Dept. 2013). Documents such as contracts qualify as examples of documentary evidence. *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714 (2d Dept. 2012).

A motion to dismiss pursuant to CPLR 3211(a)(7) will be upheld when the movant demonstrates that the pleading party has failed to allege facts in the

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[3] Even though Plaintiffs do not directly address the statute of limitations arguments raised by Getzel before the Motion Court, Getzel does not waive CPLR 3211(a)(5). *Shah v. Exxis, Inc.*, 138 A.D.3d 970, 971 (2d Dept. 2016). Thus, if this Court does reverse the Motion Court and reinstates Getzel as a defendant, which Getzel believes would be improper, this Court should affirm dismissal of the claims and damages regarding the malpractice cause of action which predate March 12, 2018 and the claims and damages regarding aiding and abetting a fraud which predate March 12, 2015.

Getzel also does not waive any of its previously asserted arguments with respect to CPLR 3211(a)(3) and contends that the trusts and the shareholders do not have standing to sue. If this Court reverses the Motion Court, which Getzel argues should not occur, any reinstated causes of action against Getzel should not include the Trusts and/or Shareholders as plaintiffs.

complaint that fit with any cognizable legal theory. *Dastain v. K. Zark Med., P.C.*, 2017 Slip Op. 30333(U) ¶4 (Sup. Ct. N.Y. Cty. 2017). When facts as alleged lack credibility and consist of bare legal conclusions a motion to dismiss is granted and upheld. *Leder v. Spiegel*, 31 A.D.3d 266, 267 (1st Dept. 2006). The complaint will be dismissed when it merely states formulaic recitation of the elements of a cause of action. *Gold v. Lipsky, Goodkin & Co.*, 2012 N.Y. Slip Op 33423(U) (Sup. Ct. N.Y. County, 2012).

B. The Court Below Properly Dismissed the Amended Complaint as to Getzel

Plaintiffs failed to Plead that Getzel Committed Malpractice

The Motion Court was absolutely correct when Justice Borrok noted in his decision that Plaintiffs' AC failed to allege a claim against Getzel. R.4-6. Getzel successfully demonstrated to the Motion Court that in their AC Plaintiffs failed to allege that Getzel deviated from acceptable accounting standards of practice. Getzel, through both case law and documentary evidence in the way of engagement letters, tax returns and financial statements, articulated that Getzel satisfied its accounting obligations by documenting the Loans to Shareholders, did not have a conflict of interest, and that any failure to see the Loans to Shareholders rested exclusively with Plaintiffs.

As New York case law clearly notes, when documentary evidence is conclusive as to resolving all issues of law, then reversible error on granting a

motion to dismiss did not occur. *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.,* 737 N.Y.S.2d 40, 40-41 (1st Dept. 2002) *quoting Scadura v. Robillard*, 683 N.Y.S.2d 108, 109 (2d Dept. 1998). Here, the documentary evidence was conclusive, clear, convincing and available for all to see; the corporate tax returns and the corporate financial statements which documented the Loans to Shareholders on an annual basis in the same location on each document.

Plaintiffs argue that Ellen Sturm did not know about the Loans to Shareholders and misappropriates an email to fit their false narrative. Plaintiffs cite to an email wherein Plaintiffs claim that Getzel "admitted" to not providing Plaintiffs with notice of the Loans to Shareholders and that only Kenneth Sturm knew about those loans. This email (R.2434-35) does not state what Plaintiffs claim. No where in that email does it indicate that Getzel was required to do more than it did with respect to documenting the Loans to Shareholders (or have a conflict of interest). To the contrary, this email demonstrates that Plaintiff Ellen Sturm failed to abide by her responsibilities as an officer of the corporation with respect to reviewing corporate documents. *Grika v. McGraw*, 55 Misc. 3d 1207(A) (Sup. Ct. New York County, 2016) citing BCL §715, 717).

Plaintiff Ellen Sturm admits that she was originally the Vice President of the Corporation and then President (R.124, ¶22, R.138, ¶108), and further admits to not reviewing annual corporate returns and corporate financials for the corporation

she presided over even though she attended the meetings every year with Getzel. Getzel properly documented the Loans to Shareholders for all to see and by satisfying its obligations under the engagement, Getzel did not commit malpractice. R.4-6.

The Court Properly Noted that No Conflict of Interest Existed

In order to avoid dismissal of a professional (accounting) malpractice claim pursuant to CPLR 3211(a)(7), a plaintiff must show (1) a departure from accepted standards of professional malpractice; and (2) that the departure was the proximate cause of injury. *Gold v. Lipsky, Goodkin & Co.*, 2012 NY Slip Op 33423(U) ¶6 (Sup. Ct. N.Y. Cty. 2012). Proof of proximate causation is an essential element and must be pled beyond mere speculation and conjecture. *Id.* quoting *Herbert H. Post & Co. v. Sidney Bitterman, Inc.*, 639 N.Y.S.2d 329 (1st Dept. 1996).

Plaintiffs argue that the Motion Court erred in not recognizing the claimed conflict of interest. However, the Motion Court did not err at all. Getzel was not under any obligation to do any more than it did with the Loans to Shareholders given that Getzel was not engaged to detect fraud or audit the income and expenses. R.304-328.

Beyond the above, Getzel did not have to withdraw from the engagements. The Motion Court properly rejected Plaintiffs' citation to various statutes which Plaintiffs claim are pertinent to a conflict-of-interest argument. In their appellate

brief, Plaintiffs still do not actually cite to any relevant statutes or connect Getzel to any violation of purported conflict-of-interest standards of care[4]. Their allegations remain conclusory and insufficient even on appeal and thus reversal is not warranted. *D.D. Hamilton Textiles, Inc. v. Estate of Mate*, 269 A.D.2d 214, 215 (1st Dept. 2000).

In their brief, Plaintiffs cite to AICPA Code §1.000.010.11 (Advocacy Threat) and .12 (Familiarity Threat). Advocacy threats include: (a) a member provides forensic accounting services to a client in litigation or a dispute with third parties; (b) a firm acts as an investment adviser for an officer, a director or a 10 percent shareholder of a client; (c) a firm underwrites or promotes a client's shares; (d) a firm acts as a registered agent for a client; (e) a member endorses a client's services or products. Getzel did not do any of the above under their engagements. Thus, AICPA Code §1.000.010.11 does not apply. Regarding the familiarity threat, Getzel had a longer relationship with Plaintiffs than with Kenneth Sturm (R.2428 ¶16). Thus, a familiarity threat did not exist. Finally, Plaintiffs cite

[4] In addition to the statutes which Getzel references in the body of this brief, Plaintiffs also generally reference other statutes that purport to serve as a guidepost for accountant behavior. For example, Plaintiffs generally mention AICPA 0.300.020.01 (exercising moral judgment), Treasury Circular No. 230 (standards for CPA's who practice before the IRS), AICPA 0.300.060 (working diligently to discharge responsibilities), but do not implicate Getzel as having violated any of them. Instead, they are clearly referenced in a general manner to pique this Court's interest despite the lack of relevance and applicability to Getzel. The Motion Court did not fall for this trap, nor should this Court on appellate review.

AICPA 1.140.010 (Client Advocacy) which provides that a threat may exist when an accountant advocates for a client position. That did not happen at any point during any engagement.

Next, Plaintiffs cite SSTS No. 3 ¶2 (R.134 ¶89). This statute does not apply as none of the information documented by Getzel is alleged to be incorrect, inaccurate or incomplete. Beyond that, Getzel was not under any obligation to independently verify or confirm information provided by Plaintiffs (See. R.304-328).

The remaining conflict-of-interest statutes cited by Plaintiffs also do not apply. Treasury Circular Section 10.29 (R. 134 ¶91) fails. Getzel did not have a conflict performing certain accounting services for Plaintiffs and Kenneth Sturm. Despite Plaintiffs' hollow citation to the Treasury Regulation, it still has not connected the regulation to Getzel's engagement or any faux conflict of interest Plaintiffs have concocted.

Plaintiffs also cite AICPA Code ¶ 0.300.050 (general code regarding conflict of interest) & 1.110.010 (R.134-135 ¶92) which notes that "a conflict of interest creates adverse interest and self-interest threats to the member's compliance with the "Integrity and Objectivity Rule." Examples include: (a) the member or the member's firm provides a professional service related to a particular matter involving two or more clients whose interests with respect to that matter in

conflict; or (b) the interests of the member or the member's firm with respect to a particular matter and the interests of the client for whom the member or the member's firm provides a professional service related to that matter. The Motion Court correctly determined that Plaintiffs failed to allege that a conflict of interest existed with respect to this AICPA code (or any AICPA code), how that code applied to Getzel or that Getzel deviated from its standards of practice particularly given that Getzel did what it was required to do and document the information provided to it.

Nothing has changed on appeal. Here, Plaintiffs do not directly cite to the above referenced standards, but instead generally cite to them as AC paragraphs 81-94. R132-135. Instead of actually pinpointing what Getzel apparently did wrong, Plaintiffs' appeal exclusively rests on conclusory supposition, nothing more. A failure to actually identify an applicable professional standard to the claimed conflict of interest warrants affirming the Motion Court's decision to dismiss the AC as to Getzel. *Deane v. Brodman*, 192 A.D.3d 577 (1st Dept. 2021). In *Deane*, Justice Borrok, like in this case, boldly determined that hollow allegations of this variety do not survive a CPLR 3211 motion to dismiss. Justice Borrok's decision was upheld on appeal in the First Department. This Court should affirm Getzel's dismissal as well.

Remarkably, Plaintiff's frivolity did not rest with the statutes/codes re-cited in their appellate brief. Plaintiffs continue their charade by once again citing to case law which does not connect purported Getzel conduct to any deviations from standards of practice. The cases cited are emblematic of Plaintiffs' foolhardy appeal.

For instance, Plaintiffs first cite *Warshaw v. Mendelow*, 2011 WL 11100990 (Sup. Ct. New York Cty, 2011). This case does not bear any resemblance to *Warshaw* because in *Warshaw* the accountant personally benefitted from a failure to disclose and more importantly that a failure to disclose actually occurred. Here, the Loans to Shareholders were disclosed every year on the tax returns and financial statements (sometimes in more than one place on the document). Furthermore, Plaintiffs have never alleged that Getzel benefited from any alleged malfeasance (hint: Getzel did not benefit).

Similarly, *Nate B. Francis Spingold Foundation v. Wallin, Simon, Black and Co.*, 184 A.D.2d 464, 585 N.Y.S.2d 416 (1st Dept. 1992) misses the mark as Getzel never failed to disclose the Loans to Shareholders and was not in conflict being engaged by the Corporation and its shareholders to perform certain accounting services. Furthermore, *1136 Tenants' Corp. v. Max Rothenberg & Co.*, 36 A.D.2d 804, 319 N.Y.S.2d 1007 (1st Dept. 1971) proves inapposite because that was a

missing documents case, which is not analogous to the situation at hand. Even to this day, Plaintiffs have not alleged that any information was missing.

Plaintiffs say that the "real" issue is not the alleged failure to disclose the Loans to Shareholders but rather that Getzel had a duty/obligation to disclose a conflict of interest[5]. As already articulated ad nauseum in this brief, Getzel did not have a conflict of interest. Despite this clear and obvious point, Plaintiffs spend roughly three pages (19-22) of their appellate brief arguing that Getzel violated professional obligations as to this issue. However, Plaintiffs do not actually cite to one of these standards or how Getzel violated same. Instead, Plaintiffs jump from one purported activity to the next without any context and continue to make false leaps upon which Plaintiffs expect the Appellate Division to reverse the Motion Court. At the end of the day, these so-called facts serve as a red herring and do not change the only point of this case; Getzel satisfied its professional obligations as Getzel documented was meant to be documented and presented the information to Plaintiffs on an annual basis. Getzel did not have any further obligations and did not have to disclose anything additional (or withdraw).

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[5] The near duplication of the two causes of action asserted against Getzel. Regardless of the fact that they should remain dismissed for the reasons stated in this Respondent's brief, the duplicative nature of these causes of action also warrants dismissal. *Hoffman v. RSM U.S. LLP*, 169 A.D.3d 522, 523 (1st Dept. 2019).

Plaintiffs now, for the first time, raise arguments regarding business operations and dividends, to garner some form of faux sympathy. However, arguments of this kind raised for the first time on appeal must be ignored. *Diarassouba v. Consolidated Edison Co. of New York, Inc.*, 123 A.D.3d 525 (1st Dept. 2014). Irrespective of this black letter rule on appellate practice, these new allegations do not change the fact that Getzel did not deviate from its standard of care[6] and that Getzel did not commit malpractice[7].

C. The Motion Court Correctly Determined that Getzel Did Not Aid and Abet Fraud

The Motion Court properly ruled that Plaintiffs failed to plead that Getzel aided and abetted a fraud. The law in New York requires; (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor. *Goel v. Ramachandran*, 111 A.D.3d 783, 792 (2d Dept. 2013). The claim must be pled with specificity to satisfy CPLR 3016(b). *Id.* Conclusory allegations regarding actual knowledge will not suffice. *Id.* Substantial Assistance occurs when there is affirmative

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[6] Plaintiffs again reference Section 714 of the New York Business Corporation. Section 714 is a corporate governance standard not a standard of accounting practice. Getzel does not have any obligations or standards of care as it relates to Section 714.

[7] Plaintiffs continue to harp on the potential loss of S. Corp. status. The key word is "potential." First, Getzel did nothing wrong with the documenting of the Loans to Shareholders and satisfied its professional obligations. Second, Plaintiffs' claim regarding this purported issue should fall on deaf ears as the change in status never occurred.

assistance to help conceal/a failure to act when required to do so and when the aider/abettor proximately caused the harm. *CRT Investments, Ltd. v. BDO Seidman, LLP,* 85 A.D.3d 470, 472 (1st Dept. 2011). Performance of routine business services does not qualify as substantial assistance. *Id.* The Motion Court properly determined that after two filed complaints, Getzel did not aid and abet as the "loans" were "properly disclosed" by Getzel and that all Getzel did was perform its routine business services. (R.4-6)[8].

In an effort to avoid this third and final strike, Plaintiffs attempt to move the goal posts in order to shoehorn what they believe is a viable cause of action. The shifting of their legal analysis is of no avail. In *Harbinger* cited by Plaintiffs (*Harbinger Capital Partners Master Fund I, Ltd. v. Wachovia Capital Markets, LLC*, 2010 WL 2431613 at *9 (Sup. Ct. 2010)), the motion court ruled against an accountant who was engaged to perform an audit because an audit has a higher level of independent verification and analysis. Here, Plaintiffs never engaged Getzel to conduct annual audits, and, beyond that, Getzel held annual meetings

[8] Plaintiffs open their brief by arguing that the Motion Court's Decision and Order (R.4-6) created a conflicting ruling when the Motion Court dismissed Getzel from the case, but then denied Kenneth Sturm's motion to dismiss. Plaintiffs argue that the Motion Court noted that the Loans to the Shareholders were documented on the tax returns and financial statements, but then the Motion Court said something different with respect to Kenneth Sturm. Plaintiffs want to create confusion in order to sew doubt about the Motion Court's decision. Plaintiffs do this because they know that the law is not on their side. Plaintiffs' effort to undermine the Motion Court should be ignored, particularly given that the Motion Court has not once, but twice dismissed Getzel.

(which Plaintiffs admit R. 154 ¶16, R.2428 ¶19), and documented the Loans to Shareholders every year for Plaintiffs (see Tax Return and Financial Statement Sections *supra*). No further analysis is required as the failure to plead actual knowledge and substantial assistance will result in dismissal and the affirming of said dismissal. *Gaughan v. Russo*, 214 A.D.3d 592, 592-93 (1st Dept. 2023). Merely pleading constructive knowledge is insufficient. *Id.*

Similarly, Plaintiffs next cite *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 753 N.Y.S.2d 493, 499 (1st Dept. 2003). Just like *Harbinger*, *Houbigant* regards an audit and the higher standard of engagement which accompanies audit work. Again, at the risk of beating a dead horse, at no point did Plaintiffs ever engage Getzel to perform audit work. Again, as the Motion Court duly noted, Getzel properly documented the Loans to Shareholders whereby satisfying its standard of care.

Plaintiffs cite two more cases both of which regard audit engagements wherein the accountant has a higher standard of care when it comes to knowledge or what the accountant should have known. *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt, LLC*, 479 F.Supp. 2d 349, 374 (S.D.N.Y. 2007) and *Weinberg v. Mendelow*, 113 A.D.3d 485 (1st Dept. 2014)[9]. Neither case applies. Other than

[9] Plaintiffs also cite *Cromer Fin Ltd. v. Berger*, 2003 WL 21436164 at *9 (S.D.N.Y. June 23, 2003). *Cromer* opines on willful blindness with respect to aiding and abetting fraud, but analyzes same pursuant to CPLR 3212, not CPLR 3211, which is a different standard of review.

conclusory statements and supposition, Plaintiffs' appellate brief lacks any substantive arguments. This is reflected in Plaintiffs continued false assertion that Getzel "at a minimum" should have seen certain red flags. That is not an allegation. That is a guess. Nor does it satisfy the requisite standard under New York law. *CRT Investments, Ltd. v. BDO Seidman, LLP,* 85 A.D.3d 470, 472 (1st Dept. 2011); CPLR 3016(b).

Plaintiffs then devote significant space to a substantial assistance argument that collapses under even the most minimal scrutiny. The desperation is palpable as Plaintiffs argue "conscious avoidance" and "substantial contribution" without actually connecting such allegations to Getzel. Plaintiffs cite to *Weinberg* thinking that the decision actually helps Plaintiffs. Instead it does the opposite. The *Weinberg* Court noted "irregularities" in books and records and the accountant ignoring same; all of which is dramatically different than this case. Here, Getzel documented the information accurately (Plaintiffs never allege otherwise). Thus, the Motion Court decided that Getzel did not deviate from their standard of care and that Getzel did not aid and abet.

With respect to all of the above claims, whether they regard Getzel's alleged conflicts due to an apparent fraud or that Getzel substantially assisted or should have known of apparent fraud, the Getzel engagement letters confirm that Getzel was not under any obligation to detect fraud or independently verify the

information provided. R. 304-328. Getzel's ethical obligations under compilations and reviews do not rise to the level of audit. Getzel is therefore not required to do more than it did every year. Plaintiffs have not cited to cases or statutes which contradict the dispositive engagement letters. *Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714 (2d Dept. 2012). The failure to plead with particularity under this cause of action ends the discussion. *Goel v. Ramachandran*, 111 A.D.3d 783, 792 (2d Dept. 2013).

Finally, Plaintiffs devote one paragraph in their appellate brief to the claim that Getzel had some role in the purported Citibank loan taken out by Kenneth Sturm. Plaintiffs do not cite to any facts with respect to Getzel, do not cite to any documents which reference Getzel, and do not cite to any sworn statements which implicate Getzel. Plaintiffs do not have any witnesses to support their bald statements. The Motion Court recognized the hollow claim and did not get it wrong in the first instance. Even under a *de novo* review, Plaintiffs do not change anything with respect to this claim[10].

The aiding and abetting fraud allegation should remain dismissed.

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[10] This Court should be made aware that in the motion to dismiss Getzel filed before the Motion Court, Plaintiffs did not oppose Getzel's argument regarding actual knowledge or substantial assistance. Any arguments raised by Plaintiffs in their appellate brief regarding the aiding and abetting a fraud pertaining to the Citibank loans should be disregarded.

D. Plaintiffs Released Getzel

Not surprisingly, as Plaintiffs did before the Motion Court, they attempt to gloss over the very overt language in Plaintiff Ellen Sturm's email to Kenneth Sturm and the impact the language has on Getzel. In addition to that email (R.221-222), the release is further documented by the 1099-C which formally forgives the near $12 million in Loans to Shareholders (R.224).

Plaintiffs cite *Burnside 711, LLC v. Amerada Hess Corp.*, 175 A.D.3d 557, 559 (2d Dept. 2019), but fail to realize that *Burnside* does not have anything to do with a CPLR 3211 motion. Instead, that case involves a trial. In the other case Plaintiffs cite, *JP Morgan Chase Bank, N.A. v. Llardo*, 36 Misc. 3d 359 (Sup. Ct. New York Cty, 2012), the party arguing in favor of waiver failed because the purported waiving party specifically reserved their rights to pursue their claim. That did not happen here as the email (R.221-222) and formal action (1099-C)(R.224) released the claims. That is dispositive under CPLR 3211(a)(1).

Here, Plaintiffs expressed a "present intention to renounce a claim." *Carpenter v. Machold*, 86 A.D.2d 727 (3d Dept. 1982). Under New York law, the release does not need to specify all of the parties (including Getzel) who are covered under the release (which does include Getzel). *Wells v. Shearson Lehman/Am Exp., Inc.*, 72 N.Y.2d 11, 16 (1988). Moreover, broad language can serve to dispose of ripe or unripe contingent claims. *Long v. O'Neill*, 126 A.D.3d

404, 407-408 (1st Dept. 2015). Thus, under the law, Plaintiffs' arguments that Getzel was never intended to be part of any forgiveness fall short because Plaintiff's complete "forgiveness" clearly extends to Getzel. As Getzel noted, Plaintiffs cannot receive double tax benefit afforded under the forgiveness of the loans pursuant to the 1099-C. R.157, ¶36.

Plaintiffs' effort to marginalize the impact of the email as the writing of a lay person is frivolous and borderline disingenuous. The Court had already rejected that argument on Getzel's initial motion to dismiss and confirmed that Ellen Sturm released any purported damages associated with Loans to Shareholders (R.72;18-25). Nothing has changed since then. Indeed, the First Department has previously determined that "it is not a perquisite to the enforceability of a releasor be subjectively aware or the precise claim he or she is releasing. *Hack v. United Capital Corp.*, 247 A.D.2d 300, 301 (1st Dept. 1998) citing *Mergler v. Crystal Properties Associates, Ltd.*, 179 A.D.2d 177, 178 (1st Dept. 1992). Irrespective of Plaintiffs' desire to present Ms. Sturm as naïve, the law and the actual evidence belie that argument. The email and the 1099-C are clear on their face and serve as present intention by Plaintiffs (inclusive of the

corporation, Ellen Sturm and the trusts) to forgive, release and/or discharge Getzel.[11]

The remaining cases cite by Plaintiffs cite a different standard (summary judgment) or are entirely unavailing. Given the language of the email and the impact of the benefit of the tax deduction afforded by the 1099-C, Plaintiffs forgave and released the Loans to Shareholders and cannot double dip by receiving the tax benefit associated with the forgiveness and then still go after Getzel despite the release.

Given the above, this Court should uphold Getzel's dismissal by the Motion Court.

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[11] Consideration is not needed when a discharge is provided. *Pratt Plumbing and Heating, Inc. v. Mastropole*, 68 A.D.2d 973 (3rd Dept. 1979) citing *Zullo Lbr. v. New York City Housing Authority*, 48 A.D.2d 453, 456 (1st Dept. 1975).

CONCLUSION

For the foregoing reasons, Defendant-Respondent Getzel Schiff & Pesce LLP respectfully requests that this Appellate Court affirms the Order of the Motion Court wherein Defendant-Respondent Getzel Schiff & Pesce LLP was dismissed from the case.

Dated: New York, New York
December 6, 2023

Respectfully Submitted,

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